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

Wednesday, 22nd 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.

Transcript produced by Trevor McGowan 
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Both, as we know, north of the Ngol. He then turned west and headed towards what he called Sultan Rob's, and he describes his trip as well. Now Sudan Intelligence Report No. 104 is on the screen. He says: "I next went west to Sultan Rob's and was well received..." He presented a second-class robe of honour. He described the Dinka, and at the end he noted, consistent with the evidence we've previously discussed, with the other things that we have seen, they have large herds of cattle. When Mahon reports that he travelled west from Fauwel and Um Semima to Sultan Rob's -- Sultan Rob's village -- it's clear that Sultan Rob had to have been located in what's called the village of Burakol. You can see that on the current map. When you leave Um Semima, Sultan Rob's old village at Mathiang, south of the Kiir, is at least due south and frankly southeast from where you began. In contrast, Sultan Rob's new village at Burakol is to the southwest, clearly to the southwest of Fauwel and Um Semima. Mahon's description of Sultan Rob's village being to the west is thus much more consistent with Sultan Rob being where he had been reported to be before namely at Burakol, north of the Kiir, and not at Mathiang, south of the Kiir.

Again, this does take a degree of what I have referred to openly as detective work, one has to look at the documents, but one can't just pretend that that work, that analysis, doesn't need to be done. One does need to do it.

The Government, when it engages in the effort, suggests that Mahon really was an enthusiastic trekkker and therefore that he made a big loop to the west of Um Semima, and that therefore when he said he went west it really meant east. I would suggest to you that that makes no sense.

When you look at Mahon's report, he describes quite carefully the directions that he takes. He refers to going southeast, to northeast, to southwest at various points in his point. I therefore suggest that when he described going west to Sultan Rob's village, it is very clear that he was going to the new village at Burakol.

Mahon's report then goes on to describe how he arrested an Arab sheikh on his return to Bahr el Homr, and this was returning north from Sultan Rob's place.

The MENAS report confirms -- and I think Professor Crawford's reference yesterday to the dominant usage of the words "Bahr el Homr" as referring to the Ngol makes it fairly clear -- that in this dry-season visit Mahon arrested the Arab sheikh on the Ngol.

That's the only reference that one could have been making if one was going north, the only river that one could have been referring to if one was going north from Burakol on the northern side of the Kiir. The river that one come to would be what is today the Ngol, and that would be where he found an Arab sheikh and arrested the sheikh; in the dry season, which is exactly consistent with the evidence we've previously discussed of the Messiriya coming south during the dry season to graze on the Ngol. That makes perfect sense of the documents.

The third pre-1905 Condominium report that I'd like to look at was by Captain Percival of the Arab Mounted Infantry, also called the Camel Corps. The full account of this report, it's a dry season December 1904 trek, and you can find the full account of his trek in Gleichen's 1905 compendium.

This report provides very clear evidence of substantial numbers of Ngok Dinka settlements well to the north of the Kiir, as well as indirect but I would suggest powerful evidence of Ngok Dinka to the north of the Ngol. You can see on the current slide an excerpt of Percival's trek notes, which are arranged on a daily basis.
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<td>1 basis. He would describe what it was he encountered, typically, as you can see, in very short, terse accounts but what he encountered each day of his trip.</td>
<td>1 going to see explicit reference to how that occurred.</td>
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<tr>
<td>2 When you look on the trek notes what you see is that a few days' journey from Lake Keilak up in the north he struck &quot;what I take to be the Bahr el Arab&quot;. In fact -- and it is, I think, now agreed by everyone -- the only river that Percival could have struck here was the Ngol, not the Kiir. When he referred to the Bahr el Arab here, it's common ground that this was not the Kiir/Bahr el Arab in today's parlance, but rather the Ngol.</td>
<td>2 Indeed, when we read Percival's notes with care -- and the Government prefers not to; it prefers to pluck out snippets, soundbites if you will, and say, &quot;Uninhabited, therefore no Ngok&quot; -- but Percival goes on and only a few miles from where he had described the area as uninhabited he says he encountered some Ngok Dinka. He wrote:</td>
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<td>3 When he reached the Ngol, Percival noted: &quot;I have been some miles up and down the river but can find no trace of inhabitants. The country between here and the jebels would appear to be uninhabited ...&quot; And Professor Crawford and the Government of course seized on that.</td>
<td>3 &quot;I surprised them and they thought we were Arabs raiding ...&quot;</td>
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<td>4 The fact that Percival found the banks of the Ngol uninhabited during the dry season is in some tension, of course, with the reports from Mahon and Wilkinson, who had said they had encountered villagers coming south from the Ngol, between the Ngol and the Kiir.</td>
<td>4 That's not surprising; it was the Arab Mounted Infantry, and there was a history of slave raiding and cattle raiding in that area. It's not surprising that the way that he found the Ngok Dinka was by surprising them. If they knew he was coming, they would hide.</td>
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<td>5 There are various explanations for that. One can't be positive based on these somewhat fragmentary reports, but one has to think about it and try to explain it. One explanation is that Percival was leading, as we've seen, the Arab Mounted Infantry.</td>
<td>5 He then wrote: &quot;... but I found them friendly and obtained a guide.&quot;</td>
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<td>6 It was a substantial contingent, 40 men or so with rifles on camels and horses and mules. It was a formidable force for rural villagers in small villages when the major part of the population -- not all of them, but a major part of the population, the males -- were to the south with their cattle herds. It would not be surprising if local villagers were afraid of that Arab Mounted Infantry and chose not -- and indeed we're here and the jebels would appear to be uninhabited ...&quot;</td>
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<td>7 Indeed that's consistent with the environmental evidence, which indicates that the Ngok would not build permanent settlements right on the river. Why wouldn't they do that? Because, as we saw previously, there's seasonal flooding. If you build your houses on the river -- people learned that even in this century in New Orleans and other places -- your houses get washed away when the seasonal rains come.</td>
<td>7 After he had been able to assuage their concerns.</td>
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<td>8 Percival described the river as being uninhabited, he meant the banks of the river rather than the areas set slightly back from the river.</td>
<td>8 One I would suggest powerful explanation for why the early Condominium reports such as they are -- and there are virtually none -- don't mention many Ngok in particular areas is that the Ngok hid, for very good reasons.</td>
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<td>9 There's a further explanation for that as well, as we have seen. Percival described the river as being uninhabited, he meant the banks of the river rather than the areas set slightly back from the river.</td>
<td>9 Second, it could well be -- it's not clear because</td>
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<td>10 When he reached the Ngol, Percival noted: &quot;I have been some miles up and down the river but can find no trace of inhabitants. The country between here and the jebels would appear to be uninhabited ...&quot; And Professor Crawford and the Government of course seized on that.</td>
<td>10 this is a terse and fragmentary report -- that when Percival described the river as being uninhabited, he meant the banks of the river rather than the areas set slightly back from the river.</td>
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<td>11 The fact that Percival found the banks of the Ngol uninhabited during the dry season is in some tension, of course, with the reports from Mahon and Wilkinson, who had said they had encountered villagers coming south from the Ngol, between the Ngol and the Kiir.</td>
<td>11 Indeed that's consistent with the environmental evidence, which indicates that the Ngok would not build permanent settlements right on the river. Why wouldn't they do that? Because, as we saw previously, there's seasonal flooding. If you build your houses on the river -- people learned that even in this century in New Orleans and other places -- your houses get washed away when the seasonal rains come.</td>
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<td>12 There are various explanations for that. One can't be positive based on these somewhat fragmentary reports, but one has to think about it and try to explain it. One explanation is that Percival was leading, as we've seen, the Arab Mounted Infantry.</td>
<td>12 Therefore, the houses would be set back in wooded areas somewhat away from the river and therefore Percival, especially if the people who were hiding from them, would not have seen them.</td>
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| 13 It was a substantial contingent, 40 men or so with rifles on camels and horses and mules. It was a formidable force for rural villagers in small villages when the major part of the population -- not all of them, but a major part of the population, the males -- were to the south with their cattle herds. It would not be surprising if local villagers were afraid of that Arab Mounted Infantry and chose not -- and indeed we're here and the jebels would appear to be uninhabited ..."

Trevor McGowan
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09:09 1 an element of detective work, but it's common ground
2 I think on both sides that the fire, during this time of
3 the year, when there were no clouds, no thunderstorms,
4 would have had human origins.
5 The question therefore is: what caused the fire?
6 It's not a question one should dismiss as speculation;
7 it's a question that has to be answered. That's one of
8 the reasons ABC experts were selected, scientific
9 experts.
10 The answer to the question of what caused the
11 fire -- and this is a question that one does indeed have
12 to answer. If one is going to rely on these documents,
13 one has to understand why it is that Percival saw
14 a fire. The reason that Percival saw a fire is because
15 the Ngok Dinka back-burn their crops at the end of the
16 growing season.
17 There is the description of that sort of
18 agricultural practice. It's one of the reasons that
19 I spent a lot of time on environmental evidence, which
20 might have seemed a little bit esoteric, but one of the
21 reasons I spent the time with that evidence is because
22 it is necessary in order to explain an otherwise
23 lifeless and abstract written record.
24 So when Percival describes the fire, he must be
25 referring to Ngok Dinka engaging in their traditional

09:10 1 agricultural practice of burning the harvested crops off
2 their fields.
3 The Government suggests that: well, maybe this fire
4 was caused by the Messiriya. It doesn't work. It
5 doesn't work at all. Why doesn't it work? Because the
6 Messiriya farm up in the north above the goz. That's
7 where they would back-burn their fields.
8 It therefore makes no sense at all to suggest that
9 the Messiriya, who hadn't even begun their trek south
10 out of the goz to this part of the Bahr at that time of
11 the year, would be burning their fields, which don't
12 even exist in this area at that time of the year. What
13 had to be happening was that the Ngok Dinka were
14 back-burning their fields. The same evidence, the same
15 report, compels that conclusion when you look at cattle
16 tracks.
17 Again, the Government will no doubt say that I'm
18 engaged in undue detective work. But one has to make
19 sense of what Percival actually reported.
20 Percival cited cattle tracks on the Ngol river. The
21 Government says: those cattle tracks could have been
22 either Messiriya or Ngok cattle. It's important though
23 to look at what Percival actually reported, and this is
24 just next to the area that he described as uninhabited.
25 He described encountering -- or one of his parties

09:12 1 encountering, more accurately -- Dinkas who were driving
2 cattle south, as hard as they could. This is at a place
3 called Amakok, not far from the Ngol river.
4 That's very important. It explains who made the
5 cattle tracks: the Ngok Dinka cattle made the cattle
6 tracks. The Government's speculation that maybe it was
7 the Messiriya cattle is completely unsupported. There's
8 no reference to any Messiriya, much less any Messiriya
9 cattle in Percival's description here.
10 He described Messiriya much further up in the north
11 when he began his trek, but not here. The reason is
12 obvious: they hadn't gotten here because this wasn't the
13 time that their seasonal migration would have gotten
14 them to this particular area. Precisely consistent with
15 that, Percival describes seeing Dinka driving their
16 cattle south as hard as they could.
17 That tells us something else, though, when we think
18 about it in the context of the environmental evidence.
19 If the Dinka were driving their cattle south as hard as
20 they could, where were they coming from? They were
21 headed south. That means they were coming from the
22 north. What does that mean? That means there were
23 Dinka up there in the north.
24 I can't tell you exactly where the Dinka were, but
25 I can tell you that driving their cattle south as hard

5 (Pages 9 to 12)
09:14 1  this is well to the north of the Kiir, it's 11 miles
2  north of the Kiir at this point. And he describes
3  Achak, a Ngok village, as a "biggish" village.
4  He then proceeded south from Achak another 11 miles
5  until he reached the Kiir. Then he headed northwest to
6  its junction with the Yamoi, also called the Nyamora,
7  and proceeded up the Yomoi through what he called
8  "another village" -- and I've lost track of quite how
9  many Ngok villages he's gone through, but it's a number
10  here -- and proceeded via Bongo to village Burakol to
11  where Sultan Rob is at present living.
12  This again is Percival in 1904, which fits precisely
13  withMahon in the previous year, and with Wilkinson in
14  the year before. And that is a consistent pattern of
15  citing Sultan Rob three times to the north of the Kiir
16  in a short period of time in the same years before 1905.
17  The Government makes the argument that I confess
18  I've never fully understood that Burakol isn't the same
19  as Abyei, and that it wasn't in the same place. It says
20  instead: well, actually there are two or three places
21  that are two and a half or three and a half miles apart.
22  I think in fact, when you look at all the various
23  distances, it's a much smaller area. And this indicates
24  where Percival found Sultan Rob: you can see the places
25  on the map, and Ms Miles nicely took Mr MacDonald

09:16 1  through this.
2  But it frankly doesn't matter whether Burakol was
3  one mile or two miles from present-day Abyei Town. If
4  you tried to locate the heart of Rome or Paris, it no
5  doubt has moved a mile or two miles. The fundamental
6  point is: this was a rural agrarian people; the centre
7  of their culture at that point, where their paramount
8  chief was located, was in a little cluster of villages.
9  The people were spread out widely throughout the
10  Bahr, as we've seen from the evidence -- from the
11  environmental evidence, from Percival, and from the
12  other evidence, and as we're going to see from Cunnison.
13  But where their paramount chief had his seat, and where
14  the trade centre was, was in this cluster above the
15  Kiir. The fact that it might have moved a mile this way
16  or that way is neither here nor there. That was where
17  the paramount chief had his seat at the time, with his
18  people spread out in a large band to the north
19  throughout the Bahr region, which was precisely suited
20  to their culture.
21  Percival also recounts -- and the Government put
22  some emphasis on this yesterday -- that Sultan Rob told
23  him that the Bahr el Arab is uninhabited, except for
24  occasional parties of wandered Arabs. As we know, when
25  he referred to the Bahr el Arab he meant the Ngol; we've

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09:17 1  already seen that. So what Sultan Rob is doing is
2  saying to Percival, "The place where you saw the Ngok
3  driving their cattle south, and where you saw the fires,
4  that's really uninhabited." And the Government seizes
5  on that and says, "Ah ha, look, there are only Arabs
6  living around the Ngol".
7  Let's look carefully at why Sultan Rob would have
8  said that. The Government criticised him to
9  an extent -- or criticised us, frankly -- for us putting
10  forward a Ngok witness who was dissembling. Let's look
11  at why he did that.
12  In March 1906 Huntley Walsh gave a lengthy
13  description of an encounter with Sultan Rob. He said:
14  "For some reason Sultan Rob did all he could do to
15  prevent my going up the Kiir."
16  Sultan Rob's efforts to prevent Huntley-Walsh from
17  exploring his territory continued, and I think it's
18  worth your reading it on the slide, and then me
19  emphasising some points:
20  "Among other things he told me that none of his men
21  knew the river, which afterwards they proved to know
22  very well."
23  He then sent a man to guide Huntley Walsh. The man
24  pretended not to know anything and then guided him up
25  a false canyon into a dead end. Then at the end

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09:19 1  Huntley-Walsh drew a conclusion:
2  "I fancy that the latter [Sultan Rob] must have
3  given him [the guide] orders to do so. Both Bimbashi,
4  Bayldon and I have proved that Sultan Rob is a liar, and
5  we have both found that [and this is the important bit]
6  he does all that he can to hinder and mislead
7  expeditions sent to discover facts concerning this part
8  of the country."
9  I would suggest, contrary to the Government's
10  insinuations that there was something wrong with this,
11  this was entirely understandable. It made perfect
12  sense. Of course Sultan Rob wanted to protect his
13  people. I won't sit here and judge -- I know you won't
14  either -- his motives for doing that.
15  What's important is that when he told things to the
16  Condominium officials, that in no way means that they
17  are true. When he said Ngok weren't in particular
18  places, he probably meant the opposite. He wanted to
19  direct the Condominium officials, who were with the Arab
20  Mounted Infantry, with the history of slave raiding in
21  the region, away from his people. He did it to protect
22  his people. It was a noble statement even if he
23  dissembled.
24  It is important to understand that, though, because
25  when you seek to rely on statements from him that there

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<td><strong>09:20</strong> 1</td>
<td>were only wandered parties of Arabs somewhere, it in no way reflects where the Ngok really were. On the contrary, it suggests that they were exactly there, and just like he told the guide to lead the Condominium officials away from where the Ngok were, that statement in all likelihood was meant to conceal where the Ngok were located. It's also important to look at the maps that Percival produced. The Government just to disclose just one part of Percival's full sketch map. Percival took a long trek, as we've seen, coming from Lake Keilak down to Sultan Rob and then going back up to where he started. The Government has only disclosed part of that full sketch map, and that is the part that begins at Burakol, in the southern part of where Percival trekked, and goes further south. What the Government discloses, therefore, omits the sketch map for the area north of the Kiir, north of Burakol, up to Keilak; the part of the Abyei Area that the Government says didn't have any Ngok in it. The Government has not disclosed those parts of the sketch map, notwithstanding our requests and notwithstanding your order; notably those parts of the sketch map which were taken and which existed in all likelihood was meant to conceal where the Ngok were located. It's also important to look at the maps that Percival produced. The Government just to disclose just one part of Percival's full sketch map. Percival took a long trek, as we've seen, coming from Lake Keilak down to Sultan Rob and then going back up to where he started. The Government has only disclosed part of that full sketch map, and that is the part that begins at Burakol, in the southern part of where Percival trekked, and goes further south. What the Government discloses, therefore, omits the sketch map for the area north of the Kiir, north of Burakol, up to Keilak; the part of the Abyei Area that the Government says didn't have any Ngok in it. The Government has not disclosed those parts of the sketch map, notwithstanding our requests and notwithstanding your order; notably those parts of the sketch map which show what it was that Percival reported.</td>
<td><strong>09:22</strong> 1</td>
<td>in those areas. Look at what the Government did: it disclosed the part of the sketch map beneath the Kiir and said, &quot;Ah ha, there are Ngok beneath the Kiir&quot;. It did not disclose the part of the sketch map above the Kiir and it now argues that there is no evidence that the Ngok were above the Kiir. I would suggest that that use of the document, submission of part of the document and not the whole document, does not provide a basis for concluding that there weren't Ngok up there. I would suggest, on the contrary, that it provides a very powerful negative inference that just as Percival reported that he encountered Ngok driving cattle just south of the Ngol and cattle tracks from Ngok cattle on the Ngol, that those sketch maps which the Government -- and you can see it listed on the Government's own index -- that those sketch maps which were taken and which existed showed the Ngok in exactly those places. I'd like to move on. Even the partial sketch map that the Government does disclose clearly identifies a number of villages. Note this is just the bottom part of Percival's sketch map, just the southern part, but even that part shows a whole cluster of villages to north of the Kiir. It's a little difficult to note on the slides, but</td>
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09:26 1 It's again essential to note here -- and I've said
2 that one has to view these documents with care -- that
3 this was a dry-season observation. This was not
4 a wet-season observation. The Condominium officials
5 never went there in the wet season.
6 So what he's saying is that there are Ngok Dinka
7 going up to the Bahr el Arab, the Ngol, which is
8 precisely consistent with his reporting not that this
9 territory is uninhabited but that he encountered lots of
10 Ngok villages between the Kiir and the Ngol and that he
11 encountered Ngok cattle herders driving their cattle
12 south as hard as they could from the Ngol.
13 What does that mean about the wet season? What it
14 means by the wet season is that the Ngok were to the
15 north of the Ngol during the wet season, where he didn't
16 go and which he couldn't know about.
17 So his reference to the boundary as a dry-season
18 boundary is precisely consistent with the environmental
19 evidence and precisely contrary to the Government's
20 case.
21 It's also useful to note that Percival -- and this
22 is a little more general -- refers to Sultan Rob's
23 territory as a large area of country; he doesn't refer
24 to it as a 14-mile strip squeezed in along the southern
25 bank of the Kiir/Bahr el Arab. He also refers to it

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09:27 1 extending far to the east and far to the west. Frankly,
2 the boundaries that he describes go beyond those
3 identified by the ABC experts in both the east and the
4 west.
5 Finally, note that I have spent time going through
6 the entire pre-1905 Condominium record. It is basically
7 three people: Mahon, Percival and Wilkinson. Those
8 sources require careful attention. When you give them
9 careful attention I would suggest that they lead to
10 a relatively strong conclusion which is precisely
11 consistent with what the ABC experts found and what the
12 environmental evidence shows.
13 But I would like to go on to one further document
14 which the Government omitted from its discussion. This
15 is Gleichen's 1905 compendium, which I think qualifies
16 pretty much as a pre-1905 document.
17 You will recall at the Tribunal's first procedural
18 meeting that Professor Crawford spent some time talking
19 to you about Gleichen's 1905 compendium. He emphasised
20 its importance. It seemed to have lost importance in
21 the Government's presentation. Their memorial recited
22 a passage that refers to the Bahr el Ghazal region, and
23 they in particular relied on a passage that said:
24 "The Dinkas occupy the lowlands in the north of
25 Bahr el Ghazal, their southern limit being the edge of

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09:28 1 the tableland where good grazing and pastureland
2 terminate."
3 Based on that quotation, which is in a chapter
4 describing the Bahr el Ghazal region, the Government
5 claimed: no Dinkas are mentioned living in the province
6 of Kordofan, ie to the north of the Bahr el Arab. You
7 can see the citations on your slide. I would suggest
8 that is completely misleading. When you look carefully
9 at Gleichen, which was a compendium of what had been
10 produced in the preceding seven years since 1898, it
11 powerfully supports everything that I have just been
12 saying.
13 The passage that the Government cites is firstly
14 a general reference to the Dinka. But more importantly,
15 it is a geographical and environmental reference there.
16 The reference to the southern limit, the reference to
17 where good grazing and pastureland terminate, is
18 a reference to geographical and environmental features,
19 and it is precisely consistent with what Cumnion
20 described and what was described in all the
21 environmental evidence.
22 It describes the Dinka extending up to where good
23 pastureland and grazing stop, and that is the Bahr
24 region. It's an area that is well watered, where the
25 soil is fertile. That is the area that the Gleichen

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09:30 1 compendium, in the very quotation that the Government
2 relies on, refers to.
3 More importantly, what the Government doesn't refer
4 you to in Gleichen is even more important. Gleichen's
5 compendium also describes specifically the Ngok Dinka.
6 It says, and this is in 1905:
7 "Sultan Rob and Dar Jange belonging to Kordofan,
8 with the southern boundary of Kordofan extending
9 southwards to the Bahr el Arab, leaving the Maalia and
10 the Rizeigat to Darfur, and the Homr and Dar Jange to
11 Kordofan."
12 What that does is it puts the southern boundary of
13 Dar Jange on the Bahr el Arab. That is precisely
14 consistent with all the evidence we've been discussing.
15 It has the Dar Jange, the Ngok Dinka, living in the Bahr
16 region, to the north of the Bahr el Arab. Their
17 southern boundary here in Gleichen, in the passage that
18 specifically refers to them, is put on the Bahr el Arab.
19 The Government has it exactly backwards, and that's
20 why I talked to you about the Twic. The Government has
21 it backwards: the Ngok lived down to the Kiir and
22 a little bit south; the Twic lived south of the Kiir.
23 That is what Gleichen said in 1905 in the one
24 pre-1905 document that the Government doesn't want to
25 talk to you about. Again, that's precisely consistent

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| 09:31 | 1. with what Professor Cunnison and Professor Allan told you about the environmental evidence.  
2. The Gleichen compendium also included a map, and we can see that there, and we're going to blow it up, you'll remember we looked at this with Mr MacDonald.  
3. The map has descriptions of the Dar Jange; you can see it down there. The Bahr el Arab is of course the Kiir -- I'm sorry, is of course the Ngol; I've committed Wilkinson's mistake. The map again shows Sultan Rob extending up to the Ngol; it shows the Messiriya far to the north above the goz.  
4. That is it, members of the Tribunal, for the pre-1905 record. As I've said, it's fairly limited, but it nonetheless allows us to draw a number of important conclusions.  
5. It places the Ngok with permanent villages, prosperous agricultural fields, scattered throughout the Bahr region. It doesn't tell us exactly where they are; it's impossible given the nature of the record. But it does tell you that they're definitely between the Ngol and the Kiir, and it provides strong inferential evidence that they're well to the north of the Ngol.  
6. That's exactly the area that the Ngok had migrated into; and the Government claims, without any support, that's exactly the area that the Ngok had migrated to.  
7. These two areas point towards the territory, as Lloyd also cites a report that says the southern boundary of Dar Homr is between the Bahr el Arab and the River Kiir, the latter being occupied by the Dinkas under Sultan Rob. It's clear here, when he referred to the Bahr el Arab, that he meant the Ngol, as we have seen, and not the Kiir, which he called the "River Kiir." That's the same terminology that Wilkinson, Percival and Gleichen had all used in the preceding years.  
8. Thus what we have from Lloyd is the Messiriya going -- no further south -- he talks about the Dar Homr's boundary.  
9. That in fact they hadn't moved out of it; they were still there. Gleichen's compendium, which sums up what we know about the pre-1905 record, puts their southern boundary on the Kiir/Bahr el Arab, which makes perfect sense. It also puts Sultan Rob to the north of the Kiir/Bahr el Arab, in Burakol, from 1902 to 1905.  
10. The pre-1905 Condominium records don't let us identify every Ngok village, or all the Ngok territory, with precision. They couldn't; that's in the nature of the record. But they give us powerful evidence to support the SPLM/A's claim, and to completely contradict the Government's suggestion that the Ngok were either entirely or predominantly south of the Kiir. That makes no sense at all.  
11. As we will see, the post-1905 evidence, which we're now going to turn to, does that even more emphatically.  
12. What the post-1905 evidence shows is that the Ngok were scattered widely throughout the Bahr, extending up to the goz.  
13. Let's start with Lloyd, who prepared a map in 1907 which is on the current slide. It shows -- and it will be highlighted for you -- that there were two references to Dar Jange, which means the territory of the Ngok.  
14. Again, these are limited references -- PROFESSOR CRAWFORD: I'm sorry, sir, this is repeated.  

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| 09:34 | 1. The phrase "Dar Jange" does not mean "the territory of the Ngok"; it means "the territory of the Dinka".  
2. It's a general phrase.  
3. MR BORN: Mr Chairman, I never once interrupted the Government's presentations -- PROFESSOR CRAWFORD: Well, I will on this occasion because that's an outrageous remark.  
4. MR BORN: -- and I would appreciate not being interrupted.  
5. THE CHAIRMAN: Please, Mr Born, go on.  
6. MR BORN: Thank you very much.  
7. These two areas point towards the territory, as I said, of the Ngok Dinka, and they're both well up in the north, well above the Abyei Area, and they point towards Ngok Dinka territory.  
8. Lloyd also cites a report that says the southern boundary of Dar Homr is between the Bahr el Arab and the River Kiir, the latter being occupied by the Dinkas under Sultan Rob. It's clear here, when he referred to the Bahr el Arab, that he meant the Ngol, as we have seen, and not the Kiir, which he called the "River Kiir." That's the same terminology that Wilkinson, Percival and Gleichen had all used in the preceding years.  
9. Thus what we have from Lloyd is the Messiriya going south -- no further south into the grazing territory coming south -- no further south into the dry season, than approximately the Ngol. That description, the Messiriya coming down and grazing around the Ngol, is exactly right. It has the Messiriya coming to the Ngol. That is in no way inconsistent with the Ngok being there. On the contrary, as we're going to see, it is precisely consistent with the Ngok being there.  
10. There's another fire report by Lloyd at the same time. I'm not going to spend much time on that because we've already looked at what the sources of fire are.  
11. Again, though, it's a confirmation of Ngok Dinka agricultural practices in the area.  
12. I'd like to move on quickly -- because I've used a bit more time than I would have liked, I'm told -- through Hallam's report. It's another instance where the Government has only provided partial copies of maps, and not the full copy showing all of Hallam's trek reports. I would suggest in these circumstances it's very difficult to draw conclusions about where the Ngok were not.  
13. I would also point out though that Hallam's map, which the Government relies on, again confirms that in 1997 the Ngok Dinka paramount chief, at this point Kuol Arop, was in Burakol, to the north of the river.  

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| 09:35 | 1. Grazing territory coming south -- no further south into Dar Jange, the Ngok Dinka territory. During the dry season, than approximately the Ngol. That description, the Messiriya coming down and grazing around the Ngol, is exactly right. It has the Messiriya coming to the Ngol. That is in no way inconsistent with the Ngok being there. On the contrary, as we're going to see, it is precisely consistent with the Ngok being there.  
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As we've seen, that's exactly what Percival and Mahon had previously reported. The Government suggests that there are Arab settlements shown to the north of the Kiir here. That is completely wrong. When you read the route report by Hallam he talks about not settlements, but Arab "camps" in the dry season, Arab "camping ground" in dry season. These are not villages. That's another one of the reasons that I spent so much time with the environmental evidence. These are seasonal nomadic camping grounds. When the Messiriya came south from their area above the Muglad, they would spend six days or so at particular camps; not villages. Again, that's precisely consistent with the environmental evidence. The Government goes on and makes much of a sketch map. The map only provides selective portions of Whittingham's tour of the area in 1909. These materials support not the Government's case but our case. The Government once more only provides selective portions of Whittingham's map.

Whittingham trekked through several areas: (1) the country north of Turda and south to Dawas and Abyei; (2) Turda to Koak, and Bara to Mellum; and (3) Abut off Bari to Wul.

The Government only disclosed a partial sketch map of the first section of Whittingham's trek; it did not disclose anything else. We made requests for it, the Tribunal ordered production of it, and nothing was produced. The focus of Whittingham's trek was to mark locations of watering spots. This has been scoffed at in previous discussions, saying: "Oh, of course everything would be noted." But when you look at Whittingham's map it omits numerous villages in places we know from other sources there had to be villages. Therefore the fact that Whittingham's map doesn't show particular things doesn't mean they weren't there; it means he was making a drawing for other purposes.

Finally, perhaps the most important point: although the Government didn't disclose it, when we got the very limited access that we did to the Survey Department records, we obtained -- pretty much by chance, frankly -- part of the Whittingham sketch map for the area between Turda and Koak to Bara and Abyei. That is Ngok Dinka agricultural lands. It's not Messiriya agricultural lands because (a) as we saw, the Messiriya don't like farming, and (b) when the Messiriya do farm, they do it with millet up in the north in the goz, where their crops grow. They don't do it in the Bahr down here.

That is Ngok Dinka, and that is one of the reasons that the Government I would suggest did not disclose that map, because that map provides clear evidence of Ngok Dinka cultivation well to the north. The map also shows something else: it shows a Dinka dugdug on the south bank of the Ngor in the region of Bara, to the east of the Abyei Area. As we've seen, dugdugs are characteristic of the Ngok Dinka and not of the Messiriya.

Finally, there are repeated uses of Ngok Dinka terminology here. One can scoff at toponymy, as...

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Professor Crawford did, but the repeated use of Ngok Dinka names in this area I would suggest is, together with the other evidence, fairly probative. Again, it's important to note the Government didn't disclose this part of the trek report and instead disclosed other parts to the south, and I would suggest that one can draw a powerful inference from that. I'd like to move on to a 1912 publication by the Sudan Intelligence Department. This was an exhaustive book-length study of the Kordofan, it's titled Kordofan and the Region to the West of the White Nile, and it's an important work which summarised the existing Condominium knowledge at the time.

It described the relevant parts of Kordofan as follows, and you can see it on the slide: "To the south of Dar Nuba and living in the open plains which extend to the Bahr el Arab there is a considerable Dinka population. As the country dries up and the mosquitoes disappear they move slowly south, watering at the various rain pools to the Arab or Gurf river [that's the Kiir], along the banks of which they form innumerable small settlements of two or three huts each."

We have seen those descriptions before. This is exactly consistent with the environmental evidence. It...
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9:42 shows the Ngok living throughout the Bahr region, the plains, and moving south to around the rivers during the dry season.

9:43 referred to parenthetically as Dar Jange, and we can go back to Professor Crawford's interruption of me -- it places the Ngok Dinka squarely in the area between and above the Kiir and the Ngol.

9:44 It extends up to around 10°20' latitude, and it is precisely consistent with the environmental evidence and what we've otherwise described. It extends barely at all beneath the Kiir/Bahr al Arab, and it puts the Messiriya far up in the north, just the way the environmental evidence and Professor Cunnison described.

9:45 The Government argues that Dupuis's sketch map fails to identify Ngok villages elsewhere, but again this is based on dry-season observations and one wouldn't expect it to do so.

9:46 the Ngok: virtually always to the north of the Kiir, sometimes to the north of the Ngol; always consistently -- consistently -- between the Kiir and the Ngol and a significant number of references to the Ngok north of the Ngol.

9:47 That is based on a limited set of observations which necessarily could not include the Ngok during the wet season. It's a little bit like saying, "I went out in July and didn't see any snow." Of course you don't see any snow in July. And you don't see any Ngok Dinka in particular areas because that's the wrong season of the year.

9:48 When you think about it, the fact that the Condominium administrators never went during the wet season provides powerful indications of why there wouldn't be any observations of where the Ngok Dinka were during the wet season.

9:49 Finally I'd like to move on and spend some time with one of the most important witnesses in the record: Professor Cunnison. Professor Cunnison lived for two years with the Messiriya. He was put forward by the Government as their only fact witness accompanying their first memorial. What he has to say is very important, and I think it is telling that all of their fact witnesses Professor Cunnison was the one who was not
identified to be brought here.

He has written extensively on the area, and I would refer you to his books. His books don't put you to sleep, his books are actually riveting. I find them exciting. If you read -- and the names are on the screen, but he is a learned man. He wrote The Homr and their Land, The Social Role of Cattle, Baggara Arabs, Some Social Aspects of Nomadism in a Baggara Tribe, and one of my favourite is on giraffe hunting by the Messiriya in the region, which is a particular specialty of his apparently. But he knows this area quite well.

He describes the region, geographically first of all, in a way that is quite consistent with what Professor Allan did. He divides the region, this entire area, into four zones. First there's the Babanusa, which he describes as a sandy area in the north and northwest of the country which is used by the Messiriya for grazing during the rains.

Second, he describes the Muglad, which stretches from Babanusa in the north to the goz, the sandy, arid strip. He describes that as the headquarters of the Messiriya.

Third, he refers to the goz. He describes it as being between Muglad and Wadi el Ghalla in the north and the river system, the Bahr, in the south. He describes the goz as a transit stage between Muglad and the Bahr.

Finally, of most importance to the Ngok, he describes, south of the goz, the Bahr itself. He describes it as the area -- which I previously referred to -- of dark, deeply cracking clays and numerous winding watercourses, all connected eventually with the Bahr el Arab. It contains also two permanent lakes: Keilak, which lies slightly southeast from the Muglad, and Abyad in the southeast corner of the country. Cunnison notes that north of the Bahr is the goz.

Recall this is exactly what Professor Allan described and showed you on the satellite imagery. It shows starting at the southern boundary of the goz the Bahr begins. The Bahr is the dark, rich, deeply cracking clay soil that extends down to the Kiir. That is how Professor Cunnison described the region. It is the description that Professor Crawford you will remember stumbled on; that's because they didn't have an expert on this topic and because they didn't want to focus on Professor Cunnison.

When you look at the evidence which you see on the slide in front of you now and when you look at what their own fact witness said, the Bahr is the region that starts from the goz; it stops when it goes down to the Kiir. It is the black clay soil where the Ngok built their culture.

When we move on from that, we can see that Cunnison's description of the goz continues in other of his works. He also defines more specifically a part of the goz as the Bahr el Arab, and he distinguishes that from the Bahr itself. The Bahr el Arab itself, as part of the Bahr generally, is the area between the Kiir and the Ragaba ez Zarga; it's that strip between the Ngol and the Kiir/Bahr el Arab.

When we look at a 1953 article he wrote on the Homr and their land, he quotes: "The river system is known to the Arabs as the Bahr, although they subdivide the area into the Ragaba, consisting of the Ragaba ez Zarga and the Ragaba Umm Biero, and the Bahr, or the Bahr el Arab, which consists of all riverbeds between the Ragaba ez Zarga and the main river. The nomenclature of the rivers is confusing", he says.

He is clear that the Bahr el Arab is not just the Kiir/Bahr el Arab down at the southern boundary of the Ngok Dinka territory, but instead it's the waterways between the Kiir and the Ngol.

He repeats this description of the term Bahr el Arab in his giraffe hunting article. He says: "Giraffe move from Upper Nile province in the early rains and distribute themselves over the wide area known as the Bahr el Arab, penetrate north over the Ragaba ez Zarga and Ragaba Umm Biero and enter the goz district between there and Muglad ..."

We can make light of the fact -- the Government no doubt will -- that this is an article about giraffe hunting. What's important about it is that it tells you about the region, and what it says is that the region of the Bahr is the region that extends south from the goz down to the Kiir.

That makes perfect sense because that is a region that is defined environmentally as the black clay fertile soils that are damp and subject to seasonal flooding. You can see it from the satellite imagery. Professor Allan, whose evidence has not been challenged, explained it to you: the goz starts to the north, the Bahr starts to south. Cunnison and Allan agree. Nobody disagrees.

Cunnison goes on and then repeatedly describes the existence of numerous permanent Ngok Dinka settlements throughout the Bahr region. This squarely supports the SPLM/A's case and squarely contradicts the Government's case, which I would suggest is why Professor Cunnison isn't here. His 1962 article is titled "Some Social Aspects of Nomadism in a Baggara Tribe, and their Land, The Social Role of Cattle, Baggar..."
09:53 1 Aspects of Nomadism in a Baggara Tribe”. It said:
2 “The Nuer and the Dinka have permanent homes from
3 which they move part of the year.”
4 This is a recognition of the permanent nature of the
5 Ngok settlements.
6 In his 1966 book, Baggara Arabs, Cunnison goes on
7 and says:
8 “Much of the Bahr has permanent Dinka settlements,
9 although during most of the time that the Homr occupy
10 it ...”
11 Recall he spent his time with the Messiriya:
12 “... the Dinka are with their cattle south of the
13 Bahr el Arab.”
14 Cunnison explicitly concludes that permanent
15 Ngok Dinka villages were located throughout what he
16 repeatedly calls ’much of the Bahr’. Again, this was
17 the area extending south of the goz.
18 In his article on ”The Social Role of Cattle”
19 Cunnison specifically addressed the question of whether
20 it would make sense to try to encourage the Messiriya to
21 cultivate in the Bahr. The Messiriya has a proud
22 culture, as we saw, that did not include agriculture.
23 They were cattle herders and they were proud of it;
24 rightfully so. But he answered a Government suggestion
25 that they be settled in the Bahr, and he said to this:

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09:55 1 the bush for two years, explained this. He said: the
2 Ngok Dinka have permanent homes, that's their
3 traditional land, there are settled farms throughout
4 that land. That is Ngok Dinka land, it's not the
5 Government's land. The Government case in this
6 proceeding is essentially to take that land away, the
7 way their own witness said they shouldn't do 20 years
8 ago.
9 Cunnison’s witness statement is to the same effect.
10 He says:
11 “During the wet season the Homr lived in settled
12 camps to the north in Babanusa. As the dry season came,
13 the Homr moved first briefly to the Muglad, where the
14 cattle grazed on the remains of the millet harvest ...”
15 That's where the back-burning is that the Messiriya
16 did, not down in the Bahr:
17 “... then they moved south through the extensive
18 sandy goz to the area called the Bahr.”
19 Of course, the Bahr starts when the goz stops:
20 “This is the area around the Bahr el Arab and the
21 Ragaba ez Zarga.”
22 One wonders how exactly that particular formulation
23 got in there. What the Bahr is, as we have seen
24 emphatically, is the area that starts south of the goz
25 and it goes down to the Kiir. It's defined by the soil.

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09:54 1 “It might be possible but [and I emphasise this
2 language] this is the traditional land of the Dinka, who
3 return there and cultivate during the rains.”
4 That tells you who was in the Bahr. This is the
5 Government's own witness in response to the Government's
6 proposal to put the Messiriya in the Ngok Dinka's land.
7 Cunnison, their witness, said: no, you can't do that
8 because it is traditional Ngok agricultural lands. That
9 is precisely consistent with the Whittingham map, which
10 showed the cultivation, that the Government didn't give
11 to us.
12 He went on and said the same thing in another paper.
13 This was called ”Settlement of Nomads in the Sudan:
14 A Critique of Present Plans”. He said and I quote --
15 you can see it on the slide:
16 “There are settled farms throughout much of the land
17 [that's the Bahr] and all areas are used for grazing by
18 nomad herds. It could be argued that Babanusa,
19 bordering the Hamar people in the north, might be
20 preferable.”
21 Look at it again: ’settled farms throughout much of
22 the land’; that's the Bahr. You saw what the Bahr was
23 from Professor Allan. He wasn't cross-examined on that,
24 he wasn't challenged on that.
25 Professor Cunnison, their expert who lived there in

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09:56 1 Then at the end:
2 "For part of the year they shared the area with the
3 Dinka, whose permanent homes were dotted around, but
4 shortly after the arrival of the Homr sections, most of
5 the Dinka would decamp further south to their dry season
6 areas.”
7 As with his published views, Cunnison is very
8 clearly acknowledging the existence of the Ngok Dinka
9 throughout the Bahr region; they migrate south in the
10 dry season. Not all of them migrate south; most of them
11 did, Cunnison describes, but some of them would stay,
12 and we are going to see why they stayed.
13 He goes on in the next slide to explain how:
14 "It would be useful for the Messiriya to camp
15 regularly near a Dinka settlement, with whose members
16 one might become friendly and even make brotherhood.”
17 Recall the witness testimony about how the Ngok and
18 the Dinka are brothers:
19 “One can then exchange milk for grain from them to
20 avoid sending back to the Muglad for one's own grain or
21 buy wild honey or use their houses [the Ngok houses] for
22 leaving baggage if occasion should arise to go on
23 a visit elsewhere.”
24 Think about the Government's case: this can't be
25 true, Cunnison is wrong; there are no Ngok houses there,
there are no Ngok people there, they are all south of the Kiir.

This is why the witnesses talk about a brotherhood.

This is why the Ngok have to be in this area: because when the Messiriya come south into the Bahr, they camp next to the Ngok Dinka permanent houses; they leave their belongings in those houses; they get food from the Ngok. That's why they're brothers: because they live together during part of the year.

If, on the Government's case, as Professor Crawford would have you believe, that can't be because there aren't Ngok there, that's just not true. And Cunnison, their own witness, who they didn't bring here, tells you it's not true.

Let's look at the Abyei Protocol; it tells you the same thing. If you look in the Abyei Protocol, Abyei -- and I showed you this before -- is the bridge between the people. It's not a bridge that stops in mid-air with nobody on it; it's a bridge that has both people on it together. That's why it's a brotherhood.

It's the same thing in the other provisions of the Abyei Protocol that the parties agreed to, contrary to what Professor Crawford told you. You look at it and you see in Article 1.1.3 that: “The Messiriya are nomads and they will be entitled to exercise their traditional grazing rights in the area.”

That's what the experts said and that's what the Abyei Protocol says.

Third, Cunnison also describes -- and I'll go through this quickly -- the nomadic character of the Messiriya's life. You can see the slides that describe this. It describes how nomadism is the only way of life, a proud way of life to which they are attuned, how the tribesmen are continually on the move.

He goes on and in the next slide describes where the Messiriya have their home. He says: “The Muglad is regarded by the Homr as their home. Their arrival there from the Bahr ['from the Bahr'] is the occasion for great rejoicing and anticipation. This is almost the only place where the people have anything like permanent homes. It is where they cultivate [where they cultivate: not down in the Bahr] and store their grain, as their forefathers did. If people are away, they want to return to it.”

“It”, Muglad, up in the north, above the goz.

Similarly he wrote elsewhere that nearly all Messiriya cultivation is in the Muglad; their cultivation is otherwise in Babanusa, further north. Once more, this is exactly consistent with the Abyei Protocol says.

environmental evidence, and it's exactly consistent with the SPLM/A case.

There's one point on which Cunnison disagrees with both the ABC experts and the SPLM/A, and it's a disagreement that was created by the Government and which is wrong. Cunnison says that he was: "... informed that the effect of the ABC's decision would be to exclude the Homr from the summer grazing and living areas in the Bahr.”

And that he believed that that would be "fundamentally unjust".

It would be. It would be fundamentally unjust.

That should not happen. And that's what the experts held: it would not happen.

We looked at what they said. They said that the Messiriya, precisely consistent with Article 1.1.3 of the Abyei Protocol, would retain their traditional grazing rights in the Bahr, in the Abyei Area.

The parties foresaw this. Professor Cunnison was misinformed by the Government. He was told what the effect of the ABC decision would be. In fact, what the experts said -- and you can read this; this comes from their report: “The experts want to stress that the boundary that is defined and demarcated will not be a barrier to the interaction between the Messiriya and the Ngok communities. The decision should have no practical effect on the traditional grazing patterns and the two communities.”

That goes back to the notion of brotherhood, to the notion of a bridge, and to Article 1.1.3 of the Abyei Protocol, which preserves those traditional grazing rights.

Professor Cunnison's only disagreement was on this point. It was a legal point, as to which he was given a legal conclusion which was wrong, by the Government. Taken together, Cunnison's writings, his witness statement and his other statements, are frankly devastating for the Government's case. He describes the existence of permanent Ngok Dinka homes throughout the Bahr region. That is precisely consistent with the environmental evidence. It is consistent with the documentary record, so far as one can elicit useful conclusions from that record.

He describes the Messiriya as coming south into that region to live as brothers with the Ngok Dinka. They couldn't live as brothers if the Ngok Dinka weren't there, like the Government tells you.

Cunnison isn't here for a reason. His evidence, though, is extraordinary powerful, and I would suggest
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|---|---|
| 10:02 | 1. He went out of his way to say: this is what he saw.
2. His evidence is also supported by Mr Michael Tibbs.
3. somebody who the Government has not referred to in the slightest. Looking at the next slide, Mr Tibbs refers
4. to the fact that to the west the Ngok went all the way
5. to the boundary with Darfur.
6. "As I note in Sudan Sunset, Grinti, I believe,
7. though I'm not sure, is on the north bank of the Kiir
8. River [is within the Ngok territories]. Travelling from
9. Abyei Town to Grinti I would see Ngok villages, just
10. clusters of two or three tukuls [you'll remember that]
11. and luaks [you'll remember that also] to the north of
12. the watercourse we travelled along. I find myself
13. unable to give an eastern boundary to the Ngok's lands,
14. as my travels throughout the district did not take me
15. through the eastern part of the Ngok's lands."
16. I should apologise: I recall now as I read the
17. reference to Sudan Sunset that there was a reference to
18. that book being self-published by Tibbs, so I think
19. there must have been some reference in the Government's
20. presentation.
21. But let's return to the Tibbs description. He
22. explained that:
23. "There was no defined boundary between the Ngok and
24. the Messiriya in the north. Abyei was the centre of the

| Page 50 |
|---|---|
| 10:04 | 1. Ngok, as Muglad was the headquarters of the Messiriya."
2. He said:
3. "I always considered the area south from Antila
4. [which is north of the Ngol], on our direct road from
5. Muglad to Abyei, to be within Ngok territory. From that
6. road, as soon as we reached Antila, I would see Ngok
7. luaks, which were permanent round cattle byres for Ngok
8. cattle herds, otherwise referred to as 'dugdugs', and
9. typical Ngok villages dotted about."
10. He went out of his way to say: this is what he saw
11. from the road; he wasn't able to go to other areas; he
12. didn't go anywhere in the wet season. I would suggest
13. that that also provides powerful evidence that the Ngok
14. were well to the north of the Ngol. We don't know
15. exactly how far north because people simply didn't go
16. there. This is an area the size of Belgium.
17. I used the example previously of driving on the
18. highway south from Brussels, and seeing what you can on
19. either side of the road; this was far worse: you just
20. didn't know what existed on the other side. But you can
21. tell from the environmental evidence; from Cunnison, who
22. lived out there for two years; and from what, as we're
23. going to see, the Ngok people themselves say.
24. We can also tell from the Harvard Development
25. Project which studied the region in 1970. The project

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|---|---|
| 10:05 | 1. report -- and these are people who spent time out in the
2. field -- said early in the dry season:
3. "The Ngok cattle camps congregate in the immediate
4. vicinity of Abyei. By the height of the dry season
5. Ngok Dinka herds are far to the southeast, pushing on
6. the borders of Nuer territory. As soon as it begins to
7. rain a bit, the herders can turn back towards Abyei. As
8. the land grows wetter, the herds can move up into the
9. sandier areas on Abyei's northern perimeter."
10. Where are the sandy areas? We know where the sandy
11. areas are now because we spent so much time looking at
12. it. Cunnison told us where they are: they're the goz.
13. Professor Allan told us where they are: they're just on
14. the goz. We saw from the satellite imagery; they're on
15. the goz. That's where the Ngok went. That's what the
17. Cunnison told us. And, as we're going to see, that's
18. what the Ngok Dinka tell us.
19. I'd like to sum up then, going back to
20. Professor Crawford's statement that there's no
21. documentary evidence or other evidence in the record
22. showing that the Ngok were up to the Ngol, much less
23. north of the Ngol.
24. We have Professor Cunnison's detailed firsthand
25. description of permanent Ngok villages dotted throughout

| Page 52 |
|---|---|
| 10:06 | 1. the Bahr, based on two years of living with the
2. Messiriya.
3. We have Mr Tibbs's firsthand description of
4. permanent Ngok villages 25 miles north of the Kiir, well
5. north of the Ngol at Antila.
6. We have Whittingham's recently discovered map
7. showing cultivation north of the Ngol.
8. We have the 1910 Hasoba map identifying Ngok dugdugs
9. and villages well north of the Kiir.
10. We have the 1912 Kordofan handbook, which describes
11. the Bahr el Arab as the southern -- not the northern --
12. boundary of the Ngok Dinka; and which shows, in the
13. accompanying map, Dar Jange extending from the Kiir up
14. to 10°20' latitude.
15. We have the 1913 Kordofan map, which identifies the
16. Ngok Dinka as located almost entirely north of the Kiir.
17. We have Dupuis's 1921 sketch map showing Ngok
18. dugdugs in villages throughout the location to the north
19. of the Kiir, extending up to Bok, which is near the goz.
20. We have Howell's 1951 observation describing the
21. Ngok as living through the Bahr el Arab, extending
22. northwards along the main watercourses, of which the
23. largest is the Ragaba Umm Biero.
24. We have the 1965 and 1966 Abyei agreements, in which
25. the Messiriya acknowledged the Ngok living on the
10:08

1 Ragaba ez Zarga.

2 And we have the Harvard Development Report
describing the Ngok living up to where the sandy regions
stop.

3 Professor Crawford is just wrong. When you actually
look at the record and try to think about it, when you
don't just pull soundbites out of it that suit you, what
the record shows you is, undeniably, the Ngok living
throughout the entire Bahr region.

4 It's also not surprising that the more time people
spent in the field, the more detailed and the
further north their descriptions of the Ngok go. Think
about it: who tells you most about the Ngok?

5 Professor Cunnison, the Harvard Development Report,
Mr Tibbs; people who actually lived there.

6 Who doesn't tell you much? People like Henderson,
who Professor Crawford relies on, who rode in a truck
from Muglad down to Abyei. The people that actually
lived there are the ones that can tell you most.

7 With that I suggest we turn to the people who lived
there most, the Ngok Dinka themselves. Contrary to what
Professor Crawford would tell you, this is not evidence
that we ought to look at from the perspective of
Rudyard Kipling. I'm sure there was no intended irony,
but Rudyard Kipling isn't necessarily the best source to
choose in either evaluating oral evidence or looking at
a colonial people, a tribal people.

10:10

1 conclusions that they drew from the witness testimony
are powerful.

2 They were educated, smart people. Their work, their
efforts, demand respect; and not, as I said before,
contempt. We should show humility towards what they
did. Think about it if you could spend six days with
witnesses from all these areas. Wouldn't that tell you
a lot more than those snippets of testimony that you got
yesterday? I think we all saw the quality of the
interpretation. We saw that, right?

3 The experts didn't complain about that. They had
immediate access to all those witnesses. I think the
judgments that they drew are entitled to the greatest of
respect. We should approach those with humility and not
with contempt.

4 I'm not going to spend a lot of time -- because I've
used too much time already -- on going through the
witness testimony. It's on the slides, and if we can
just quickly show those.

5 There are a number of specific descriptions from
different of the Ngok Dinka elders in the chieftoms
about particular events in their lives. You can
conclude, as I think Professor Crawford tries to
insinuate, that it's all made up. I wouldn't do that.

6 These witnesses are honest, they told the truth there,
Q. Does the name Kol Arouth have any meaning in the Dinka land, but we call it Kol Arouth, beside the river.

A. This is a place the Arabs refer to as Mellum in the dry

Q. And where is Kol Arouth?

A. My father was born in Wun Bial, a place called Wun

Q. Can you please tell the Tribunal where your father was born?

A. I will tell them. My grandfather, the father of my

Q. Could you please tell the Tribunal where your father’s

A. I will tell them. My grandfather, the father of my

Q. And where is Kol Arouth?

A. This is a place the Arabs refer to as Mellum in the dry

Q. Does the name Kol Arouth have any meaning in the Dinka

A. Kol Arouth is an open area. It is in the same area

Q. During the time of your father’s father, did the

A. Yes. North of Kol Arouth you would be confronted with

Q. Just so the Tribunal is clear, is Kol Arouth a reference

A. Kol Arouth is an open area. It is in the same area

Q. Can you please confirm for the Tribunal which of those

A. They are not very far. They are places where you can go

Q. Thank you.

Now, you’ve described that these are places where

Q. And where is Kol Arouth?

A. My father was born in Wun Bial, a place called Wun

Q. Can you please, if you’re able, describe for the

A. In actual fact Wun Bial and Wun Ameth are practically

Q. Can you please, if you’re able, describe for the

A. This is a place the Arabs refer to as Mellum in the dry

Q. Thank you.

Q. And where is Kol Arouth?

A. I’m 75 years old.

Q. Do you know how old you are?

A. I was born in Abyei.

Q. During the time of your father’s father, did the

A. Those days, when things were normal, no conflicts, no

Q. Can you please confirm which of the places you referred

A. They are not very far. They are places where you can go

Q. Thank you.

Now, you’ve described that these are places where

Q. Can you please, if you’re able, describe for the

A. I can tell them.

Q. Can you please tell the members of the Tribunal where

A. We have no questions, Mr Chairman.

Q. Can you please, if you’re able, describe for the

A. Kol Arouth is an open area. It is in the same area

Q. If you could tell the Tribunal when you spend your time

A. North of Kol Arouth you would be confronted with

Q. During the time of your father’s father, did the

A. Yes. North of Kol Arouth you would be confronted with

Q. Can you please confirm which of the places you referred

A. They are not very far. They are places where you can go

Q. Thank you.

Now, you’ve described that these are places where

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Now, you’ve described that these are places where

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A. They are not very far. They are places where you can go

Q. Thank you.

Now, you’ve described that these are places where

Q. Can you please confirm which of the places you referred

A. They are not very far. They are places where you can go
Day 5 Wednesday, 22nd April 2009

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<td>just ride in a truck through it or lead a contingent of</td>
<td>we had reference to Noong yesterday from one of the</td>
<td>coming and providing evidence about the current</td>
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<td>2 40 Arab cavalry men through it -- where the Ngok Dinka</td>
<td>government's witnesses -- to Riet, Kol-Lang, Dagak,</td>
<td>proceedings. There's no reason to disbelieve that</td>
<td>Trevor McGowan</td>
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<td>3 people were.</td>
<td>Awol, and other places. There are further references to</td>
<td>evidence, and I would recall for you the fact that the</td>
<td><a href="mailto:info@TMGreporting.com">info@TMGreporting.com</a></td>
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<td>4 I'd like to look first at what the chief of the</td>
<td>the Ngok along the river; that's the Ngol of course.</td>
<td>ABC experts had a chance to consider that testimony at</td>
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then to Meiram. The Abyior of my father's age and my grandfather's age would also use this grazing route and meet the same settlements of the Ngok."

An Achueng chief, Ajak Malual Beliu, who was born in the mid-1930s, recalls the birthplaces of his father and grandfather. He says:

"The following are some of the Achueng permanent settlements that I know of and have been told by my father and grandfather. Mading and Agany were permanent settlements southeast of Abyei Town and north of the River Kiir. North of Abyei Town, Noong [which we heard reference to previously] was a village of the Achueng."

An elder of the Mareng chiefdom, Malual Alei Deng, who was born in 1940, recounts:

"The lands of the Mareng chiefdom have traditionally been centred in the place called Nyama, in the north, and further south of Nyama towards Abyei Town. I lived in Nyama and so did my Mareng from my father's and grandfather's time."

As we've seen, Nyama is well to the north of the Ngol.

Adol Kwot Mual, a Manyuar elder, testified:

"I was born in the ... 1940s ... My grandfather was born in Thuba and lived there until he was a man."

I have been told that my grandfather was initiated in

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11:02

1 Thuba."

2 Again, all of these statements -- and the reason
3 I take you through them, and I realise to some extent
4 it's tiresome, but I take you through them to point out
5 the specific details that these witnesses testified to.
6 One can challenge their recollection, one can
7 challenge where places are and so forth -- I'm going to
8 show you a map that puts everything together, I just
9 showed you a small selection of places that were
10 referred to in the first witness statements that
11 I referred to; I will show you a map that puts all these
12 places on a single map -- but the notion that these are
13 unspecific or that they are unreliable I think is simply
14 speculation. I think when you look at what the
15 witnesses who describe their territory -- and you've
16 seen these are straightforward people, they're people
17 who tell you what they know, and that's what their
18 witness statements do.
19 If we can move on to the next slide, Belbel
20 Chol Akuei Deng, who is the chief of the Alei, describes
21 how during the chiefcy of Chol Lual in the
22 mid-1800s -- and again this is reporting what he hears
23 from his father, his grandfather, the people, the elders
24 of his tribe -- the chief's family settled further south
25 in Thuba, among Alei settlements, and other settlements

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11:05

1 We have put in significant numbers of witness statements which coincide exactly with what the ABC experts themselves -- five impartial men, three of them African, two of them African experts, the three picked by IGAD, chosen by the parties, congratulated by the parties, including the Government, at the end of the proceedings for being impartial and doing the proceedings right -- they looked at this witness evidence and reached the same conclusions that we say you should reach, and I would suggest that that judgment is entitled to the greatest of respect.

2 I could go on through more witness statements, but I suspect that that would not be enormously helpful for you. I would urge, though, that you read the witness statements and give deference to the fact that that is the way that these people speak. They didn't keep documentary records, they didn't do trek reports; that's not how they did it. Instead they have oral traditions that must be taken into account and deserve to be taken into account.

3 If we could look at a map, though, that tries to give modern description to what is on the witness statements. Here is a map that shows the locations of the towns that are referred to in the witness statements. The black dots that you see on the map are

Page 68
11:06 1 the towns that are referred to in the various witness statements. That's also included in our materials.
2 This is not vague or generalised testimony. There are a number of specific villages and settlements that are referred to. Consistent with Cunnison and consistent with the Harvard Development Report and consistent with everything else that we've seen, these are villages dotted throughout the Bahr. They are north of the Ngol, south of the Ngol; there are very few of them beneath the Kiir.
3 What I'd like to do next is to briefly address the so-called "Civsec map" which was referred to by Professor Crawford at some length. You'll recall this was a 1933 sort of cartoon sketch. It looked something like this, and it's in the arbitrators' daily bundle, and much was made of it by the Government. First, it's somewhat curious in that the Government submitted this twice. It was submitted first with their counter-memorial at Annex 39, and it was called "Civsec 66/4/35, minutes of the meeting 28th October 1933". Then it was submitted again at Annex 40 of the counter-memorial, and it was described as "An agreement made at Wunrog, 7th March 1935". Obviously the SPLM/A and the Ngok don't know what the provenance of the meeting was or the map was, but

11:08 1 it's somewhat peculiar that the Government would have submitted it twice, describing it in a different way.
2 Be that as it may, the map shows nothing about the territory of the Ngok Dinka that has any value for these proceedings. First, it concerned disputes between other tribes: the Malwal, the Rizeigat and the Homr. It didn't involve discussions with the Ngok in the slightest. Therefore, whoever it was -- and, as the Government says, they have no idea who drew it -- whoever it was didn't have information from or, so far as the record indicates, about the Ngok that has the slightest veracity. Second, it is completely obvious from the map -- and Professor Crawford at the end of the day couldn't and didn't really try to deny that -- that it shows dry-season grazing areas. The reason you know it shows dry-season grazing areas is, when you look at it, it has the Homr substantially down in the south. That, Cunnison tells us and all the environmental evidence tells us, is where the Messiriya would come in the dry season. Therefore, to show, as that map did, the Ngok in a particular area of the south, basically in the same latitude as the Messiriya, is not at all surprising.

11:10 1 That's consistent with what I said prior to the break about how the Messiriya and the Ngok would be in similar areas. It's inaccurate because it so sort of crudely segregates the two peoples when in fact, as we know from all the evidence, they in truth overlapped. Importantly, what the map doesn't show is what happened in the wet season. And for all the reasons we talked about [before] the break, we know that if the dry-season grazing was in the south, then the wet-season home areas and permanent settlements that Cunnison described so graphically were in the north, scattered throughout the Bahr. That, I would suggest, is the true value of this map, whatever its provenance.
4 The idea, though, that you can from a dry-season grazing area in the south deduce what the territory of the Ngok Dinka was is childish. That map does nothing of the sort. It is a dry-season reflection of uncertain provenance that has no bearing at all on where the Ngok themselves lived for most of the year.
5 I'd also like to turn on, though, to a map that does have more value. We were mindful of the Government's criticisms of the witness evidence which, because it was only 26 witnesses and because it was prepared to some extent under the time pressures of this case, couldn't fully capture -- we would have liked to fully capture all the Ngok Dinka villages that one could; we couldn't do that in the time allowed. So we also have submitted, for the Tribunal's assistance, a community map. The Government has scoffed at this, but community mapping is a recognised and sophisticated means of trying, in a scientific manner, to identify where it is that people live.
6 One can criticise the methodology of this, one can question the way that it was conducted; that's fair enough, that's litigation. One should examine this evidence like the other evidence in the record with care and discretion, and try to assess where it's stronger and where it's weaker; we don't dispute that in the slightest. What one can't do, though, is just dismiss it. One has to look at it and try to understand what it shows. What this shows, I would suggest, is a very powerful picture of Ngok Dinka villages scattered throughout the area that the community mapping group was able to study. We are fortunate to have with us today Dr Peter Poole. Dr Poole is one of the world's leading community mapping experts. He in fact, I'm told, prepared the world's first community map. There is a recognised methodology and technique for preparing community maps. It is a technique that has been
11:13 I developed to address exactly the evidentiary problem that the Canadian Supreme Court and the Inter-American Court identified in their judgments. It is the problem of: how do you determine where a people that do not have written records, and who do not have the sorts of technological instruments for record-keeping that we do, where they live, where they lived in the past? How does one do that?

What Dr Poole and numerous other experts of this sort around the world have done is to harness modern technology with pre-modern knowledge of an area. It puts the members of a community, community mapping, together with modern mapping techniques, the community mapping project, and attempts to identify as precisely and carefully as possible where it is that people live, and where they describe their ancestors as having lived.

Again, one can challenge how this is done: the Government is free to cross-examine Dr Poole. But it provides a way to respond to the Government’s criticisms of the witness testimony. Unfortunately Dr Poole, given the exigencies of this arbitration process, didn't have time to spend the same period that he might ordinarily have done. One might ordinarily spend a year to study an area three-quarters of the size of Belgium. He nonetheless was able to spend a significant period of time in the region, with a significant number of Ngok Dinka people, aimed at recording permanent villages and other sites which would be of assistance to the Tribunal.

All told he came up, in a study area with a radius of some 40 miles, with 150 permanent settlements, 56 burial sites, 74 grazing sites, 35 cultivation sites, 45 community meeting and court locations, and 11 sacred sites.

Again, the Government can cross-examine him and challenge those various points, but it is a substantial and more detailed picture than the witness testimony itself was able to present. That's not surprising: we could only put in 26 witness statements; he was able to draw on a much broader range of material. The Government has challenged both the entire concept of community mapping, but also the way that Dr Poole conducted that particular study. The best person in the world to answer that is, Dr Poole who himself was able to present. That's not surprising: we could only put in 26 witness statements; he was able to draw on a much broader range of material.

The whole complex we were dealing with was a significant number of Ngok Dinka people, aimed at recording permanent villages and other sites which would be of assistance to the Tribunal. All told he came up, in a study area with a radius of some 40 miles, with 150 permanent settlements, 56 burial sites, 74 grazing sites, 35 cultivation sites, 45 community meeting and court locations, and 11 sacred sites.

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11:16 conscience that my statement will be in accordance with my sincere belief.

Presentation by DR POOLE

THE WITNESS: On the slide you are going to see the topics that I'm going to address one by one over the next 10 minutes or so. I'm going to spend a little more time on community mapping, that's item 2, because there's quite a lot of unfamiliarity with it, and there are people doing it in different ways in different places. So I'm going to take care to describe the methodology that myself and my colleagues developed in the early 90s.

My academic background: the last item there doesn't have a date on it. I actually got the PhD in 1980, and I spent the preceding six or seven years as the director of national parks planning for the Canadian Arctic. During that time I spent pretty well six months of every year visiting Inuit in their communities, and Dene, Gwitchen and other peoples of the Canadian Arctic, talking about conservation, talking about their issues. In fact I wrote my thesis on relationships between indigenous peoples and conservation, good and bad. After that I spent the rest of the 1980s working on a series of projects, again with indigenous peoples, not just in Canada but then throughout Central and South America. Towards the end of that decade I, by a series of chances, was asked to conduct an experiment in the Arctic with a new form of search-and-rescue device, which had been invented by a Canadian company. I had just heard about GPS from one of the research scientists. So I managed to get hold of one of the first civilian GPS units that were becoming available. And I spent a year or so in the community of Pangnirtung in Baffin Island with the Hunters and Trappers Association, who'd set up their own search-and-rescue system, and they did very well.

The whole complex we were dealing with was a Russian-American rescue satellite, rescue procedures in Canada, and the GPS itself, radio communications, and so forth. And within a year they had developed a very efficient methodology for doing community-based search and rescue, which cost about 100th of the cost of airborne search and rescue in the Arctic at that time. So about a year or so later the price had dropped from 30,000 to less than 1,000. I was invited to work with the Ye’kuana people of the Cunucunuma in the Venezuelan Amazon. I wasn't sure what it was about, but I went down and said "So, what's the plan?" They said, "We're going to unilaterally demarcate our territory, and then the Government will start paying..."
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Day 5 Wednesday, 22nd April 2009

11:26 1 just as accurate as digitising because you are still
2 following a line with a modem or a pencil.
3 Finally, community ownership: they own the map, and
4 that makes a tremendous amount of difference to the way
5 they use it and the confidence with which they use it.
6 So coming to the Abyei mapping project, as Gary has
7 just mentioned, he has mentioned the general purposes of
8 the project.
9 I should point out that my remit on this was to
10 collaborate with International Mapping, who were going
11 to produce the maps, the community maps and all the
12 other maps related to the project. My remit was not to
13 frame the mapping process so it led towards a boundary
14 of any kind; it was simply to direct the trainees
15 towards collecting evidence of presence, and having that
16 presence go back to 1905. That was my remit.
17 There are two more points here which I should point
18 out. In this methodology that we use, even though you
19 can localise GPS -- it's a perfectly obvious and simple
20 thing to do -- you can't necessarily localise the other
21 bits, the computer and the printer, especially in places
22 like humid tropics.
23 So the community mapping process evolved into a kind
24 of complementary form of organisation in many places
25 where the community teams would actually be the ones

11:28 1 going out and getting the information and recording it
2 on logbooks, and then a community association or
3 a support NGO, or me, would take that information and
4 just put it on the final map. All we did was to
5 regularise it and digitise it, really. But the actual
6 collection, the design of the legend, was all within the
7 community.
8 Coming to this project specifically, the first step
9 always is to look for the best source map, and from that
10 source map we will derive whatever we need as
11 a background upon which the trainees will place their
12 information.
13 It was not easy here because the satellite images of
14 the area tend to be rather low scale or extremely
15 expensive. I think we calculated it would cost more
16 than 100,000 if we were to get high-resolution imagery
17 of the whole area.
18 The other option was a medium-scale map, 1:250,000,
19 from that area made by the United Nations and a Swiss
20 agency. So International Mapping produced a topographic
21 map and we brought satellite images anyway in the event
22 that they might prove useful.
23 So I'm now going to go through the other four items
24 on the slide there, the methodology.
25 The first step was to train the mappers. There were

11:30 1 12 young men -- well, medium-sized men, some young, some
2 older -- and we started off with the GPS units and
3 within about three or four days -- some of them already
4 had used a GPS unit and after I sort of checked
5 everybody's sort of way they approached it and the way
6 used it, it was very clear to me that they were going to
7 move quite fast.
8 So on the third or fourth day we went out on one of
9 our first exercises, which entailed driving just 20 or
10 30 kilometres down the road from Agok to Abyei, and
11 maybe now and then I would stop and say, "Take a point
12 here", and there was an appropriate legend symbol, we'd
13 already worked on the legend, and we simply recorded
14 a dozen points.
15 When we went back I asked them to place those points
16 on the topographic base map, which had latitude and
17 longitude lines on it, and they did that and they
18 discovered that the road between Agok and Abyei was in
19 fact, as depicted on the map, inaccurate by up to
20 9 kilometres in one case. So the line of crosses that
21 the trainees plotted went this way and the road went
22 that way (indicates).
23 So that told us something about the accuracy of that
24 map, and it became another factor which we had to take
25 into account in: how can we plan field trips when we are

11:31 1 not absolutely sure that we can get from this point to
2 that point without having to go around?
3 So that was another delaying factor that obliged us
4 to think: well, maybe we should concentrate on a smaller
5 area that we know we can cover, or we feel confident we
6 can cover, without assuming that we can go long
7 distances and assume that the roads as shown on the map
8 would be there.
9 So along with that field training and classroom
10 training we went into logbooks. Now, the logbook is the
11 key. In the logbook the trainee will register the
12 number, the date, the names and the people of that
13 group. We had 12 people divided into three teams, 1, 2,
14, 3,
15 So each page of the logbook had: team 2, trip 1,
16 from here going to there, and then there was
17 an observation number, with its latitude and longitude,
18 the legend symbol, the number of the photograph or
19 photographs that were taken and some comments.
20 So every single observation that the mapping teams
21 made is traceable. It can be checked by anybody who
22 takes a GPS unit and keys in those coordinates; it will
23 take him to that point. So in that sense the mapping
24 process was quite transparent.
25 The community meetings had been arranged for us, and

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Trevor McGowan
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23 (Pages 81 to 84)
there were nine of them, each one with 25 elders who had been invited on the basis of previous involvement in the case or the fact that they were local authorities who had something to contribute. During those meetings the trainees and Kwol Biong, who was sort of the lead trainee, had a list that had been drawn from various sources, a sort of working list of potential sites in that area, in that chieftaincy, and simply went through them. This sort of generated a discussion which lasted anything from five to six or seven hours, and it was a long, thorough discussion. You could tell there was a tremendous amount of interest and response to the points that were made; no, it's not here, it's there, and: it should be there, and so forth. So by the end of the community meeting we had a pretty good idea where the sites were that needed visiting, and at the end of the meeting three or four elders came forward or were selected to accompany the mappers. So what happened next was the mappers went to that area, and in each case they made two visits. One was a sort of reconnaissance visit to find out how accessible the sites were; because the elders couldn't put them on a map because we weren't sure whether the map was accurate, so they said, "Well, we will take you there by this road and that road". So they took us there, and I would say that in most cases the sites that were registered in the logbooks were sites that had already been talked about or discussed. There were only a few cases where someone said, "Oh, there is also a grave", or there was a village that we missed. But by and large the elders' meetings covered pretty well a large proportion of the data that was eventually mapped, so in that sense they were very, very useful. I think the next slide refers back to the decision, based partly on the fact that we couldn't depend upon the maps being reliable, based on the fact that it wasn't possible to say, "All these points we've talked about are here, here and here" -- it's easy in the Amazon, you're always on a river, but in this case it was completely the opposite in terms of access. Then there were problems of visibility. The burning hadn't taken place in some areas where we expected it to have taken place, so there was not good visibility, and there were the problems of the roads, the rivers being flooded and not passable. So all of these factors combined led to the decision to concentrate on a limited area of 40 kilometres' radius from Abyei. As my colleague has already pointed out, the list of settlements, which I would say, from all the mapping projects I've done, is this pretty good. The first one or the second and third one I ever did took people a year, a solid year, and they came up with 4,000 observations, but that's never been equalled since in my experience. Some of the people who do community mapping come back with like 20 observations. In Africa and Bolivia I've seen examples where the data is fairly skimpy. Now, on that kind of continuum I would say this is in the upper half, quite good, and I have the strong impression that if we hadn't had the problems of access and mobility that a lot more sites would have been recorded; but that is speculation, of course. Finally we come to the map. One of these we've already gone over. The second one was the quality of the data. Now, my point of comparison for this is other projects that I've worked on, and a very strong indicator is how disciplined the mappers are in filling out their logbooks. The whole thing has to be focused on the record, which has to be transparent and has to be something that they can come back to later, or somebody else can inspect if they wish. So in that sense I looked really hard at the way the people filled out their logbooks, the things they put in, the diligence and the care, and in that respect I thought that they were very good, I would say. The methodology -- they didn't really -- this is one of the first times that I'd used cameras, or trainees had used cameras, and we set the cameras at a very low resolution so that the whole -- I thought, "Well, you're not going to take more than 2,000 photographs", so each camera was set at a resolution where they could get 2,000 photographs without having to change the disk or anything else like that, which made it a lot easier to record the photographs because it went from one to several hundred. I think that the contribution of the elders was really interesting. It came in two batches. One was in the meetings, which were extraordinarily lively; they were lively, but at the same time people listened to each other, and that was always interesting. The other one was that during the trips itself there was a continual conversation going on about what happened here, what used to happen there. It's very much like the conversations I alluded to earlier: one would be in one place for a while and people would start
Q.  How significant is your method in terms of your knowing the projects I've done is about three to five weeks, I would say that the average time for training for an area that size. There was, I said a year, it could take up to a year for and not having too many ideas about how much access the Sudan and getting a sense of how large the area was estimate that I was asked to give before coming out to I know that's not perhaps a very good answer. But my estimate that I was asked to give before coming out to the Sudan and getting a sense of how large the area was and not having too many ideas about how much access there was, I said a year, it could take up to a year for an area that size. I would say that the average time for training for the projects I've done is about three to be five weeks.
11:46 1 something to gain from the process, what measures did
2 you take to safeguard against, say, unconscious bias?
3 A. I wouldn't know how to deal with unconscious bias, but
4 I did impress upon them that they -- their work and
5 their results were transparent, and open to challenge by
6 anybody with a GPS unit and an interest in inspecting
7 the results. That's the way it was set up. So they
8 were aware of that.
9 Q. Who prepared the questionnaires that were asked?
10 A. The -- my legal colleagues on the case.
11 Q. Did you approve them?
12 A. I approved of them, yes.
13 Q. No, that wasn't my question. I'm not asking whether you
14 approved of them, because my understanding is that you
15 don't take responsibility for the content of the
16 material as distinct from the orderly method in which
17 the material is gathered. Is that correct?
18 A. Yes.
19 Q. So I am not asking whether you approved of them; I'm
20 asking whether you approved them?
21 A. Well, I didn't -- I wasn't asked to approve them.
22 Q. No. So the answer is "no"?
23 A. Yes.
24 Q. What were the procedures for independent supervision of
25 the mapping teams when they were in the field engaging
in their activities?
2 A. There wasn't an independent supervisor.
3 Q. Can I take you to the burial sites. I'd like to look at
4 a picture which is figure 21 of your report, which we
5 will put on the screen, just before page 25 of the
6 report. The caption is "Grave of Deng Akonon,
7 Taj Alei". You say that -- sorry, it's figure 21, just before
8 page 25 of your report.
9 A. Taj Alei, okay, yes.
10 Q. So I am not asking whether you approved of them; I'm
11 asking whether you approved them?
12 A. Well, I didn't -- I wasn't asked to approve them.
13 Q. No. So the answer is "no"?
14 A. Yes.
15 Q. What were the procedures for independent supervision of
16 the mapping teams when they were in the field
17 engaging
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11:50 1 meetings, and I assume that this was one of the them.
2 I wasn't on all trips; we had three cars on the road.
3 A. My assumption is that they came to this grave
4 site, the elders said, "This is the grave site", and
5 they took a photograph of it.
6 Q. How many burial sites purporting to be from around 1905
7 did you find in Abyei Town?
8 A. They didn't do mapping in Abyei Town as far as I know,
9 unless they did some after I left.
10 Q. You referred to the study area. How far north did the
11 study area extend?
12 A. 40 kilometres, roughly 40 kilometres.
13 Q. So in terms of the northwards coordinate, what was that?
14 A. I'll just have to check.
15 Q. Can I represent to you it was 10º7' north?
16 A. Okay, I can't read it, it's too small, so --
17 Q. I've been having the same problem.
18 A. Okay. This is -- you're looking at the community
19 mapping map here? Is that the line along the top?
20 10º7'.
21 Q. They way we achieved 10º7' north was to take 40 miles
22 north of Abyei in a direct northwards line --
23 A. 40 kilometres, sorry.
24 Q. 40 kilometres. I'm sorry, are we miles or kilometres?
25 A. I'm going to go back to my slide on that one.
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11:48 1 in their activities?
2 A. There wasn't an independent supervisor.
3 Q. Can I take you to the burial sites. I'd like to look at
4 a picture which is figure 21 of your report, which we
5 will put on the screen, just before page 25 of the
6 report. The caption is "Grave of Deng Akonon,
7 Taj Alei". You say that -- sorry, it's figure 21, just before
8 page 25 of your report.
9 A. Taj Alei, okay, yes.
10 Q. The bottom figure on that page.
11 A. Mm-hm.
12 Q. How do you know that that grave dates from 1905?
13 A. That -- the -- when the mapping team were in the field,
14 they were there with elders, and the elders would have
15 said, "That is the grave site", and even if it doesn’t
16 look like a grave site, that for the mappers was the
17 authority upon which they were resting.
18 Q. So the mapping team simply worked on the basis that they
19 were told that that was a grave site?
20 A. Yes. I imagine that that grave site was the subject of
21 the -- a community meeting, the relevant community
22 meeting for whichever chiefdom it is in, and that came
23 up in discussion. There was a whole list of grave sites
24 to be discussed with the elders, during the elders'
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11:51 1 Q. By all means. We understood that it was miles.
2 A. Okay, I'm so used to see kilometres.
3 Q. So I think counsel accepts that we're talking about
4 miles.
5 A. Okay.
6 Q. So the 10º7' was what we achieved by taking 40 miles
7 from Abyei Town.
8 A. Mm-hm.
9 Q. What's the northernmost point that the mapping team
10 plotted on the map?
11 MR BORN: Professor Crawford, if I could just interrupt
12 for a moment, we've taken the liberty of putting the
13 map up so that perhaps you can read it a little bit
14 more closely.
15 PROFESSOR CRAWFORD: That's fine, thank you.
16 What's the northernmost point that the mapping team
17 reached within the study area?
18 A. The name of it?
19 Q. Well, the coordinates will do; the name would be
20 helpful.
21 A. I can't read the coordinates.
22 Q. I'm sorry. We regarded it as Raantilraan, which we put
23 at 10º3' north.
24 A. Okay.
25 Q. You're happy with that?
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11:52  A. Yes.

11:53  Q. The SPLM/A at paragraph 51 of the rejoinder states: "... the community mapping project, shows permanent Ngok Dinka villages were located throughout the Bahr region extending north to ... latitude 10º35' north, both in 1905 and for decades thereafter."

11:54  A. I'm sorry, who made that statement?

11:55  Q. That was made by the SPLM/A in a comment on your report.

11:56  A. Ah. I wasn't involved in taking the mapping project that far north, so --

11:57  Q. Let me just read the sentence again, as it relates to the area furthest north. Community mapping project, paragraph 51 of their rejoinder: "... the community mapping project, shows permanent Ngok Dinka villages were located ... extending north to ... latitude 10º35' north ... in 1905."

11:58  A. That information may have been gathered, but it wasn't included in the study area. That 10º35' would have been outside the study area.

11:59  Q. And the community mapping project, to which that sentence refers, is your community mapping project?

12:00  A. Yes.

12:01  MR CRAWFORD: Thank you, I have no further questions.

12:02  THE CHAIRMAN: I thank you. No questions? I thank you very much, Dr Poole.

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What was true of Kordofan and the Bahr el Ghazal in particular. There was no administration of any kind other than what the Ngok Dinka provided for themselves. The British had no interest in the Abyei Area in 1898, in 1905, or for that matter in 1920 or 1930. The British established no government post there, no school, no health clinic; indeed no presence at all. There was no economic development. The Ngok Dinka were left on their own, the way they had always been. As long as the colonial Government heard no reports of tribal fighting, the British stayed away. The Abyei region was remote and inaccessible except in the dry season and, I emphasise again, simply of no interest.

The little the British did know of the Abyei region in 1905 was based on what a few British officers had seen while passing through for a few days from El Obeid to the Bahr el Ghazal. Because they had no interest in the region, they naturally have left very brief records of their brief treks. There were in fact only three British officials who passed through before 1905. These three aimed to see the Ngok paramount chief, whom they called "Sultan Rob". Otherwise they saw only a tiny part of the huge Abyei Area. By the time of the 1905 transfer most of the region remained entirely unexplored. The British had no idea of what was in the areas they had never visited. And the areas they had never visited accounted for the vast majority of the territory.

It is worth remembering that the reason for these few British treks was simply to show the local people that the British had arrived in the Sudan, or "to show the flag", as it's often put. British officials on treks knew nothing of the Ngok Dinka language or customs, and there is no evidence they were interested in learning anything about them. It is very likely that the Ngok Dinka would have been afraid of British officers who did visit the region. I refer now to some of the comments that have been made in the last two days. As those British officers travelled in sizeable groups with armed -- often -- northern Sudanese or Arab soldiers, and on horseback, just as slave raiders had done in the past. In fact, the Anglo-Egyptian colonial regime was known throughout the northern Sudan as the "second Turkiyya", referring to the era of the Turko-Egyptian regime of the 19th century that had been overthrown in the nationalist revolution of the Mahdiyya. This was the slang expression for the new regime, the "second Turkiyya" since, as far as the Sudanese were concerned, the British were just another foreign exploiter. They'd...
The Ngok Dinka are likely to have been concerned for their and their community's safety in the presence of European officers. And they had no reason, certainly, to trust them. Because the British administration was so rudimentary and focused on practical issues rather than with details, the 1905 transfer decision was clearly about people, not land. The stated purpose of the transfer was to place slave raiders and the people they raided under one administration. No effort was made to define the territory that this decision would involve. There was no reason to define that territory. The covering letter transmitting to Cairo the material for the 1905 Governor-General's report on the Sudan was a typical summary of information in many departmental and provincial reports. The Sudan Government, or the Anglo-Egyptian Condominium, was highly bureaucratic. This 178-page cover letter was no doubt compiled in the usual way by Sir Reginald Wingate's civilian and military staff officers, then likely drafted by the private secretary of the Sudan Government, Lee Stack; whose career, incidentally, was Government, Lee Stack; whose career, incidentally, was still no reason for a provincial boundary. There is no evidence of Ngok land use well north of the river of the region and the historian of the period, providing particularly interesting and important to the historian of the extent of Sultan Rob's lands. Moreover, we know that by the time of the transfer there still was confusion about the location and names of the local rivers. We therefore still do not even know what was meant then by the Bahr el Arab, and Wingate confesses as much in this very cover letter of which so much has been made. The few British officers who trekked through the Abyei Area before 1905 saw only a fraction of the region that they passed on the route they had travelled. It is absurd to imply that the Ngok must have been absent from the remaining areas. It is likewise unhistorical and unreasonable to think that because a few British trek notes do not mention the Ngok Dinka as present in a certain area during a certain season, then they must not have used that land during another season.

We have to bear in mind that these treks were not for the purpose of recording the location and identity of local inhabitants. The purpose of these few British treks was nothing more than reconnaissance, showing the flag, announcing the existence -- literally the existence -- of the new regime in Khartoum, a week's journey away. Because the documentary record is so scanty, Ngok witness testimony becomes important. The detail and breadth of that testimony is, as I think you've seen to some extent this morning already, impressive. In many cases the Ngok witness statements are the only evidence we have on the issue of who inhabited the Abyei region in 1905. In other words, for large parts of the Abyei Area before and in 1905 we have no contemporary documents, and no witness testimony from anyone else. Indeed, for all the reasons I have already discussed, this is simply not surprising. Given this meagre record, the Ngok witness testimony is particularly interesting and important to the historian of the region and the historian of the period, providing evidence of Ngok land use well north of the river systems of the Bahr and up into the goz in the period around 1905.

A. You are equating the two garments, I believe. No, the Dinka would do. The Ngok Dinka must have been aware of the new regime in Khartoum, a week's existence -- of the new regime in Khartoum, a week's flag, announcing the existence -- literally the new regime in Khartoum, a week's flag, announcing the existence -- literally the Abyei Area before 1905 saw only a fraction of the region that they passed on the route they had travelled. It is absurd to imply that the Ngok must have been absent from the remaining areas. It is likewise unhistorical and unreasonable to think that because a few British trek notes do not mention the Ngok Dinka as present in a certain area during a certain season, then they must not have used that land during another season.
12:12 1 I didn't know that.
2 Q. Prior to the transfer in 1905 there had been at least
3 two complaints, one from the Twic and one from the Ngok,
4 about raiding from southern Kordofan Arabs; you're aware
5 of that?
6 A. Yes.
7 Q. And that was the motivation for the transfer?
8 A. That was the announced motivation, yes.
9 Q. Is there any reason to think that it wasn't the
10 motivation?
11 A. I haven't found one.
12 Q. So the answer is: no?
13 A. The answer to what?
14 Q. The answer to my question is: no. I said "Is there any
15 reason to think that wasn't the motivation?" and you
16 said --
17 A. I don't have any reason.
18 Q. You said in your statement that Kordofan was established
19 as a province in 1900?
20 A. Yes.
21 Q. That's a province of the Condominium?
22 A. Right.
23 Q. Following the military victory. Of course, it had been
24 a province under the Turkiyya since the 1820s; is that
25 right?

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12:14 1 to a particular page, and obviously if you don't
2 remember the page or deny that he says it, we'll do that
3 later on.
4 MR BORN: Which publication are you referring to?
5 PROFESSOR CRAWFORD: Hill.
6 MR BORN: What's the name of the book, so that we can try
7 to look at it in the record while you're asking the
8 question?
9 A. It's called -- shall I? -- Richard Hill, Egypt in the
11 MR BORN: Do you know the page number, Professor Daly?
12 A. Too many people are here to check! No, I don't.
13 PROFESSOR CRAWFORD: He says that the Condominium
14 basically took the Turko-Egyptian provinces over when
15 the administration was established.
16 Perhaps we'll leave this. I'll come to this in
17 submission.
18 A. If I might, the significance of this is that the
19 boundaries of Kordofan were never fixed, whether under
20 the Turkiyya, or indeed late into the Condominium
21 period, and certainly not during the Mahdiyya, when
22 Kordofan ceased to exist as a province.
23 Q. In the 1903 annual reports there's a statement about the
24 boundaries of Kordofan?
25 A. Mm-hm.

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12:16 1 Q. I'm sorry, can you say yes or no?
2 A. Oh, I'm sorry, I didn't know it was a question.
3 Q. Yes, it is a question. Everything I ask you is
4 a question.
5 A. I was waiting for a change of tone of voice.
6 Q. I'm sorry, I'm an Australian and my tone of voice is
7 very flat. That's not a question!
8 A. Then I won't answer it! I don't have it at hand;
9 I can't tell you.
10 Q. But my question was this: is it the case that the annual
11 reports for Kordofan prior to 1905 made a statement
12 about provincial boundaries?
13 A. Every year --
14 Q. The annual reports.
15 A. I don't know off-hand.
16 Q. Thank you. You said that the British administrators who
17 passed through couldn't communicate with the local
18 people because they didn't know the language.
19 A. Right.
20 Q. Is that accurate?
21 A. Yes, I said they didn't speak Dinka.
22 Q. That's true, you said they didn't speak Dinka. So how
23 would they have communicated if they'd met?
24 A. If they had met they would have communicated, if at all,
25 through interpreters.
12:17 Q. Can I take you to Percival's route report of December 1904.
A. Yes.
Q. This is at tab 31 of the common bundle. He's talking about Sultan Rob, who he met at Burakol, he says "where Sultan Rob is at present living". He makes some remarks about the region. Then he says:
"There are no Dinkas west of Burakol as far as I could see, and Sultan Rob told me that there were only Homr Arabs west of him. He told me the Bahr el Arab ..."

12:18 MR BORN: By which I think we agree that he meant the river or part of the river to the north, not what we now call the Bahr el Arab?
A. Yes.
Q. "... is uninhabited, he told me, except for occasional wandered [is what he says] parties of Arabs."
A. I know the passage.
Q. "He knew Chak Chak, which he said was the next lot of natives to those he ruled."
A. As I say, there must have been some means of translation. It's possible of course -- and likely
Q. Let's turn to the question of Ngok population. Would you agree with the estimate of 50,000 for the population of the Ngok in 1905?
A. No.
Q. How would you go about estimating that population?
A. I am not a demographer, I don't have a way. I have only the historical sources. I have looked extensively through the nine volumes of the 1955/56 Sudan census --
Q. Yes.
A. -- and taken to heart its findings. I have no reason to argue with them.
Q. You would expect that the population of the Ngok, like other population groups in Kordofan, would have increased after 1900?
A. Yes.
Q. Yes, since one writes a lot, it's true.
Then we know from the 1904 annual report that Lieutenant Bayldon was told by Wingate to go and work out the little-known rivers, the Bahr el Arab, the Kiir, the Lol; that comes from the annual report for the Sudan of 1904, and he did in fact do that?
A. Mm-hm.
Q. So there is some evidence, isn't there, of a concern by the British Government to discover the hydrology of the rivers?
A. There was certainly an interest. I think it's worth pointing out that the basin of the Bahr el Arab was the last, or certainly one of the last, of the river systems in the Southern Sudan to be so opened up by the British.
Q. The first task of the Government in the south was to extend and secure its river communications."
A. I'm sure I wrote it.
Q. In your second report at page 3, fourth bullet point, you say:
"Southern Kordofan's complex hydrology was of little or no concern to the Sudan Government in 1905."
Q. Do you agree with that still?
A. Yes.
Q. In The Empire on the Nile, which I have to say -- and this isn't a question -- I enjoyed very much, you say at page --
A. I won't thank you, since it's not a question.
Q. At page 135 -- I think we're having comments as well as questions.
MR BORN: On both sides.
PROFESSOR CRAWFORD: Page 135, Empire on the Nile, you say:
"The first task of the Government in the south was to extend and secure its river communications."
A. You refer to a command by Kitchener to Peake to reconnoitre the Bahr el Ghazal and the Bahr el Jebel;
Q. You recall that?
A. I'm sure I wrote it.
Q. Thank you. Can we turn to Wilkinson's route report. Here's a clean copy of it. (Handed)
A. Thank you.
Q. In your first report at page 49, third paragraph, you
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12:23 1  say:
2 "We are left then with the conclusion that the best
3 documentary evidence so far located for the northern
4 boundary of the area of the nine Ngok Dinka chiefdoms in
5 1905 remains, in the opinion of this historian and as of
6 the date of the present report, Wilkinson's itinerary of
7 1902, which establishes a permanent Ngok presence on the
8 Ragaba al-Zarga."
9 That's what you say in your report?
10 A. Yes.
11 Q. Can you point me to the words in Wilkinson's route
12 report, his itinerary of 1902, which establish
13 a permanent Ngok presence on the Ragaba ez Zarga?
14 A. Well, Wilkinson never uses a phrase like that.
15 Q. So the answer is you can't?
16 A. I cannot point you to anything in the itinerary that
17 establishes -- where Wilkinson says there had been
18 established a permanent Ngok presence on the
19 Ragaba ez Zarga. What I'm doing there is summarising my
20 view of the meaning of Wilkinson's itinerary.
21 PROFESSOR CRAWFORD: Thank you, Professor Daly. I have no
22 further questions.
23 THE CHAIRMAN: I thank you. There are no questions from
24 the part of the Tribunal. I thank you very much,
25 Professor Daly.

12:25 1 THE WITNESS: Thank you.
2 MR BORN: Thank you, Professor Daly.
3 (12.25 pm)
4 (The witness withdrew)
5 MR BORN: I apologise for failing on this occasion to
6 introduce Professor Daly. I'd mentioned him, as you
7 will recall, yesterday in glowing terms. I think he
8 demonstrated his historical mastery of the field.
9 I am trying to manage my time judiciously and will
10 therefore move directly to Mr Schofield, who I also will
11 not introduce. I introduced him in glowing terms
12 yesterday and he will now address you.
13 THE CHAIRMAN: Please, Mr Schofield.
14 (12.26 pm)
15 MR RICHARD SCHOFIELD (called)
16 THE CHAIRMAN: Could you read the affirmation in front of
17 you, please.
18 THE WITNESS: Certainly. I solemnly declare upon my
19 honour and conscience that my statement will be in
20 accordance with my sincere belief.
21 Presentation by MR SCHOFIELD
22 THE WITNESS: I've got around ten minutes to go through
23 quite a few slides here and to make one or two points.
24 What I would ask is that anyone on the Tribunal, any
25 of the people surrounding me on either side, we could

12:27 1 go back to some of these slides if necessary for the
2 purposes of clarification.
3 I am very honoured to be here presenting some
4 evidence. The last time I was here I believe was about
5 eight or nine years ago, when I was showing some of my
6 MA students around the wonderful ICJ museum downstairs,
7 recommended for everybody if it's open.
8 Some of my details are here, you can read those at
9 your leisure, but I should state at the outset that I am
10 not a Sudanese expert, nor would I ever purport to be,
11 but I have been recognised as an expert on the origins
12 of international boundaries and boundary questions more
13 generally within the Middle East, particularly in the
14 Gulf and the Arabian peninsula. Obviously my knowledge
15 tends to be best where Britain has had a hand of some
16 sort.
17 I am going to begin by looking at some of the
terminology that we might use in order to establish the
boundaries' various degrees of health.
18 I was reminded of the way in which the government's
19 expert, Mr MacDonald, stated at the time of the transfer
20 that the Bahr el Arab was fit for the purposes of
delimitation, it hadn't yet been delimited, but the
21 feature was robust enough to be considered for
22 delimitation.

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32 (Pages 117 to 120)

Trevor McGowan
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"... a line separating areas of different political administration, authority or jurisdiction."

Of course, if we are actually going to talk about delimitation then we ought to look at the other recognised stages very briefly in a boundary's evolution.

Recognised by de Lapradelle in 1928 and refined by the American geographer Stephen Jones in 1945, there are three stages to this. Generally the stage of allocation allocates the territory in a line will in future be drawn. Note that it doesn't allocate a boundary as such.

The second stage would be delimitation, where the line is established, and of course, as we know, the line has no width; it needs to be specified. A demarcation, although there are many instances of confusion, simply marks out that line on the ground. Let's go on.

Delimitation requires, I would purport, that both levels, inasmuch as the way I described it, an executive act determining a boundary line, geographic identification of the boundary line, the line being the point here, detailed description of the location of a boundary line, ideally to the degree that it can be mapped, and a fourth stage will often be taken: a survey.

Unfortunately he would die in the Bahr el Ghazal region governor of the Bahr el Ghazal at the time of transfer. Reflecting this uncertainty. I don't need to spend extension, could only be indeterminate and indefinite.

Kordofan and Bahr el Ghazal, separate ones in each of their administration reports to the Bahr el Arab as the southern tributaries; very vague, and certainly a zonal implication.

A legacy of uncertainty. Again, in many, many ways we can say that the Bavarian traveller Ignatius Pallme, his description in 1844 of an Ottoman boundary which contracted and retreated, and did so regularly over a period of years, as recorded in many Ottoman salnameh -- not here, but elsewhere in the Ottoman world -- that was a fairly standard depiction of an Ottoman provincial boundary. Some were more firmly established than others, it must be said, depending where you looked.

But certainly by 1898 we had the definition at the bottom. This mudiria was vaguely defined, but may have been described as enclosing the entire district water by the southern tributaries; very vague, and certainly a zonal implication.

Uncertainty continued to reinv into the 1900s. Abeyi had not been defined, numerous Condominium officials, as we've heard very eloquently over the last few days, had referred to the Ngol/Ragaba ez Zarga as the Bahr el Arab. The Government seems to have accepted this designation, and that the following officials made such an admission: Wilkinson, Percival, Boulnois -- I don't know if it's an anglicised or a French -- O'Connell and Lloyd.

Whatever the reason, they did acknowledge that reality. The important thing is that the Government appears to suggest that references by the governors of Kordofan and Bahr el Ghazal, separate ones in each of their administration reports to the Bahr el Arab as a provincial boundary, were sufficient to establish a boundary.

I would reckon, although I couldn't be absolutely sure, that provincial boundaries cannot be unilaterally determined by provincial governors. Some centralised executive action is probably needed. Even then, both Kordofan and Bahr el Ghazal governors were demonstrably confused as to the location of the Bahr el Arab at the time of transfer. So any putative boundary surely, by extension, could only be indeterminate and indefinite.

Reflecting this uncertainty. I don't need to spend too much time on it, other than to say: he was the governor of the Bahr el Ghazal at the time of transfer. Unfortunately he would die in the Bahr el Ghazal region.
uncertainty, it must be said, in the 1905 annual report, which was dated January 1906. We were taken through very, very eloquently again -- by the Government counsel elements of this report. I refer to pages 10 and 11 of the annual report for 1905. But if we look at page 10, the Bahr el Ghazal exploration, the last sentence says: "Much of the course of these rivers is still unknown ... and doubt still exists as to the correct names of the intricate waterways which intersect this part of the Sudan." On the next page, of course page 11, which we heard about yesterday, we had a very full treatment of the sudd clearing in the Bahr el Arab. It was very evident from this that Wingate, the governor-general, had begun to think about clearing up the question of identifying rivers in the Southern Sudan. That's been addressed yesterday. The point I would make is that we'd only got so far in this process. If we look at the second paragraph of page 11 of the report, there is still an indication that Wingate is confused in January 1906, whereupon he repeats almost the same phrase as was made in the previous annual report, saying that the various waterways -- he asked Lieutenant Walsh to go back to penetrate as far as possible along the various waterways known locally as...
12:41 1 recognised -- or "inter-provincial limit" might be
2 a better term -- recognised as separating somehow the
3 two adjoining provinces, I don't think it could be
4 considered a definite boundary at all, simply because of
5 the pertaining confusion over the feature that actually
6 constituted the boundary; as I say, one which went right
7 the way up to 1905.
8 So in effect you could not be sure, when referring
9 to the Bahr el Arab, which feature, for much of the
10 early part of the decade, was actually being referred
11 to. And as I say, that was in the dry season --
12 Q. You accept, though --
13 MR BORN: Please, if you could let the witness finish his
14 answer.
15 MR BUNDY: I have specific questions. My specific
16 question was: is it your opinion that Condominium
17 officials took the view at that time that there was no
18 provincial boundary? He can answer, "No, I don't
19 think they took that position", or, "Yes". It's
20 a simple question.
21 MR BORN: I think he was answering your question,
22 Mr Bundy.
23 A. I think I was trying to provide a context, and I think
24 if you read through the report, and if you listened to
25 what I've just said, I don't think I could give such

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12:43 1 an easy "yes" or "no" [answer], simply because in my
2 mind no boundary had been allocated, no boundary had
3 been delimited, no boundary had been noted other than
4 running along a river in an administration report. But
5 that, to my mind, did not constitute a boundary
6 definition.
7 MR BUNDY: But do you accept in these administration
8 reports -- are you referring to the annual reports by
9 that?
10 A. Yes, I'm referring to the 1902/1903, obviously,
11 Bahr el Ghazal, those independent --
12 Q. The annual reports. Do you accept in those annual
13 reports there is a section entitled "Province
14 Boundaries"?
15 A. I accept that. It's absolutely on the record, yes.
16 Q. Do you accept that under those headings the southern
17 boundary of Kordofan and the northern boundary of
18 Bahr el Ghazal is stated as the Bahr el Arab?
19 A. In individual reports, yes.
20 Q. Thank you. If there was no --
21 A. No, it's not stated as a boundary. I'm sorry to
22 interrupt again. It's under a heading, it's under
23 a box, "Provincial Boundaries".
24 Q. And then it sets out a description?
25 A. Yes.

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12:44 1 Q. And it's your view that that's not a description of
2 a provincial boundary?
3 A. Not a defined one, no.
4 Q. If there was no provincial boundary in 1905,
5 Mr Schofield, why was there a need for a transfer from
6 one province to another?
7 A. It's been alluded to earlier today that a people were
8 transferred from one province to another.
9 Q. How could a people be transferred from one province to
10 another if there was no distinction between the two
11 provinces, if there was no provincial boundary?
12 A. Because the margins of the borderlands, the borderland
13 margins of the two provinces weren't adequately defined.
14 Q. If the Condominium's intention had been to fix
15 a provincial boundary on a line of latitude, do you
16 accept that that would have been a straightforward
17 exercise that could have been done?
18 A. It's beyond my competence to talk about lines of
19 longitude and latitude in a technical sense.
20 Q. I'm just saying: if they had wished to fix the boundary
21 as a line of latitude, would it have been relatively
22 easy just to say "The boundary follows such and such
23 a latitude", if that had been their wish?
24 A. If they'd gone for a very -- it's a hypothetical
25 question because they never decided to do that.

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12:45 1 Q. It's entirely hypothetical, I agree.
2 A. It's often commented, isn't it -- and I think
3 Stephen Jones, the famous American geographer, made the
4 point -- that nomination of lines of latitude and
5 longitude and nominations of rivers are a sure guarantee
6 of absenteeism in boundary drawing.
7 Q. My question --
8 MR BORN: If you could let him answer the question.
9 MR BUNDY: I'm sorry, Mr Born. Mr President, I've asked
10 a simple question.
11 If it had been the intention -- I'm not saying it
12 was -- to draw a provincial boundary, any provincial
13 boundary, along a line of latitude, could that simply
14 have been stated in reports or other official documents?
15 A. In my opinion, no, because for a deliberate delimitation
16 along lines of latitude there would need to be central
17 action sanctioning such a development. It would need to
18 be official.
19 Q. Are you aware of any boundaries in Sudan that follow
20 lines of latitude?
21 A. I haven't looked much beyond this one, no.
22 Q. The references in the annual reports before 1905 under
23 the heading "Province Boundary" refer to the
24 Bahr el Arab. Would it be fair to consider that
25 Condominium officials were considering a river as the

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35 (Pages 129 to 132)
12:47 1 province boundary, even if we accept your proposition
2 that the location of the river was uncertain?
3 A. Obviously from the content, yes.
4 Q. Professor Daly, in his second report, has called Wingate
5 "the only official who mattered". Do you agree with
6 that?
7 A. I subscribe -- I would subscribe to his expertise
8 inasmuch as he has written, as far as I know, the only
9 biography of the individual; I know of no other.
10 MR BUNDY: Thank you very much, Mr Schofield.
11 I have no further questions, Mr President.
12 THE CHAIRMAN: I thank you.
13 I thank you very much, Professor Mr Schofield.
14 (12.49 pm)
15 Submissions by MR BORN (continued)
16 MR BORN: Thank you, Mr President, and thank you,
17 Mr Schofield.
18 I've been working hard to manage my time
19 judiciously. I'm not sure I have succeeded terribly
20 well in that.
21 I only now in closing want to address one issue.
22 Professor Crawford referred to us not quite as badly as
23 he referred to the ABC experts; he didn't say that our
24 memorial was a scientific shambles; but he did say we
25 were cartographically challenged in how we put our

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12:49 1 statement as to the delimitation of the Abyei Area in
2 the event that the Tribunal were to go on and address
3 the question under Article 2(c). I'd just like very
4 briefly in closing to address that question. It's
5 a relatively straightforward and simple point.
6 The Government seems to want to have it both ways.
7 When we draw what they call "fuzzy boundaries" they
8 castigate us. When we draw precise boundaries they
9 castigate us also. The truth of the matter is -- and
10 we've, I think, been very straightforward about this,
11 the ABC experts were straightforward about it -- if the
12 Tribunal were to address the question under 2(c) of
13 identifying the precise territory of the Ngok Dinka
14 chiefdoms, that's difficult. It's hard to draw precise
15 lines, we don't deny that.
16 On the other hand, the SPLM/A also faces the
17 practical -- and to some extent political -- difficulty
18 in that there will need to be an Abyei referendum, there
19 will need to be an Abyei Area that is administered,
20 there will need to be an Abyei Area that sits with the
21 other provincial boundaries that are in Sudan.
22 Therefore, in delimiting the Abyei Area and
23 recognising that it was impossible, particularly in the
24 timescale of this arbitration, to go out and demarcate
25 each stream, each riverbed, each area of shrubbery, each

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12:51 1 area of cultivation, what the SPLM/A did here, as it did
2 before the ABC experts -- and which is hardly any
3 surprise -- is to try to use manageable and practical
4 straight-line boundaries. It used some that already
5 exist, it extended some that already exist, and it
6 relied on the evidence -- which I've demonstrated
7 I think in great detail -- as to why the Ngok Dinka
8 territory extended up to latitude 10º35' north.
9 That's not -- and I won't pretend it is -- precise.
10 I'm not saying that there wasn't a Ngok Dinka village
11 just to the north, or it didn't go quite up to the north
12 of that line. But in terms of putting forward a claim
13 in these proceedings, as was put forward before the ABC
14 experts, that is a line that provides a fair
15 representation of the extent of the Ngok Dinka
16 territories in all directions. And the suggestion that
17 it was some sort of cartographically challenged mishmash
18 has no more substance than the accusation that the ABC
19 experts' report was a scientific shambles.
20 With that, Mr President, I'd like to thank you all
21 very much for your attention during this presentation.
22 Thank you.
23 THE CHAIRMAN: I thank you very much, Mr Born.
24 I understand that there is a question on the part of
25 Judge Schwobel.

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12:52 1 (12.52 pm)
2 Questions from THE TRIBUNAL
3 JUDGE SCHWEBEL: Thank you, Mr President.
4 A question for Mr Born, to which counsel for the
5 Government may also wish to respond, both after lunch.
6 The witness statement of Zakaria Atem Diyn Thibek
7 Deng Kiir, who testified not this morning but earlier,
8 states in paragraph 33 as follows:
9 "A great deal of this conflict has been caused by
10 the fact that the SPLM/A had realised too late that the
11 boundary which they accepted denied the Ngok their
12 rights to the land they used north of the Bahr el Arab
13 after 1905. This territory is known by the Ngok Dinka
14 to have been in Kordofan before 1905, and was thus not
15 part of the area transferred. The Ngok were not at all
16 happy about the SPLM decision to accept the 1905
17 boundary. The SPLM wanted to cover up for their
18 political embarrassment by clinging to the life buoy
19 thrown to them by the experts. This complicated the
20 situation further as it raised serious fears among the
21 Ngok."
22 I'd be grateful if you would give your view as to
23 the thesis that inheres in that statement, as well as
24 its factual inferences. Thank you.
25 THE CHAIRMAN: I thank you very much. The hearings are

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36 (Pages 133 to 136)
15:02 1 describe exactly how many of the Bahr it is, but it's
2 clear it's a big chunk. It goes up beyond what we've
3 called the Ngol, the Ragaba ez Zarga, in Atem's words,
4 the Government's witness's words.
5 He then goes on in that paragraph and also in
6 paragraphs 25 and 26 to describe why that is, and
7 I think it's helpful to look at why that is because it
8 coincides very nicely with the Government's other
9 witness, Professor Cunnison, who wasn't able to be here.
10 He says, and this is in the next sentence of
11 paragraph 23:
12 "The area to the north of Abyei is good for cattle
13 grazing and has always been the grazing for my
14 sub-section."
15 "Always". He goes on in paragraph 25 to say:
16 "Beginning in October, the Messiriya migrate south
17 of Abyei where they stay for the entire summer period
18 until the first rain when they return. The reason for
19 this is that the Messiriya cattle are sensitive to the
20 flies."
21 We've seen that referred to before in the record:
22 "The Ngok Dinka build luaks for the rainy season and
23 our cattle can survive the flies."
24 I'd like to take us back to the description of the
25 Bahr region, the environmental evidence which we put in

continued

15:04 1 and which is uncontroversed. Atem here affirms that in
2 terms. He explains how it is that the Ngok can survive
3 throughout the Bahr region, which we looked at, where
4 there is seasonal flooding and where there are the
5 flies: they build luaks, and they have the short-legged,
6 non-humped cattle which are able to survive in that
7 area.
8 Then he gives another reason that I was a little bit
9 embarrassed frankly that I hadn't made this in my
10 presentation, but he goes on in paragraph 26 to say:
11 "If a Ngok wishes to take his cattle into
12 a Messiriya area he is not prohibited."
13 That, of course, is above the goz. He says:
14 "But he does not need that ..."
15 He doesn't to go need to go up into the dry areas
16 above the goz:
17 "However, grazing to the north of our normal areas
18 is unsuitable for our cattle. The grass there, called
19 lisaig, makes our cattle sick. The Messiriya cattle are
20 used to it and the people have methods for treating the
21 symptoms of that we Ngok Dinka do not know."
22 I will come back in closing and explain to you what
23 lisaig is. You won't be surprised, though, when I tell
24 you now that lisaig is a grass that grows in sandy
25 areas. It doesn't grow in the goz, it grows up in the

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37 (Pages 137 to 140)
15:05  1 north.
2 I'd finally like to take you to paragraph 28. If
3 you look, he gives an explanation which, not
4 surprisingly, coincides with the government's legal
5 thesis. Then in the second-to-last sentence he says,
6 and he is describing the Abyei Area in accordance with
7 the Government's case:
8 "This clearly excludes areas of Ngok settlements
9 which were in Kordofan before the transfer."
10 So here he's referring to the areas north of the
11 Bahr el Arab which were in Kordofan before the transfer
12 and which caused, from his perspective, the political
13 problems. This was the area to the north of the Kiir
14 which supposedly got given away.
15 The important thing, the important factual
16 inferences to draw from this, is that the Government's
17 witness, Zakaria Atem, who brought them here, in his
18 witness statement does two important things: he
19 describes how the traditional Ngok territories extended
20 well north of the Kiir/Bahr el Arab, up to and beyond
21 the Ngol/Ragaba ez Zarga.
22 We saw him. He's not a scientist, but he can tell
23 us about the area, and he told us why that would be the
24 case. He told us about the luaks, he told us about the
25 flies, he told us about the rains and he told us

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15:08  1 What he tells you there is, if you accept the
2 Government’s legal theory, which he had put in his
3 statement, it is in his view unfair because it takes
4 away from the Ngok Dinka their traditional lands.
5 The good news is it isn't unfair. The good news
6 is -- we’ve seen it before, we’re going to hear it
7 again -- the legal formula in Article 1.1.2 of the Abyei
8 Protocol does not adopt the bizarre interpretation that
9 the Government has put. Instead the experts got it
10 exactly right.
11 Thank you, Mr Chairman.
12 THE CHAIRMAN: I thank you very much.
13 Does the Government want to answer the question
14 raised by Judge Schwebel?
15 Reply to the Tribunal by PROFESSOR CRAWFORD
16 PROFESSOR CRAWFORD: Most certainly, yes, sir. It's
17 an important question, and we would as a matter of
18 courtesy have answered it in any event.
19 However, I have to say that we've now had what
20 amounted to a ten-minute speech going somewhat beyond
21 the implications of the question and I reserve the right
22 to come back tomorrow in my discussion of the
23 travaux préparatoires of the Abyei Protocol to deal
24 further with the implications of what counsel for the
25 SPLM/A have just said.

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15:09  1 The first point I would make is that the whole of
2 that statement was Mr Zakaria's testimony and not just
3 the bits that suit counsel for the SPLM/A. It's obvious
4 if you read our witness statements that they are not
5 completely consistent with each other. The reason for
6 that is that there are different views held amongst the
7 various people who gave witness statements and we didn't
8 try and homogenise them.
9 It's clear that Mr Zakaria, as a respected elder
10 member of the Ngok community, takes a broader view of
11 the extent of historical Ngok lands than the Government
12 does; that's his prerogative. But he also takes the
13 view, which is his own view as I understand it, that the
14 Danforth compromise involved a territorial transfer to
15 Kordofan. It's not a very surprising view because
16 that's what it says.
17 He expresses the corollary of that: that when that
18 compromise was reached, after intensive and lengthy
19 negotiations, as I said in my first speech, there was
20 considerable disquiet amongst the Ngok community as to
21 the implications for them, as well there might have
22 been. The agreement was reached by the SPLM/A and not
23 by the Ngok, and that gave rise to disquiet. That's
24 what he's saying.
25 What its implications are for this Tribunal of

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38 (Pages 141 to 144)

Trevor McGowan
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15:10

1 course is unfathomable, but the Government affirms the truth of what he is saying in the paragraph to which you refer, and then the context of the testimony that he gave allowed him to say what he thought on all fronts.

2 Thank you, sir.

3 THE CHAIRMAN: I thank you very much. We are now to begin the second round of replies, this time on the delimitation issue. I recall that each side will have 80 minutes and the Government begins.

4 Please, Mr Bundy, you have the floor.

5 (3.11 pm)

Submissions by MR BUNDY

15:11

1 MR BUNDY: Thank you, Mr President, distinguished members of the Tribunal. I shall begin the Government's reply to the SPLM/A's first-round pleading on the question: what was the area of the nine Ngok Dinka chieftoms transferred to Kordofan in 1905? I'll be followed by Professor Crawford, who will discuss the SPLM/A's tribal case.

2 We've heard two very different accounts of what happened at the time. The SPLM/A has painted a picture of confusion, ignorance, uncertainty in the minds of Condominium officials as to the area that was idea where the Ngok Dinka were really located. That's other factors that only emerged after that date."

3 They also say that Condominium officials had little idea where the Ngok Dinka were really located. That's from paragraph 114 of their rejoinder.

4 On that last point, Mr President, I need to interject a brief comment. Yesterday afternoon Mr Born purported to quote something that I said yesterday morning in my first-round presentation. At page 183 of the transcript counsel said that I said:

5 "It is self-evident that as of 1905 Government officials would have had no knowledge of tribal locations."

6 That's what counsel said that I said: that as of 1905 Government officials would have had no knowledge of tribal locations.

7 As an advocate I can certainly have no objection if opposing counsel tries to cite my words against me. But when he does so, I'd prefer it if he could quote me correctly. I did not say that it's "self-evident that as of 1905 Government officials would have no knowledge of tribal locations".

8 If one checks the actual transcript at page 20 -- Mr Born's reference to the transcript was incorrect, but if one checks the actual transcript, it will be seen that what I actually said was:

9 "It is self-evident that as of 1905 Government officials would have no knowledge of tribal locations or other factors that only emerged after that date."

10 By dropping the final words that I said, counsel seriously distorted my point.

15:12

According to our opponents there was no provincial boundary between the two provinces at the time. That, as you'll recall from this morning, was the principal conclusion of MENAS: no provincial boundary. The location of the pre-transfer boundary and the post-transfer boundary is thus irrelevant to your task. That was repeated by Mr Born on Sunday. Boundaries have not been established pursuant to any decree or proclamation; a point raised by Professor Daly. There was no administration on the ground; a point also raised by Professor Daly this morning.

No one knew for sure which river was which, or where the rivers lay, a theme that permeates the SPLM/A's pleadings; and that the Governor-General's views that the districts transferred, that were formerly part of the Bahr el Ghazal province, and that lay to the south of the Bahr el Arab, that those were incorporated into Kordofan should be disregarded; which is precisely what the SPLM/A's memorial and counter-memorial did, along with the MENAS report and the first daily report. They also say that Condominium officials had little idea where the Ngok Dinka were really located. That's from paragraph 114 of their rejoinder.

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By dropping the final words that I said, counsel seriously distorted my point.

15:14

As both Professor Crawford and I have shown, by 1905 Condominium officials did have a good idea of where the Ngok Dinka were located, and of the area that was transferred in that year.

The litany of points of confusion, lack of knowledge and uncertainty posited by our opponents brings, at least to my mind, the eloquent words of Yeats in his poem "The Second Coming":

"The falcon cannot hear the falconer;"

"Things fall apart; the centre cannot hold;"

"Mere anarchy is loosed upon the world,"

"The blood-dimmed tide is loosed, and everywhere"

"The ceremony of innocence is drowned;"

"The best lack all conviction, while the worst"

"Are full of passionate intensity;"

"It's a moving verse, but it's not the way"

It's a moving verse, but it's not the way

Condominium officials viewed the situation at the time.

The transfer decision was not controversial in 1905, and it was not complicated. Condominium officials had a well articulated intention. There had been complaints from Sultan Rob and Sheikh Rihan of raids of Baggara Arabs living in Kordofan on Dinkas living in Bahr el Ghazal. It was thought that this situation could be better controlled if those territories situated in

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Trevor McGowan
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39 (Pages 145 to 148)
**THE GOVERNMENT OF SUDAN / THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY**

**Day 5 Wednesday, 22nd April 2009**

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<td>the Bahr el Ghazal province at the time, were transferred to Kordofan so that all the protagonists would be under the same administrative authority of the Governor of Kordofan. There was no dispute in 1905 over these issues. Condominium officials were not trying to settle a territorial dispute where different positions have been advanced. No one was posturing for litigation purposes. All that was involved was a straightforward administrative transfer of an area from one province to another. It did not involve large-scale change to Sudan's provincial boundaries. Relatively limited -- though nonetheless important -- areas were at stake. This was not a complex matter for Condominium officials in 1905, and we would submit that it does not need to be a complicated task for this Tribunal either. The pieces of the documentary record fit together like a jigsaw puzzle; they add up. The essential task for this Tribunal, we would respectfully submit, is to examine that record as a whole in assessing the parties' positions. Does it really support the proposition that Condominium officials in 1905 intended to transfer from Bahr el Ghazal to Kordofan areas that extended up to the 10°35’ north latitude, or even the 10°22’30” north</td>
<td>not diminish its importance, although it may say something about the ABC's work. The centre does indeed hold; nothing falls apart. Perhaps, if I may be permitted to say so, this Tribunal is in a very real sense the second coming when compared to the ABC experts' report. Now, we have been told by the SPLM/A not to second-guess or rewrite what Government administrators wrote at the time, and that the most reliable approach is to look at what Government administrators said they transferred to Kordofan in 1905. The SPLM/A memorial in fact, at paragraph 1579 referred to the 1905 Condominium officials, and the tribunal is invited to play detective and speculate as to the alleged missing gaps. Despite counsel's complaint that there are only two dozen or so documents referring to the Ngok Dinka or Messiriya from the time, the fact is that we have numerous intelligence reports prepared on a monthly basis, annual reports for the relevant provinces of Bahr el Ghazal and Kordofan for each of the significant years; very detailed accounts from Government officials who visited the area, including with their sketch maps, and the views of the senior-most Government administrator who recorded contemporaneously and which referred specifically to the transfer and its location. It is a rich and informative body of documentary evidence. We know what happened at the time because the relevant documents are on the record. The fact that the ABC experts did not refer to much of this record does not diminish its importance, although it may say something about the ABC's work. The centre does indeed hold; nothing falls apart. Perhaps, if I may be permitted to say so, this Tribunal is in a very real sense the second coming when compared to the ABC experts' report. Now, we have been told by the SPLM/A not to second-guess or rewrite what Government administrators wrote at the time, and that the most reliable approach is to look at what Government administrators said they transferred to Kordofan in 1905. The SPLM/A memorial in fact, at paragraph 1579 referred to the 1905 Condominium officials, and the tribunal is invited to play detective and speculate as to the alleged missing gaps. Despite counsel's complaint that there are only two dozen or so documents referring to the Ngok Dinka or Messiriya from the time, the fact is that we have numerous intelligence reports prepared on a monthly basis, annual reports for the relevant provinces of Bahr el Ghazal and Kordofan for each of the significant years; very detailed accounts from Government officials who visited the area, including with their sketch maps, and the views of the senior-most Government administrator who recorded contemporaneously and which referred specifically to the transfer and its location. It is a rich and informative body of documentary evidence. We know what happened at the time because the relevant documents are on the record. The fact that the ABC experts did not refer to much of this record does</td>
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<td>latitude? Is that what the record really shows? Or does the record support the proposition that the transferred area was viewed by Condominium officials themselves as much more limited, and as lying along the Bahr el Arab and to its south? Unlike many boundary disputes dating from more than a century ago, the basic facts relating to the transfer, and the evidence of the intention of Government officials who effectuated the transfer, are well documented. Despite counsel's complaint that there are only two dozen or so documents referring to the Ngok Dinka or Messiriya from the time, the fact is that we have numerous intelligence reports prepared on a monthly basis, annual reports for the relevant provinces of Bahr el Ghazal and Kordofan for each of the significant years; very detailed accounts from Government officials who visited the area, including with their sketch maps, and the views of the senior-most Government administrator who recorded contemporaneously and which referred specifically to the transfer and its location. It is a rich and informative body of documentary evidence. We know what happened at the time because the relevant documents are on the record. The fact that the ABC experts did not refer to much of this record does</td>
<td>the Condominium officials after all, and today we've actually heard virtually no discussion whatsoever of the documents that the SPLM/A previously said were decisive. There's been no mention today, for example, of the March 1905 Sudan Intelligence Report, no mention of the 1905 annual reports. These were documents that even Professor Daly in his first report termed &quot;foundation texts&quot;, and yet he couldn't even remember the annual reports in questions put to him this morning. Now, we also have had by Mr Schofield, my good friend and colleague, a passing reference to Wingate's memorandum, but nothing at all focusing on what Wingate actually said about the transferred area. That was the passage we all recall where Wingate said that the transferred areas comprised the districts of the two Sultans to the south of the Bahr el Arab, and formerly a portion of Bahr el Ghazal province, that had been incorporated into Kordofan. In considering the evidence it's perfectly clear that Government administrators were not relying on oral tradition or on post-1905 events when they described the transferred area; nor did they feel that they needed to know where all the areas were that the Ngok Dinka allegedly occupied or used. They didn't need to know and they weren't interested</td>
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in connection with the transfer in climatic conditions, soil, vegetation and other environmental elements. They weren't interested in those, and those did not figure into their decision and their description of the transfer. Condominium officials make no mention of these kinds of factors in relation to the transfer decision, and indeed Professor Allan confirmed in response to a question put to him that there's no document evidencing that Condominium officials considered these kinds of environmental factors relevant at all to the transfer decision or to their description of the transferred area.

Those officials were focused on a much more limited exercise: transferring the districts, the areas, the territories, the country -- those are the terms that are used -- of two tribal chiefs previously located in Bahr el Ghazal to Kordofan. The location of the transferred area must be viewed in the light of the object and purpose behind the transfer. That purpose was only to transfer an area that was previously in Bahr el Ghazal province to Kordofan so that the area would be placed under the same administration, and the only areas transferred were those necessary to fulfil that purpose, ie areas that those officials were focused on a much more limited exercise: transferring the districts, the areas, the territories, the country -- those are the terms that are used -- of two tribal chiefs previously located in Bahr el Ghazal to Kordofan. The location of the transferred area must be viewed in the light of the object and purpose behind the transfer. That purpose was only to transfer an area that was previously in Bahr el Ghazal province to Kordofan so that the area would be placed under the same administration, and the only areas transferred were those necessary to fulfil that purpose, ie areas that previously had been in Bahr el Ghazal. People already living in Kordofan did not need to be transferred to Kordofan. On Sunday counsel for the SPLM/A said that the decisive issue for the ABC experts was to locate: "... the extent of the territory of the nine Ngok Dinka chiefdoms as they stood in 1905, not the location of the putative provincial boundary ..." I don't intend to return to the question put to the ABC experts -- it's possible that Professor Crawford may in closing tomorrow -- but what I would say is that that formula, simply "the territory of the nine Ngok Dinka chiefdoms as it stood in 1905", is most certainly not a correct description of this Tribunal's delimitation mandate. The words "transferred to Kordofan" cannot simply be suppressed, as counsel does, and that is certainly not the way that Condominium officials in 1905 viewed the situation. Officers such as Wilkinson, Percival and Bayldon were not dispatched to investigate the location of areas occupied or used by the Ngok Dinka. Bayldon, as we know, was sent with very different instructions: specifically to explore the relevant rivers, which was the primary interest of Government officials. Contrary to the submissions of our opponents, Bayldon was in the relevant area. It was Bayldon who was the one that Sheihk Rihan of the Twic had complained to as reported in the February 1905 intelligence report about raiding. Bayldon was the one -- in fact the only one -- who explored the Ragaba ez Zarga in any details. He went up 40 miles. He also had been engaged obviously on the Bahr el Arab, the real Bahr el Arab. What is clear is that there is not a single document on the record -- there's not one -- suggesting that the transfer decision was motivated by and contingent on identifying the extent of the territory occupied or used by the Ngok Dinka in 1905. Condominium officials were simply not concerned with that issue. They were solely concerned with the transfer of an area from one province to another to control raiding in areas that formerly had formed part of the province of Bahr el Ghazal, and to accomplish that task they were only concerned with the Ngok Dinka and Twic areas situated in Bahr el Ghazal, since it was only this area that would be transferred. As I said, areas or even people already in Kordofan did not need to be transferred to Kordofan in order to achieve the object and purpose of the transfer. Hence Wingate's description in his 1905 memorandum that it's the districts of the two sultans to the south of Bahr el Arab, and formerly in the Bahr el Ghazal province, that have been transferred to Kordofan. Nor were colonial administrators trying to divide up the goz, or to allocate permanent or secondary grazing rights in an equitable manner, or to apply African principles of law. The Tribunal will search the record in vain for any trace of evidence that these kinds of considerations were in the minds of Condominium administrators when they carried out and when they reported on the transfer. Such concepts were utterly alien to the whole raison d'être underlying the transfer decision. Let me turn to the actual transfer documents, despite the fact that they've been virtually ignored by our opponents in their first round presentation. What do they tell us was the Condominium's contemporary understanding of what they were doing, and which areas they considered they were transferring? Surprisingly the March 1905 Sudan Intelligence Report first reporting on the transfer has not, at least as far as I'm aware, been even referred to by our colleagues in the delimitation phase of these proceedings. Even to the extent it referred to Sultan Rob or Sultan [Rihan's] people -- and it's not clear that "people" is in the large sense, or just referring to Sultan Rob and Sultan Rihan -- but even if it referred
to Sultan Rob's people, those people had a country. The Sudan Intelligence Report of March 1905 clearly states that the country of Sultan Rob is on the Kiir. There's never been any confusion about where the Kiir was. It didn't say his country was on the Ragaba ez Zarga or the Bahr el Homr further north; it said it was on the Kiir.

Then of course we have, as I've explained, Governor-General Wingate's description of the transferred area. On Monday counsel for the SPLM/A asserted -- and this is in the transcript at page 90 -- that Condominium officials had: "... no idea of what the territorial boundaries of the thing that they would have been transferring was."

Well, that's certainly not the case for Governor-General Wingate; he had a very good idea of the thing. It wasn't a thing; it was two districts that was being transferred to the south of the Bahr el Arab.

It can't be disputed that Wingate was the most senior official in the Sudan. Let me just recall how Professor Daly has described him: his power was absolute; he was a virtual dictator; the supreme military and civil command in Sudan was vested in him; and lastly, the governor-general in Khartoum was "the only official who mattered." The only official who mattered. That's in Professor Daly's second report at page 19.

Wingate was not thus merely some administrative official, as was intimated by the SPLM/A's presentation the other day; he was the only official that mattered. Moreover, he was interested in where the relevant rivers lay, as his 1904 memorandum and the annual report for that year clearly shows. And even Professor Daly acknowledged this this morning.

Previously in Professor Daly's written statements he had said, quite categorically, that the hydrology of the region we're concerned with was of little or no concern to Condominium officials in 1905. This morning he said, and I quote, "there was certainly an interest".

It's been suggested in the MENAS report, although not repeated in testimony this morning, that Bayldon's March 1905 report, where he correctly identified the Bahr el Arar River, would have been kept secret for months and even years. That is pure speculation, but I'd note that if that was the case than the transfer decision which was reported in the same intelligence report would have been kept secret for months and for years as well, and we know that that is not the case for either of those.

Wingate knew about the transfer, and Wingate knew about Bayldon's 1905 explorations, as well as those subsequently carried out in the same year by Sciplini and Walsh. We know that because he referred to these in his 1905 memorandum. And yet, as is clear from the submissions of the other side, either by omission or by denigration, the description of the only official who mattered, his description of the transferred area should be given no weight. Once again, I'd respectfully ask: which party is now trying to rewrite or second-guess what Condominium officials said?

I turn to a related issue which concerns the relevance of the provincial boundary. It's obviously another issue on which the parties remain divided. The SPLM argues that the location of the provincial boundary is irrelevant to the question posed. We say it's not.

Indeed we believe an assessment of the northern limits of the transferred area is inextricably linked to the question of the provincial boundary, and it's linked both before and after the transfer, and that that is how Condominium officials at the time viewed the situation.

As I've already noted in my first round presentation, three of the four transfer documents, three of the four documents from 1905 specifically referring to the transfer do so under headings/rubric dealing with provincial boundaries and changes to provincial boundaries.

In contrast we have the SPLM/A's complaint, repeated by their expert, that there was no administration to speak of in the area in question, and that therefore the very existence of a provincial boundary was inconsequential. We would respectfully suggest that that line of argument is ill-founded on a number of grounds, both legal and factual. Let me start with the legal.

As was pointed out as far back as the Island of Palmas case, but it's a passage that has been cited with approval in the court's recent case in Singapore v Malaysia, state authority should not necessarily be displayed in fact at every moment or every point of territory. As Max Huber stated in his award: "... in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. The fact that a state cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances."

We submit that these same considerations apply to administrative boundaries. Displays of sovereignty or of administration vary according to the nature of the
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1. territory being administered. When territory is
   relatively remote, a display of modest amounts of
   administration does not imply that a province is not
   administered as a unit, or that provincial boundaries do
   not exist or were not deemed to be important.
   
   Factually we know that Sultan Rob was given a robe
   of honour; it's actually reported in gazetted documents
   that the SPLM/A is so fond of, an administrative act.
   
   We know that both he and Sheik Rihan approached the
   Government to control raiding; we know that the
   Government responded; and we know that one of the
   responses was the transfer. That transfer decision was
   quintessentially an administrative act.
   
   MENAS's primary conclusion, which I can only assume
   that the SPLM/A shares, is that in 1905 there existed no
   provincial boundary between the two provinces. And this
   morning Professor Daly asserted that in Wingate's cover
   letter -- he called Wingate's memorandum Wingate's
   "cover letter". In speaking of Wingate's cover letter
   he said: "There was nothing in there about a provincial
   boundary." We disagree with that, and based on Condominium
   accounts and contemporary accounts of the situation it's
   quite clear that Government officials of the day did not
   share that view either. Certainly, as Professor Allan
   confirmed yesterday, there's no document that can be
   pointed to, referenced during the relevant period, in
   which Condominium officials said there was no provincial
   boundary. In fact, quite the opposite is the case.
   
   Frankly, I cannot see, Mr President and members of
   the Tribunal, how, when the pre-transfer annual reports
   for the two provinces contain a specific
   section entitled “Province Boundaries” -- these are the
   ones that Professor Daly could not recall this
   morning -- and when they state that the boundary is the
   Bahr el Arab, and when Wingate makes reference to the
   changes in that boundary brought about by the transfer,
   and when he discusses the transfer under a section of
   his memorandum, or covering letter if you prefer,
   entitled in bold type "Changes to Provincial Boundaries
   and Nomenclature", I do not see in the light of these
   materials that it can be maintained that there existed
   no provincial boundary or that such a boundary was
   irrelevant to the transfer or to assessment of where the
   transferred area lay.
   
   But there's a further point: in 1905, just before
   the transfer, there really had been no provincial
   boundary between the two provinces, then why would there
   have been a need for a transfer in the first place from

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1. one province to another? If you haven't got
   a provincial boundary, why do you need a transfer from
   one province to another province?
   
   In a situation where there are no provincial
   boundaries, it would have been meaningless to carry out
   an administrative act the sole purpose of which was to
   transfer the districts of two sultans from the
   administration of Bahr el Ghazal to that of Kordofan in
   order to place them under the same governor.
   
   Condominium officials would not have needed a transfer
   if there was no provincial boundary.
   
   It's precisely because the districts of the two
   sultans, as so clearly shown in Wingate's memorandum,
   had formerly been situated in the province of
   Bahr el Ghazal that they were incorporated in the
   transfer into Kordofan, and it's why he discusses it
   under the heading "Changes to Provincial Boundaries",
   and it's one of his principal changes.
   
   As I noted in my first-round presentation, it's true
   that prior to 1905 there were large portions of the Bahr
   el Arab that remained unexplored, but Condominium
   officials knew that. That was the whole reason why
   Lieutenant Bayldon was sent to explore the river at the
   end of 1904.
   
   Nonetheless, the Condominium officials were aware

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1. that areas remained unexplored, but that did not prevent
   them from still considering the Bahr el Arab to
   constitute the provincial boundary between the two
   provinces, just as it was the provincial boundary
   further west between Bahr el Ghazal and Darfur,
   a boundary which cannot be questioned.
   
   First of all, rivers can and do represent
   administrative boundaries and even international
   boundaries, and there is no general principle of law
   that requires rivers to be surveyed in their entirety to
   be considered delimited administrative or international
   boundaries, and I would suggest that the Honduras v
   El Salvador case to which I have made reference before
   supports that proposition.
   
   When the Bahr el Arab was correctly identified by
   Bayldon in March 1905 and later referred to by Wingate
   in his memorandum, there was no suggestion that that
   river was somehow no longer thought to have been the
   pre-transfer boundary.
   
   Why else would Wingate, under his section entitled
   "Changes to the Provincial Boundaries", state that the
   two districts of the sultans south of the Bahr el Arab
   had formerly been part of Bahr el Ghazal province and
   that they were being transferred? That necessarily
   implies that the Bahr el Arab, the Bahr el Arab that he

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15:44 had referred to in his long paragraph at page 11 as where Bayldon, Walsh and Sciplini were carrying out their operations, that implies that the Bahr el Arab had been the pre-transfer boundary.

5 We have, in short, four key factors relating to the provincial boundary.

7 Prior to 1905 it was expressly recorded in the annual reports for both provinces that the provincial boundary was the Bahr el Arab; not the putative Bahr el Arab, the Bahr el Arab; not a parallel of latitude, the Bahr el Arab. That was the case for the Kordofan/Bahr el Ghazal boundary and it was equally the case for the Darfur/Bahr el Ghazal boundary. It was the only river in this area that fit that description going east to west from Darfur to its origins in the east surveyed by Saunders and Peake.

16 Secondly, we have the 1905 annual reports. They show the description of the provincial boundary changes, and instead of referring to the Bahr el Arab now as the provincial boundary, they record the transfer. Those are foundation texts that we should pay close attention to; "essential" is the word that the SPLM uses.

18 We then have Wingate's memorandum talking about the transfer in connection with the provincial boundaries, and we have after the transfer the new provincial

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15:45 boundary, not fully delimited because the southern area of the transferred districts had not been precisely identified -- it did not necessarily follow a river like the northern limits which were transferred -- but you had the new southern boundary, the new Kordofan/Bahr el Ghazal provincial boundary, starting to be shown on maps like the Lloyd map I projected and the whole series of sheet 65 maps that are in the record. That's the boundary that ultimately becomes the 1956 boundary on independence.

11 That is why, for example, the 1911 Anglo-Egyptian Sudan Handbook, when it describes the northern boundaries of Bahr el Ghazal province, states as follows:

15 "The actual boundary line is not yet delimited, but it follows the course of the Bahr el Arab or Rizeigat from the Nile/Congo watershed [that's in Darfur] until the frontier of Kordofan is reached, when the boundary divides certain tribal districts to Lake No."

20 Previously, in 1903, the boundary had been the Bahr el Arab to Lake No. Now it's saying the boundary divides certain tribal districts. That's because of the transfer. The southern limits had not been precisely identified, but the northern limits were.

25 So in conclusion, Mr President, members of the

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15:47 Tribunal, the Government of Sudan submits that when the documents are looked at as a whole, the documents that shed light on and evidence what Condominium officials intended with respect to the 1905 transfer and the location of the transferred area, the following conclusions emerge.

7 First, there was a clear purpose behind the transfer.

9 Second, that purpose was to transfer areas belonging to the two sultans, and necessarily the people living in those areas or districts, that formerly had been situated in the province of Bahr el Ghazal to the province of Kordofan, so that such areas would be under the administration of the same provincial governor, the Governor of Kordofan.

16 Third, there was no need and no intention to transfer anything that was already in Kordofan before 1905. That would have been meaningless.

19 Fourth, the transferred area as described by Wingate is consistent with the fact that the March 1905 intelligence report situates Sultan Rob's country on the Kiir, as to which there's no dispute, and Sheikh Rihan's between the Kiir and the Lol. The Percival and Wilkinson sketches show Sultan Rob's territory, a great swathe of it, lying, particularly in the Percival sketch, to the south of the Kiir.

20 Next, the transfer decision was obviously related to the location of the provincial boundary. Had there been no such boundary, there would not have been any areas which could have been said to have been in the province of Bahr el Ghazal that needed to be transferred to Kordofan.

6 Sixth, the transfer documents, the so-called foundation texts -- the decisive documents, according to the other side -- refer to the transfer in connection with the provincial boundary and the change in that boundary that the transfer gave rise to.

13 Seven, Wingate's memorandum: Wingate, the only official who mattered, bears this out. His memorandum also provides the clearest and the best description of the location of the transferred area: the area of the two sultans situated to the south of the Bahr el Arab that had formerly been in Bahr el Ghazal province.

19 Eighth, that is why the post-1905 provincial boundary changes and is situated on maps to the south of Bahr el Arab.

22 Finally, our conclusion on this is that it follows that the transferred area in 1905 that was intended and carried out by Condominium officials was the area between the Bahr el Arab and the new provincial boundary.
15:50 1  further south.
  2  Thank you very much, Mr President, members of the
  3  Tribunal. I'd be grateful if you could now call on
  4  Professor Crawford.
  5  THE CHAIRMAN: I thank you, Mr Bundy, and I give the floor
  6  to Professor Crawford.
  7  (3.50 pm)
  8  Submissions by MR CRAWFORD
  9  PROFESSOR CRAWFORD: Mr President, members of the
 10  Tribunal, Mr Born's presentation on delimitation
 11  insofar as it concerns the so-called tribal
 12  interpretation demonstrated six general
 13  characteristics.
 14  The first is that as it concerns the crucial date of
 15  1905, it's based entirely on inference. However much
 16  Detective Sherlock Born -- or it may be in the present
 17  context, Mr President, Hercule Born -- tried to stretch
 18  it. There is no smoke without fire, and there is no
 19  fire without the Ngok; there is no dung without cattle,
 20  and there's no cattle without Ngok, and so on. It's
 21  a new form of prima facie title: if you are in someone's
 22  presumptive area, any activity is presumed to be that
 23  someone, no matter how large the area.
 24  The second characteristic was a highly selective
 25  attitude to sources, with which is associated

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15:53 1  an anthropological fact, and he has discussed the entire
  2  case in what is known as the anthropological present;
  3  that is to say on the assumption that all dates are
  4  compressed and that everything that is happening now is
  5  deemed always to have happened. Yet dates, and
  6  especially 1905, are crucial to this case.
  7  The fourth element of the tribal delimitation case
  8  is what I might describe as environmental determinism.
  9  It's not too much to say that he discussed the
 10  environment rather than the evidence. The environment
 11  was used to generate a presumption that everything that
 12  happened in a grossly extended area of the so-called
 13  Bahr was attributable to the Ngok in case of doubt.
 14  His fifth characteristic is the continued
 15  cartographical challenge, amounting in some cases to
 16  incompetence, as in his treatment of the Wilkinson map
 17  and route report to which I will come; and sixth,
 18  a pronounced tendency to miss the point.
 19  My anthropological fact -- he said a very
 20  complicated question of fact -- related only to the
 21  tribal definition, and I made that perfectly clear. In
 22  our view, if we are right on the territorial definition
 23  of the mandate, the question is not very difficult.
 24  Of course there is still a question of delimitation,
 25  and on the view of delimitation put forward by

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15:55 1  Mr Schofield, unless the delimitation is virtually
  2  already achieved, it's beyond the reach of a tribunal.
  3  But you would understand the questions of delimitation
  4  that would involve a certain degree of difficulty. The
  5  degree of difficulty is by no means excessive in the
  6  context of the run of delimitation cases.
  7  My point was different: to determine the boundaries
  8  of the area transferred in 1905, if that means the
  9  boundaries of the area of the Ngok in 1905, is
 10  an extraordinarily difficult thing to do. It's not
 11  a case, according to their position, simply of
 12  determining the outer edges of the Ngok in 1905 and then
 13  straightening the lines; it's a case of assuming that
 14  they extend to vast swathes of area.
 15  Area 4, the area north of the Ragaba ez Zarga,
 16  I remind you, constitutes a majority of the ABC experts'
 17  area, 11,000 square kilometres. There is no extant
 18  definition of the goz which would produce that result.
 19  I will come back to each of these points.
 20  My first point of substance then is environmental
 21  determinism and the idea that you are allowed, as it
 22  were, to give the Ngok the benefit of the doubt whenever
 23  any doubt arises on environmental grounds.
 24  One of the features of this case is the way in which
 25  the SPLM/A rely on their experts to say things and to do
In the north the soil is reddish sand, interspersed by Governor Lloyd, who said:

"As a geographer as part of my professional experience, geographers learn that environmental determinism doesn't work. You can't say, 'Well, that particular tract of land will lead to that particular livelihood'... So I'm not at all suggesting that the Bahr region determines anything, or the goz region determines anything."

That's a perfectly fair statement, and yet that of course is precisely what the SPLM/A counsel did: to determine that, on the basis of an inflated definition of the Bahr and of the goz, all the Bahr and half the goz belongs to the Ngok on environmental grounds.

The SPLM/A's environmental claim is essentially based on two points. The first is that because the Ngok crop, dura, is ideally suited to the Bahr region, they must necessarily have lived throughout the Bahr region. The same argument is made with respect to the cattle being adapted to the Bahr region's damp climate and terrain.

Now, there is of course an important point here. We accept entirely that the environment of the region does influence the movement patterns of the groups that live there, both with respect to the cattle of the Homr and the cattle of the Ngok. But that doesn't mean, and it doesn't establish, that the Ngok are in any place in which dura can be grown or their cattle can survive.

In particular, whatever may have happened since 1905, it doesn't establish that was the case in 1905. There are all sorts of reasons why the Ngok may have been further to the south in 1905 than the environmental capacity of their main crop and their main form of livelihood, which was milk from cattle, would have sustained, including political factors; the Mahdiyya itself, which forced them towards the south, and which also forced the Messiriya towards the south, as we will see.

Moreover, the whole area is much more variegated than the simplistic black and white picture presented of it by counsel for the SPLM/A. Mr Born cited an article by Governor Lloyd, who said:

"In the north the soil is reddish sand, interspersed with tracts of sand and clay mixed. This gradually increases further south until the red sand disappears and black soil commences. South of latitude 10°30'..."

We entirely accept that that may be true as a matter of geographic fact; it doesn't determine where the Ngok were in 1905. It doesn't even begin to do that. What Mr Born omitted to say yesterday was that he was citing from a 1907 Lloyd article, "Some Notes on the Dar Homr", in which Lloyd says:

"Dar Homr, or the country of the Homr Arabs, is situated in the southwestern corner of the province of Kordofan."

If the ABC experts are right, it's not situated there anymore.

With regard to the heralded black soil, Lloyd later writes:

"The southern half of Kordofan, which included Dar Nuba, consists of black soil in the centre of which rise the Nuba Mountains. The plains are inhabited by cattle-owning Baggara Arabs and the mountains by numerous tribes of Nuba."

He doesn't mention the Ngok. I accept that the Ngok live also on black soil, but they didn't have a priority right to it. There are no patent rights of the Ngok in the black soil. This is a sort of agricultural determinism. MacMichael, the prolific Sudan scholar and former Condominium governor, refers to the Homr living on black soil; it was not exclusive to the Ngok. Nor was cultivation, as Lloyd equally points out.

Nor does the environmental cattle argument sit comfortably with the assertion that the Ngok had permanent villages as far north as 10°35'. A large part of this area is the goz, a sandy, waterless area. Ngok cattle do not move well in that area. Of course the Ngok may move around it for various purposes, but the idea that they live there permanently is fantastic, and the idea that the Messiriya should have to divide that area on a 50/50 basis because of only somewhat different lifestyles is equally fantastic.

I turn to Professor Cunnison. He defines, in paragraph 6 of his first witness statement, the Bahr as "the riverine area around the Bahr el Arab and the Ragaba ez Zarga". That was his translation.

There is, it is fair to say, a slight degree of imprecision in that language. The reason is quite obvious: that a ragaba doesn't stop a soil type. If you are in an area of soil type and you come to an important river channel or a channel of an important khor, the chances are that soil patterns will continuous at least for some period of time.

But I remind you again that the area we are talking about is 11,000 square kilometres to the north of the
16:02
1. Ragaba ez Zarga, and the mere fact that some slight
2. areas to the north of the Ragaba ez Zarga might have
3. black soil doesn't begin to establish Ngok ownership of
4. those areas. You have to look at the actual documents
5. which demonstrate where the Ngok were in 1905 to
6. establish that.
7. I have two other points in Cunnison which I make
8. incidentally in the context of this reply. The first
9. relates to his non-appearance here.
10. Mr Born suggested that we deliberately withheld him
11. as a witness on the ground that his evidence was
12. unfavourable to us. I've already had occasion to remark
13. about the normal etiquette amongst legal professionals
14. of not inferring bad faith in the context of their
15. handling of a case.
16. In fact we specifically said why Professor Cunnison
17. is not here in a letter to the Tribunal of
18. 20th March 2009. We said:
19. "The Government of Sudan is willing to make all of
20. its witnesses available to attend the hearing [they
21. didn't ask to see them all] except for Mr Ian Cunnison,
22. who will be unable to attend due to his poor health."
23. He was born in 1923. He is 86. Some octogenarians
24. manage to travel to The Hague with considerable
25. frequency; some do not. The judgment that was made, in

16:05
1. materials in the record, given the shortness of time,
2. but since it is said that Professor Cunnison supports
3. the SPLM/A, I have no choice but to read the whole
4. paragraph. He says:
5. "The goz overlaps the so-called 'shared rights area'
6. of the ABC report. In describing that area in this way,
7. it seems to me the ABC was fundamentally mistaken.
8. I did not observe this.
9. He refers to his two and a half years living in the
10. region with the Homr, travelling down as far as the
11. Bahr el Arab:
12. "... I did not observe this as an area of shared
13. rights at all. Nor was the dividing line drawn by the
14. ABC within that area in any way regarded as a boundary
15. between the Homr and Dinka. The Dinka were to the
16. south, as I have said. Some Dinka sought employment in
17. Muglad. It was not unknown for individual families to
18. travel north and be, so to speak, adopted into one or
19. another of the omodiyas of the Homr. They might also
20. take surplus cattle north to market, but they did not
21. exercise regular grazing or similar rights in the
22. so-called 'shared rights area'."
23. The real area of sharing was further south in the
24. Bahr, as he defines it. There the two groups coexisted
25. for a fairly short season, but this was not a host-guest

16:04
1. consultation with his wife, was that he was not well
2. enough to travel. If the SPLM/A had asked to talk to
3. him, arrangements could have been made to do it, as we
4. offered to do with the vice president. They did not do
5. so.
6. I do not take kindly to the suggestion that I'm
7. engaged in the suppression of evidence.
8. The second point relates to the suggestion made by
9. counsel for the SPLM/A that except on one point which
10. was put to Professor Cunnison by counsel for the
11. Government, Professor Cunnison agrees with their
12. position.
13. First of all, on the point that Professor Cunnison
14. was told about, about the effect of the shared rights
15. area, he makes it quite clear in his first witness
16. statement that this is something he was told. He
17. expresses -- unlike certain experts witnesses for the
18. SPLM/A -- no view on any legal issue. You can read his
19. witness statements for yourself.
20. He does, however, express a very important view
21. about the concept of shared rights as he understands
22. them, and he does this in paragraph 9 of his first
23. witness statement.
24. We had taken the view that we would not read out to
25. you large slabs of witness statements and other

16:06
1. relationship. For him it was the Bahr, the area to the
2. south, which in the early 1950s was the shared rights
3. area. That bore no relationship to the reasoning which
4. enabled the ABC experts to transfer 11,000 square
5. kilometres of Kordofan to the Abyei Area.
6. He said much the same thing in paragraph 3 of his
7. second statement, which I will not read.
8. I made the point yesterday that there is
9. an extraordinary problem. Let's accept for the sake of
10. argument that the Cisvec area is simply a description of
11. where the Ngok are in the dry season. I'll come back to
12. the Cisvec area in a little more detail later on, but
13. the point is this: the Cisvec area of the Ngok
14. represents 500 square miles. Is it seriously suggested
15. that that group of Ngok, a rather small group in 1905, 16.
17. somehow exploded?
18. Assume for the sake of argument that the purple area
19. shown on the Cisvec map represented the area of the Ngok
20. in 1905; we don't concede that, but let's assume it. Is
21. it suggested that in 1905, without a trace of evidence
22. except the odd wisp of smoke in the distance, that the
23. Ngok exploded from this 500 square miles to occupy
24. 23,000 square kilometres? That is a fantastic
25. suggestion, and there is no basis in the evidence for

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Counsel quoted Cole and Huntingdon, a modern account based on fieldwork in Abyei in the 1970s of agricultural patterns in the region. Cole and Huntingdon shed light on the difficulties of the region and its extremely variegated character, which anyone who knows anything about the geography of riverine areas will find is not surprising. This is what they say at page 88 of their study:

"First, it was generally assumed [they mean it was generally assumed before they began their study] that there was a huge amount of cultivable land just waiting to be utilised with the available technology in the general area around Abyei. In part this myth was fostered by the northern Ministry of Agriculture officials, who compared the apparently fertile open lands of Abyei to the drier and sandier lands to the north. The supposed vast sources of land on the flood plains of Western and Southern Sudan were a myth under existing technologies, at least in the Abyei Area and probably to a greater or lesser extent in the rest of the region as well."

In fact Willis and Wilkinson knew where the Ngok went in the wet season. They were more congregated together; and, at the time Willis and Wilkinson were writing, more or less immediately after the transfer,

that was very much in the south.

I turn to the second issue of cartographic incompetence. Here I want to deal in the first place with Wilkinson's report. There are three points. The first relates to the alleged Ngok villages of El Jaart and Um Geren.

It's fair to say -- and one does try to be fair, even under provocation -- that counsel for the SPLM/A accepted that this was an inference or a hypothesis. I have to say, when counsel for the SPLM/A accepts that something is an inference, he would, on the other side, take that as a definite admission. His normal forensic mode is that of carpet-bombing, so to suggest something is an inference is already to admit a high level of doubt. But curiously enough there's not much doubt at all if you look at the document.

This is of course taken from the volume 2 routes of the Anglo-Egyptian Sudan, and it's the route report which begins at page 151 of volume 2, Major Wilkinson, the route report of January and February of 1902. There are basically three stages to the route that Wilkinson took. There's the stage south, where he meets a river which he is told is the Bahr el Arab, and then goes further south to see Sultan Rob. There's a short stage in a direction which we'll come back to, which is broadly northwest. Then he walks back on a somewhat different route, again to the river that he calls the Bahr el Arab.

The two small villages which Mr Born said were Ngok villages on the Ragaba ez Zarga are El Jaart and Um Geren. He said they were Ngok villages because they have the characteristic mode of there only being three or four houses in a rather separate area. This is a wonderful example. This would be an architectural monoply. No one else is allowed to have three houses in a small village; it has to be six or eight or some other number.

If you look at how it's described, he talks about a series of settlements. It's true that he mentions some being Arab settlements, but he's giving general descriptions. He refers to a few Homr Arabs living in various places. While he's north of Fauwel -- so far as one can tell the whole area up to now has been Arab -- he says:

"Fula Hamadai with a little water [is] sufficient to water animals ... dry on 9.2.02."

It's amazing how these administrators who didn't administer were concerned about the availability of water for the locals.

He then says:

"Small villages: mere collection of three or four huts passed to the El Jaart and Um Geren."

And that is said to be an acknowledgement of the Ngok.

Then he refers to:

"Fula Hamadai ... a village named 'Fut.'"

Well, these are villages. There's absolutely no evidence that they're Ngok villages at this time. And one would infer from the text of the report that they're not, because he goes on to say, after reaching Fauwel with its large Arab settlements, and crossing the Bahr el Arab", he finds the road to a Dinka chief named Ruweng; bearing in mind of course, there were other Dinka in this area, though this was the Ruweng.

Then he says:

"The first Dinka village of Bombo is reached."

According to counsel that should have been the fourth or possibly the third Dinka village. When he said "first" he meant first; that's what he said. There was no reason to refer to every clutch of a few houses at an earlier stage as being Arab for them to be Arab from the context; and there's no indication that they were not, in particular because they're described as the first Dinkas. And the first Dinkas he sees are even later, at Etai.
It's pure supposition to suggest that because

16:14 1 Condominium officials didn't describe a clutch of huts
2 north of Fauwel, they're somehow presumed to belong to
3 the Ngok.
4
5 We now come to the second phase of Wilkinson's
6 journey after he leaves Sultan Rob. Mr Born quoted the
7 following extract, and he did it in order to demonstrate
8 that there was Ngok settlement well to the north of the
9 Bahr el Arab in 1902.
10 I interpolate to say: we don't deny that there was
11 Ngok settlement to the north of the Bahr el Arab in
12 1902; we could not do so in light of the evidence. What
13 we deny is that it reached anywhere near the
14 Ragaba ez Zarga, and that is a crucial fact in this
15 case. It's one which, since each party at this phase
16 has to prove its own case, the onus is on the SPLM/A to
do it.
17
18 Mr Born tried valiantly, I have to say -- but
19 everything he does is valiant -- to prove the point, and
20 he quoted the following passage:
21 "Leaving Sultan Rob's settlement the road runs
22 northwest, and the river is left on the left, but is
23 struck again 2.5 miles on, and the path keeps along the
24 left bank. The country here is all open and much dura
cultivated."

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It's not in dispute that this country was Ngok

16:16 1 country:
2 "Dinka dwellings are dotted about, and the country
3 presents a most prosperous aspect."
4 Even the quickest look at Wilkinson's map
5 demonstrates that what he was doing was walking along
6 the Bahr el Arab. He crossed the Bahr el Arab from
7 Sultan Rob's village on the south bank, then headed
8 northwest, along or close to the north bank of the
9 river. He only turned away from the river at the
10 village of Gohea, which he described as on the
11 riverbank. So of course he encountered Ngok villages
12 and cultivation, but they were on the Bahr el Arab; to
13 the north of it, of course, but on it.
14 Heading northeast and then north, the next three
15 things he mentioned were the Regabet el Lau,
16 a watercourse; El Niat, described by Wilkinson as
17 a large swamp, now dry, but referred to, as Mr Born
18 claimed it yesterday, to be a Ngok village; and then
19 Abu Kareit, a Homr settlement.
20 The inference is that where he's been talking about
21 settlements of one particular group, and then comes upon
22 a settlement of a different tribe, he says at that
23 point, as he did on the way down -- he does it on the
24 way back when he comes to Abu Kareit -- the first sign

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of any human presence found by Wilkinson north of the
16:17 1 real Bahr el Arab on this trip, on the return leg of his
2 journey, was a Homr settlement.
3 I make the point, incidentally, that that particular
4 village, Abu Kareit, if you look very carefully at the
5 map -- I'll leave it to your cartographical consultants
6 to do so -- is actually not on the real Ragaba ez Zarga;
7 it's on a tributary. It lies on a stream which runs
8 into the Ragaba at Mellum.
9 In any event, our basic proposition is this: we have
10 never said that there was a mistake of the whole course
11 of the Ragaba ez Zarga in or around 1905 for the
12 Bahr el Arab; there was not, for the perfectly good
13 reason that the course of the Ragaba ez Zarga in general
14 was not known at the time. That was why it was possible
15 for people like Wilkinson to mistake the Bahr el Arab:
16 they weren't looking for another river.
17 But I would draw the attention of your consultants
18 to the fact that the river which is identified as the
19 river on which Abu Kareit lies, the Ragaba ez Zarga, is
20 actually not the Ragaba ez Zarga but a tributary of it.
21 Mr Born called for detective work and scientific
22 appreciation. Looking at a map would have been a good
23 start.
24 I would also refer to the concession -- no, I'm

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49 (Pages 185 to 188)
16:20 | the Bahr el Arab [that is in the riverine area] and
16:21 | rebuilt their stocks of cattle by trading ivory they
16:22 | hunted for cattle from traders who established buying
16:23 | centres there."

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16:23 | yourself.
16:24 | Mr Born did not refer to the majority of the route
16:25 | reports and associated information which I took you
16:26 | through yesterday. He has a rather smelly and selective
16:27 | view about colonial administration, it seems.
16:28 | Instead the primary basis on which the SPLM/A
16:29 | constructed its case is the combination of its
16:30 | environmental argument, its form of environmental
16:31 | determinism, with oral history.
16:32 | I have already commented on oral history. I don't
16:33 | deny its value in determining a general position, but it
16:34 | has to be checked against other evidence. It's said
16:35 | that Sultan Rob, who was himself of course a direct
16:36 | actor in the event, was lying when he said there were no
16:37 | Ngok to the west of his settlement in Burakol.

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16:37 | What we suggest is you look at the other evidence on
16:38 | that particular point. To take one example, what is the
16:39 | other evidence? The other evidence is the route report
16:40 | which someone walks from Gerinti, which is not a Ngok
16:41 | settlement and certainly was not a Ngok settlement in
16:42 | 1905, to the new village, to Burakol, and finds no
16:43 | treks, and then says that on the Ragaba there are only
16:44 | Arabs travelling south to go to the village to buy
16:45 | grain.

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16:45 | There is a concordance of evidence conforming with
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16:46 | clear is that the coming of the Condominium was
16:47 | an unqualified blessing for the people of the Sudan,
16:48 | including both the peoples primarily involved in this
16:49 | case.
16:50 | Professor Daly fully accepted my view that the
16:51 | population estimate given by the SPLM/A of 50,000 was
16:52 | wrong. He wasn't prepared to put his own estimate on
16:53 | it. We've given an estimate based upon his methodology
16:54 | of 5,000-10,000. Counsel distorted my statement, which
16:55 | was a slight modification of our earlier position, by
16:56 | giving the number of 15,000, but didn't explain where
16:57 | that came from.
16:58 | The consequence was that it's obvious from the
16:59 | evidence that there was significant interest by the
16:60 | Government in clarifying the river situation at
16:61 | precisely the time when the transfer occurred, and that
16:62 | incidentally in the course of those programmes there was
16:63 | something which is indistinguishable from
16:64 | administration.
16:65 | Can you imagine, if you were counsel in my
16:66 | hypothetical case between the British Government and the
16:67 | French Government for the delimitation of the boundary
16:68 | between a French Bahr el Ghazal and an English Kordofan,
16:69 | how much you would leap on these documents with joy as
16:70 | evidence of administration? But you know that for

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16:22 | Sultan Rob, who may have lied on occasions but doesn't
16:23 | seem to have been lying on this occasion, and there is
16:24 | much other evidence of the non-involvement of the Ngok
16:25 | on the Darfur boundary, north of the Bahr el Arab.
16:26 | But the principal new element about the oral history
16:27 | is the community mapping report. Now, one cannot deny
16:28 | the value of community mapping in certain contexts, but
16:29 | frankly it's the case that the information gathered may
16:30 | be gathered in a more systematic way, but it can only be
16:31 | checked in a very careful manner. We simply don't have
16:32 | the data, the data produced by the community mapping
16:33 | project that was conducted in a hurry.
16:34 | You heard the circumstances in which it was
16:35 | conducted, but in particular you heard the concession by
16:36 | Dr Poole when I asked him whether he accepted the
16:37 | SPLM/A's representation of what he had established.
16:38 | I will quote it again from paragraph 51 of the
16:39 | rejoinder:
16:40 | "The community mapping project shows permanent
16:41 | Ngok Dinka villages were located throughout the Bahr
16:42 | region, extending north to latitude 10°35' north, both
16:43 | in 1905 and for decades thereafter."
16:44 | He obviously accepted under some pressure that that
16:45 | was not the case. It is a clear misrepresentation. The
16:46 | community mapping project can establish nothing except

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16:26 1 for the area in which it was covered. You can look at
2 the outcome as to what you would think in relation to
3 areas to the north of the Ragaba ez Zarga.
4 I come back to my point about hybrid boundaries
5 which I made yesterday and which counsel for the SPLM/A
6 responded to very briefly this afternoon. I will revert
7 to some of the issues about the determination of the
8 tribal area of the Ngok at 1905 in my final presentation
9 tomorrow, but I do want to address this issue because it
10 is of fundamental importance.
11 When I was making a point about being geographically
12 challenged, I was not making that point in relation to
13 the hybrid issue; I was making the point in relation to
14 rather more, let us say, trivial questions of whether
15 their submission actually contained the complete area or
16 not, and whether particular references to coordinates
17 were geographically accurate.
18 The broader point is this: if the SPLM/A wants to
19 live by the tribal boundary hypothesis, then they die by
20 it as well. They can't pick and choose. They can't
21 say, as they now seem to be saying, there were virtually
22 no Ngok in area 1, the area below the Bahr el Arab, and
23 then say that as a matter of tribal interpretation it
24 belonged to the Ngok.
25 On the basis of the assumption that that area was

16:28 1 virtually empty, it did not belong to the Ngok;
2 apparently it belonged to the Twic, who accepted their
3 being moved to the south in a boundary which
4 Titherington showed was some considerable distance south
5 of the river and which was coexistent with the boundary
6 between the Ngok and the Twic.
7 The positions they're taking don't add up, they
8 don't make sense. There is no actual evidence that they
9 were on the Darfur boundary. Mr Born says, and it's
10 true, that the agreement to which one version of the
11 Civsec document was attached -- the reason we gave you
12 two versions is that it was an annex to a meeting held
13 in the 1930s, which is one of those annex numbers he
14 mentioned. But it obviously was brought into being for
15 another purpose and was used in the context of
16 a discussion about grazing rights for the Ngok Dinka
17 south of the Bahr el Arab and south of the Darfur
18 boundary.
19 It's obvious that the Ngok had no interest in what
20 was being discussed at that meeting, although the map
21 itself was being used as an apparently valuable addition
22 to the body of information about grazing rights in the
23 general area. But the fact that they had no interest in
24 it demonstrates the point, which is that they were not
25 on the Darfur boundary at all, as the other evidence

16:29 1 shows.
2 If they are not on the Darfur boundary, then their
3 own theory of the case means that the Abyei Area does
4 not include an area so far to the west, and Sultan Rob
5 was right in saying that more or less at the time of the
6 transfer.
7 You can determine the anthropological fact because
8 that is your mandate in the context of the delimitation
9 exercise. We say, of course, that it is
10 an extraordinarily difficult fact to demonstrate, and
11 I think the process of the last two days will have
12 satisfied you of that proposition, on which counsel do
13 in fact agree.
14 We say the fact of that is the reason why there was
15 an excess of mandate in this case, because the fact that
16 was determined was actually a fact relating to
17 provincial boundaries, without the most crucial
18 provincial boundary being taken into account at all.
19 Mr President, I think I've reached the period at
20 which we are supposed to stop at this phase; we will do
21 it, but with, I hope, the assurance that if there's
22 anything that I've left out in these rather scattered
23 remarks, I can come back to it before Mr Born has the
24 last word tomorrow morning.
25 Thank you, sir. Thank you, members of the Tribunal.

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

Day 5 Wednesday, 22nd April 2009

THE CHAIRMAN: I thank you very much, Professor Crawford.
2 Are there any questions on the part of the Tribunal?
3 Mr Born.
4 (4.31 pm)
5 (A short break)
6 (4.59 pm)
7 THE CHAIRMAN: Mr Born.
8 Submissions by MR BORN
9 MR BORN: Thank you, Mr President.
10 I would like to turn now in our rebuttal submissions
11 to the interpretation of the definition of the Abyei
12 Area. I addressed this in some detail, as you remember,
13 on Monday, but it seems that I need to do so again.
14 You will remember that on Monday and Tuesday the
15 Government, both Mr Bundy and Professor Crawford, argued
16 at some length that the Abyei Area can consist only of
17 the territory that was located to the south of the
18 putative Kordofan/Bahr el Ghazal provincial boundary in
19 1905. As we've seen, they argue basically that
20 Article 1.1.2 of the Abyei Protocol refers to the
21 transfer of an area or a territory in 1905, and not to
22 the transfer of the nine Ngok Dinka chieftoms.
23 I promised you yesterday that I would come back and
24 address this in some detail.
25 I'd like to start by just referring briefly to the
Day 5 Wednesday, 22nd April 2009

17:00

1. consequences of the Government’s definition. It would
2. mean that, irrespective of what the historical and the
3. factual evidence showed, even though the Ngok’s
4. historical and ancestral homelands were located 88%, as
5. Professor Crawford put it, or 98% to the north of the
6. Kiir/Bahr el Arab, that would be irrelevant; that 88% or
7. 98% of the Ngok’s territory would be excluded from the
8. Abyei Area would result, in Mr Crawford’s submission,
9. entirely by virtue of the parties’ agreement in 2005 in
10. the Abyei Protocol.
11. As we saw at the question just at the end of the
12. morning’s session that I came back and answered, that is
13. essentially the thesis also of Zakaria Atem’s witness
14. statement on behalf of the Government.
15. I would like to turn now to the Government’s
16. interpretation of Article 1.1.2, but I’d like to do that
17. in a way that’s a bit different from how the Government
18. has done it, which, as you will recall, is to address
19. Abyei Protocol’s language in its first presentations and
20. then to spend time dwelling, in these presentations in
21. the last couple of days, on the historical documents,
22. I’d like to put those two pieces together and look at
23. them together. Naturally what I’d like to do is to
24. begin with the language of Article 1.1.2.
25. Preliminarily, though, as we’ve seen -- and this

17:04

1. sort of enquiry by this Tribunal, the Government’s
2. interpretation of Article 1.1.2 is wrong; it’s
3. demonstrably wrong in substance.
4. It’s important as we turn to interpreting that
5. definition of the Abyei Area to look to the language of
6. the Abyei Protocol. That’s something that Mr Bundy, who
7. revisited this issue for the Government today and
8. yesterday, did not do. He and the Government would
9. instead define the Abyei Area more or less by reference to
10. Wingate’s memorandum and by reference to what they
11. called the transfer documents, and not by reference to the
12. language or the purposes of the Abyei Protocol; or in
13. fact, as we come to see soon, to the drafting history of
14. the Abyei Protocol.
15. Let’s start then, as we set about trying to give
16. a substantive interpretation to Article 1.1.2, with the
17. language of what the parties agreed to, the Government
18. and the SPLM/A in 2005.
19. What they agreed to -- you can see it on the screen,
20. and it’s language we’ve had read to us repeatedly but
21. it’s worth looking at again -- the territory is defined
22. as the area of the nine Ngok Dinka chiefdoms transferred
23. to Kordofan in 1905. That’s the place we start.
24. I discussed at some length on Sunday that in the
25. English language the plain meaning of Article 1.1.2

17:02

1. goes back to excess of mandate provisions -- the
2. Government’s claim that the experts misinterpreted
3. Article 1.1.2 is not a basis for an excess of mandate
4. claim. The experts’ misinterpretation of the definition
5. of the Abyei Area in Article 1.1.2 would be an error of
6. law or an error of interpretation, not an excess of
7. substantive mandate.
8. I would suggest -- I will probably be accused of
9. misinterpreting counsel’s submissions, but I don’t think
10. I do here; I think Professor Pellet forthrightly
11. acknowledged that in the questions from the Tribunal,
12. Professor Reisman in particular, and that’s precisely
13. consistent with the Government’s memorial -- that
14. an error in substantive interpretation is not the basis
15. for an excess of mandate claim -- the Tribunal does not
16. sit as a Court of Appeal -- and an error,
17. a misinterpretation, in how the definition of the Abyei
18. Area is set forth in Article 1.1.2 is not
19. a jurisdictional excess; it’s not an excess of mandate
20. within the meaning of Article 2(c) of the Arbitration
21. Agreement.
22. If I’m right on that, that’s an end of the matter,
23. and in a sense I don’t need to keep talking on this
24. issue, but I will.
25. In any event, even if that were the basis for some

17:05

1. refers to the area of the nine Ngok Dinka chiefdoms
2. which were -- which were -- collectively transferred to
3. Kordofan in 1905. It does not refer to the transfer of
4. some sub-part of an area of the nine Ngok Dinka
5. chiefdoms, as the Government would have you believe.
6. We also saw how that interpretation was confirmed by
7. the expert report of Professor Crystal OBE.
8. Professor Crystal explained and applied the simple but
9. very important English grammatical rule of proximity.
10. It’s a common-sense rule. It makes sense. He applied
11. it in other contexts. The Government did not choose to
12. challenge that report, did not seek to cross-examine
13. him. His evidence on that issue, the rule of proximity,
14. is unchallenged and uncontroverted in the record.
15. He said, and it’s worth looking at his report, that:
16. “The analysis of all the grammatical factors
17. involved in this sentence [that is to say Article 1.1.2]
18. taken in textual isolation [that means looking at
19. Article 1.1.2 itself] points to the clear conclusion
20. that it is the chiefdoms which are being transferred.”
21. That means not a particular area that’s being
22. transferred, but rather the chiefdoms, the nine
23. Ngok Dinka chiefdoms, which is what the SPLM/A’s
24. position has been, it’s what the experts’ position was,
25. as we are going to see.
17:07
1. Let's take a step away from just the language of Article 1.1.2. Those words are clear. Those words are very clear. You can apply English rules of grammar; that confirms what the words mean. But it's also, I would suggest, important to look at what the parties meant in 2005, because that confirms -- confirms powerfully -- what the words that they used mean. This is a subject where again, just as they didn't answer Professor Crystal, they have not answered me; and more importantly, I'd say, they haven't answered the language that they agreed to in the Abyei Protocol. Those purposes recorded in the Abyei Protocol are clear. The basic purpose for defining the Abyei Area in the Abyei Protocol was to specify that region whose residents would be entitled to participate in the Abyei referendum which is provided for in Article 8 of the Abyei Protocol. Only residents of the Abyei Area will be entitled to participate in the free democratic elections, in the referendum, conducted simultaneously with the main southern referendum in 2011, on the question of whether they will go south or whether they will go north. It's undisputed that the entire reason for the Abyei referendum was to permit the people of the Ngok Dinka chiefdoms, all nine chiefdoms, who had consistently said over the past decades that they belonged to the south or over the past decades that they belonged to the south or

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17:10
1. that they wanted to choose, to vote freely and democratically on whether to be included in the south or in the north. That's why Article 1.1.2 referred to the Ngok Dinka and referred to the nine Ngok Dinka chiefdoms. In those circumstances, it would make no sense -- it would be absurd -- to say that the referendum should include some of the chiefdoms or some of the Ngok Dinka people. That would be completely contrary to the basic purpose of the referendum.

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17:11
1. given.
2. Let's look now at how some other people have interpreted the Abyei Protocol, and in particular the definition of the Abyei Area. This is the ABC experts' transcripts. It's how they, time and again, in their meetings with the parties, with the Government's delegation and with the SPLM/A, as they were expected to do under the procedural framework set out for them, how they referred to what the Abyei Area was.

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Ambassador Petterson said:
"Our job is to define and demarcate the area of the nine Ngok Dinka chiefdoms that were [not 'which was', 'that were'] transferred to Kordofan from Bahr el Ghazal province in 1905."

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Precisely consistent with what Professor Crystal said, precisely consistent with what I have been saying, precisely contrary to what the Government now says, but the Government didn't say anything then in objection. Let's look at the meeting in Agok on 18th April 2005. Ambassador Petterson said there that the mandate of the ABC was:
"... to define and demarcate the area of the nine Ngok Dinka chiefdoms which were transferred to Kordofan."

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Again, precisely the same language. In the meeting
on April 16th in Dembloya, he said again that what they
were setting out to do was:
"... determine the boundaries of the nine Ngok Dinka
chiefdoms as they existed 100 years ago."
A different formulation, but every single time it
had the same essential meaning. It referred to the nine
Ngok Dinka chiefdoms which were transferred; not to some
specific territory that was transferred. Each time the
Government sat there, the Government didn't object,
didn't protest, didn't say, "That's wrong". The reason,
I would suggest -- and we are going to come on to it --
is because the Government knew perfectly well, and
didn't disagree that that's what the language meant.
That is one of the reasons that they picked the ABC
experts. They didn't pick people that might adopt
a sort of abstract, cold, arbitrary provincial boundary
definition that the Government urges; they picked
experts that would evaluate historical evidence and they
put in -- with the greatest of respect to our mountains
of evidence -- their own mountains of evidence.
They put in 100 witnesses to talk not about
provincial boundaries, not to read on what Governor
Wingate said or didn't say, but to talk about the land,
to talk about the people, to talk about the history, to
talk about the traditional areas of both people, because

that's what they had in mind.
They didn't object when Ambassador Petterson
provided these comments, and he didn't adopt any
peculiar interpretation here; this is just what
Article 1.1.2 says in the English language.
Even the Government's counter-memorial, when you
look at it, does not disagree that what
Ambassador Petterson said at these meetings was
an acceptable interpretation of the mandate.
Flipping back, even if Professor Pellet had answered
Professor Reisman's question differently and had said:
yes, if they made a serious error in misinterpreting
Article 1.1.2 that would be an excess of mandate, the
Government conceives here that these were acceptable
interpretations. That is a concession we don't need to
rely on. It's because Article 1.1.2 is as plain as day
when you read it.
So, if we can stop here for just a moment, what we
see from the language of Article 1.1.2, what we see from
the grammatical rules of the English language applied to
Article 1.1.2 and what we see from the purposes of
Article 1.1.2, and indeed of the whole
Comprehensive Peace Agreement, is a single, clear,
inescapable conclusion, and that is that Article 1.1.2
referred to the entire area of the nine Ngok Dinka

Chiefdoms at the time they the chiefdoms were
transferred to Kordofan in 1905. That is the definition
of the Abyei Area.
With that we arrive at where Mr Bundy began
yesterday, when he addressed the issue of the definition
of the Abyei Area.
You will recall that Mr Bundy began his presentation
by addressing the reference to what he described as the
Condominium orders of the 1905 transfer, which he said
were before the Government and the SPLM/A when they
negotiated the Abyei Protocol, and you can see --
I don't want to be accused of misstating what someone
said -- you can see here that he said:
"Yes, the negotiators of the Abyei Protocol were
aware of the 1905 transfer documents."
Preliminarily, Mr Bundy's reliance on the supposed
negotiating history of the Abyei Protocol, on what was
before the negotiators of the Abyei Protocol, is a bit
of an about-face about the Government.
The Government's initial position was that the
Tribunal did not need to pay attention to these
so-called supplementary means of interpretation. You
will recall that our memorial put in a substantial
discussion of the drafting history, while the Government
devoted essentially no attention to it because, pursuant

In any case, about-face or not, Mr Bundy's
discussion of the drafting history of the Abyei Protocol
is wrong. In fact, when you go and look at that
drafting history, it confirms -- it confirms
powerfully -- what the language said, what English
grammar rules say, and what the purposes mean. It may
be a secondary means of interpretation, but it's still
one that supports the primary means.
What we will see when we look at this drafting
history is the opposite of what Mr Bundy told you.
Mr Bundy would have you think that the negotiators of
the Abyei Protocol focused on Wingate's memorandum.
There's no evidence at all -- none -- that they even
knew about it. There's no evidence that they even
referred to it.
Instead, as one would think, and as we will see the
record clearly shows -- and as the Government has
conceded repeatedly, even under Professor Crawford's
standards for concessions -- what the parties focused on
was Sudan Intelligence Report No. 128, and we will look
at that too. What we will see is the Sudan Intelligence
Report No. 128 talks about a tribal transfer of people,
the Ngok Dinka people.
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<td>17:18 1</td>
<td>17:21 1</td>
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<tr>
<td>You will recall on the first day of this hearing, in</td>
<td>about a slave raid by Homr Arabs which had carried off</td>
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| a bit of a shift from the Government's memorial, | some 30 Dinka and 1,000 of their cattle."
| Professor Crawford told us -- and you can see his | 2     It's only a small fraction of the 60,000 or so that |
| comments here on the screen -- that: | 3     we heard about. Then the record says: |
| "... the travaux of the Abyei Protocol ... can be | 4     "Two runners who arrived at Fashoda on |
| referred to in order to confirm the meaning arrived at | 5     13th September from the Dinka district reported on the |
| on an analysis of the text ..." | 6     cattle and slave raid." |
| 8     He then went on to say, as part of the travaux of | 7     I would like to move on from that for just a second. |
| the Abyei Protocol, that: | 8     There was then, in January 1905, a similar report from |
| "Reference was specifically made to the Sudan | 9     the Twic Dinka, who complained, as Sultan Rob had, to |
| Intelligence Report of March 1905, one of the transfer | 10     the Condominium authorities about a similar kind of |
| documents." | 11     raid. Sheikh Rihan made the complaints, and you can see |
| 13     Let me repeat that so that we don't miss it: | 12     them on the screen there. I won't read it out because |
| "... specifically made to the Sudan Intelligence | 13     it's just the point of the complaints. |
| Report [No. 128] of March 1905." | 15     As we know, it was these complaints and the raids |
| 16     Professor Crawford didn't make that up. You can | 16     that they referred to that resulted in a decision by the |
| look at the Government's memorial, which is exactly | 17     Sudan Government to ensure that both the victims, the |
| consistent with it. It's on the screen for you. This | 18     Ngok and the Twic, and the perpetrators, the Homr, were |
| is the Government's memorial, and it said: | 19     placed together under a single administrative authority. |
| 20     "It was precisely this passage ..." | 20     The rationale was that if you had the same governor |
| 21     The passage there just above the quote, the passage | 21     looking after both peoples, then it would be less likely |
| which quotes Sudan Intelligence Report No. 128: | 22     that the two peoples, and in particular the northern |
| 23     "It was precisely this passage which led to the | 23     Arabs, would do bad things to each other. The idea was |
| formulation of the ABC's mandate and that of this | 24     to place the tribes together under a single authority. |
| Tribunal." | 25     We heard Professor Daly, the world's leading authority |
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<td>on this subject-matter, describe that purpose very</td>
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<td>clearly this morning.</td>
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<td>3     So, with that background, let's look now at what the</td>
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<td>4     Government has said is the text that the parties --</td>
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<td>5     these parties, the SPLM/A and the Government -- had in</td>
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<td>6     front of them when they negotiated Article 1.1.2.</td>
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<td>7     We can see it on the screen there, and we look at</td>
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<td>8     the passage which the Government has said was precisely</td>
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<td>9     the passage that led to the formulation of the ABC's</td>
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<td>10     mandate. It makes it unmistakably clear that the</td>
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<td>11     transfer in question was not a transfer of territory,</td>
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<td>12     not a transfer of an area, but the transfer of a tribe,</td>
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<td>13     the transfer of a people.</td>
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<td>14     Look at the slide, look at what it says:</td>
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<td>15     &quot;It has been decided that Sultan Rob, whose country</td>
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<td>16     [yes, he had a country] is on the Kiir River, and</td>
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<td>17     Sheikh Rihan of Toj are to belong to the Kordofan</td>
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<td>18     people.&quot;</td>
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<td>19     &quot;Are&quot;, those: Sultan Rob and Sheikh Rihan:</td>
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<td>20     &quot;These people have on certain occasions complained</td>
</tr>
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<td>21     of raids made on them by southern Kordofan Arabs, and it</td>
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<td>22     has therefore been considered advisable to place them</td>
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<td>23     under the same governor as the Arabs of whose conduct</td>
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<td>24     they complain.&quot;</td>
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<td>25     It's perfectly clear that the object of this</td>
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Day 5
Wednesday, 22nd April 2009

17:24
1. transfer, the 1905 transfer, the thing, the object or
2. the subject that was transferred in 1905, was the
3. Ngok Dinka and Twic Dinka people, and not a defined
4. territorial area, not an area.
5. That's plain when you read the language. It refers
6. to, "These people have on certain occasions": it refers
7. to placing "them", not "it", under the same governor.
8. Beyond any conceivable doubt it was Sultan Rob,
9. Sheihk Rihan and their people who were to belong to
10. Kordofan and be under the administration of the Kordofan
11. governor.
12. Mr Bundy argued on Monday, and with a fair bit less
13. conviction today, that the reference to "people" is
14. really just a reference to Sultan Rob and Sheihk Rihan.
15. I would suggest to you that although that at least
16. acknowledges that it was people, not territory, that was
17. transferred, that the suggestion that it was just those
18. two individuals, Sultan Rob and Sheihk Rihan, is
19. hopeless, it's desperate.
20. Sudan Intelligence Report No. 128 did not transfer
21. just Sultan Rob and Sheihk Rihan. It was not some sort
22. of late 19th century/early 20th century witness
23. protection programme. This was a transfer of the
24. people. When we look at what happened before the
25. transfer, when we look at what the transfer said, when

17:27
1. Twic Dinka people. That's what the language of the
2. report says, that's what the purpose of the decision was
3. meant to be.
4. It is, as I said -- and I'll no doubt be accused of
5. being unduly adversarial in my advocacy style -- but it
6. is absurd, quite literally absurd, to say that it was
7. just Sheihk Rihan and Sultan Rob that were transferred.
8. No. It's right that people were transferred; it's wrong
9. that it was those two people. It was the Ngok Dinka
10. people and the Twic Dinka people.
11. I shouldn't in a sense even have to do all this.
12. I shouldn't have to be harsh. I should be able to be
13. understanding, because the Government agreed with me.
14. Let's look at what their memorial said. The invention
15. that we heard just recently of a transfer of Sultan Rob
16. and Sheihk Rihan or of an area isn't what the Government
17. said before. You can look in their written submissions.
18. The Government said:
19. "It was decided in early 1905 to transfer the latter
20. groups [ie the Ngok Dinka and the Twic Dinka] to
22. The Government didn't say to transfer Sultan Rob and
23. Sheihk Rihan; didn't say an area. They said it was
24. decided in early 1905 to transfer "the groups". Then,
25. just to make sure we didn't miss the point, they said it

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17:29
1. again:
2. "Apparently investigations were carried out and
3. a decision was promptly made to transfer both the Ngok
4. and the Twic to Kordofan."
5. They couldn't have put it much more clearly.
6. Perhaps they could have, actually; they could have just
7. referred to Sudan Intelligence Report No. 128, which
8. itself is crystal-clear. But just to make sure we
9. didn't miss the point, the Government said it in the
10. plainest of language.
11. There can be no doubt from the language of 128, no
12. doubt from the language of the Government's memorial, no
13. doubt from any reasonable interpretation of the purposes
14. and the context of this that what was happening was
15. a tribal transfer of the Ngok people.
16. Exactly the same interpretation of the relevant
17. Sudan Intelligence Report and the Condominium decision
18. was made by the Government during the ABC presentations.
19. It wasn't that the Government made some slip of the pen
20. in its memorial which its counsel might now want to
21. explain away. No. Here's what the Government said to
22. the ABC experts. Let me read it out from the slide:
23. "The decision to transfer the Ngok Dinka and Twic to
24. Kordofan ..."
25. It didn't say, "The decision to transfer the area

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56 (Pages 213 to 216)
17:30 1 beneath the Kiir to Kordofan", as Mr Bundy would have
2 you say. That's what they said there: the decision to
3 transfer the Ngok Dinka and Twic to Kordofan. Those are
4 tribes, those are people; that's not an area.
5 6 Let's look at the next slide. The Government then
6 said:
7 "The reason of transferring the Ngok and the Twic to
8 Kordofan ..."
9 Again, not an area, but the Ngok and the Twic. And
10 guess what you see underneath: you see Sudan
11 Intelligence Report No. 127, which has the language that
12 I referred to you previously, explaining for the reason for
13 protecting the people of the tribes.
14 15 Let's look at the next slide, and here it's a little
16 bit obscured:
17 "The decision to transfer."
18 The decision to transfer the Ngok and the Twic to
19 Kordofan. And guess what you see underneath: you
20 see Sudan Intelligence Report No. 128, which says what
21 we've already seen, and which, just as I said, just as
22 the Government's memorial said, just as the previous two
23 slides said, just as the ABC experts said, that it was
24 a decision to transfer the Ngok and the Twic to
25 Kordofan.
26 It did not, as Mr Bundy sought to do, describe this

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17:33 1 On Monday Mr Bundy said:
2 "I shall discuss each of these documents in turn,
3 but before doing so I might just note in passing that it
4 is absolutely extraordinary in the Government's view
5 that the ABC experts referred to none of these four
6 documents in connection with the transfer in their
7 report, despite the fact that all of them had been
8 submitted to the experts by the Government ...
9 It's a bit like Professor Crawford's accusation of
10 a scientific shambles. And, like Professor Crawford's
11 accusation, when you go and look at the report with even
12 the slightest care, it's wrong.
13 Let's look. Far from ignoring the transfer
14 documents, the ABC experts' final report refers directly
15 and specifically to Sudan Intelligence Report No. 128.
16 You can see that on the screen, you can read the
17 footnote, you can read it on the text. Mr Bundy didn't
18 do it for you, but let me take you to it.
19 The experts said specifically that the Sudan
20 Intelligence Report provides:
21 "... the official principal reason for the transfer
22 of the nine Ngok Dinka chiefdoms ...
23 This is the part of the report that supposedly
24 didn't exist. This is the thing which, extraordinarily
25 in the Government's view, the experts never paid

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17:31 1 as a transfer of territory and an area. They took the
2 same position as the Government's memorial. It
3 described precisely the passage that was used, as the
4 Government put it, to formulate Article 1.1.2.
5 Not surprisingly, in the experts' report that's what
6 they said about exactly this document. First we've seen
7 how the experts described this in the various meetings
8 with the people. We heard also -- I'm going to come on
9 in a moment to describe the ABC report itself, but
10 before we do let's look at what Professor Daly, the
11 world's leading expert on the Condominium and Sudan has
12 to say about this, what he said about it in
13 cross-examination. He said:
14 "Because the British administration was so
15 rudimentary and focused on practical issues rather than
16 with details, the 1905 transfer decision was clearly
17 about people, not land. The stated purpose of the
18 transfer was to place slave raiders and the people they
19 raided under one administration. No effort was made to
20 define the territory ...
21 That's Professor Daly under cross-examination.
22 Mr Schofield said exactly the same thing. Again, he
23 defended that position on cross-examination from
24 Mr Bundy. He answered clearly that it was a people that
25 were transferred.

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17:34 1 attention to. When you look at what the experts did, they
did just what everybody else who's ever looked at this
document concluded: they said that it was the
principal reasons for the transfer of the nine
Ngok Dinka chiefdoms to Kordofan, again a tribal
transfer.
7 If you don't read the experts' report with any care,
maybe then you say it's a scientific shambles, maybe
then you say they didn't even bother to refer to the
transfer documents. But if you do read it what you see
is the same thing that the SPLM/A has said, the same
thing that I have said, the same thing the Government's
memorial has said, the same thing the Government's
presentation to the experts said.
14 In addition, if you go and look at proposition 7 in the
experts' report, they described the full context of the
Sudan Intelligence Report. They ended with another
conclusion that this was a tribal transfer, not a
territorial one. They said that the Ngok people were
regarded as part of the Bahr el Ghazal province until
their transfer -- "their transfer" -- in 1905.
22 So I don't think there really can be any doubt about
it. It's completely clear that the transfer decision in
1905, which is recorded in Sudan Intelligence Report
No. 128, which is precisely the passage that the parties

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| 17:36 | had before them when they negotiated the Abyei Protocol, and as to which's that's no evidence that they had any other passage, any other document in front of them, that this passage, precisely the passage which formulated their views, shaped their views, was a transfer of the tribes. That's what Sudan Intelligence Report No. 128 said. That's, when you go and look at the ABC report, what the ABC experts said. That's what Professor Daly said. That's what Mr Schofield said. That's what the Government's presentations to the ABC experts said. That's what the Government's memorial said. The only person who has said something different is Mr Bundy, and he is just plain wrong on this issue. Mr Bundy then went on and addressed the question of the provincial boundaries. He treated the references to the provincial boundaries in the annual reports as some sort of extraordinary revelation. He emphasised how there was a reference to changes in the provincial boundaries. That's hardly surprising; it's not surprising in the least. It's obvious that if you transfer a people, especially if you transfer a large and widely dispersed people like the Ngok Dinka, there will be territorial consequences. A transfer of people will at some point entail -- or at least potentially entail, depending on where they are -- territorial consequences. That's what happened here: after the transfer decision there were territorial consequences. But critically, the critical passage before the parties when they negotiated the Abyei Protocol was a tribal transfer that only subsequently had territorial consequences. It was the tribal transfer of the Ngok Dinka people that defined subsequently the area. That is not a case of the Condominium officials, as Mr Bundy has said and as the Government has argued, defining some area beneath the Kuir or somewhere else. They had no idea of what sort of area they might be transferring; they didn't think about it. What they transferred, as everybody said, including the Government, was a people: the Ngok Dinka people. Mr Bundy relied in particular on the annual reports. We can see references in the annual reports to the changes to the boundaries, but it's useful to look at them as well. They refer in both cases to the Ngok Dinka people, the Dinka Sheikh: Sultan Rob and Sultan Rihan Gorkwei are now included in Kordofan. Again, this is the territorial consequence of the previous tribal transfer. That's exactly how the Condominium officials treated the provincial boundary in the next years. Contrary to the Government's claims, Kordofan's boundaries were not extended to encompass any particular area, any specific area in 1905; again, because it was only the administration of the Ngok people, and not a defined territory, that had been transferred. In 1905, as we've seen, the Condominium officials had no idea about what territory the Ngok Dinka inhabited. Mr Bundy said this, and I will, with all respect, stick to my interpretation of what he said. In 1905, as we've seen, the Condominium officials had no idea about what territory the Ngok Dinka inhabited. Mr Bundy said this -- and I will, with all respect, stick to my interpretation of what he said -- very clearly when he made the statement in his opening comments that: "It is self-evident that as of 1905 Government officials would have had no knowledge of tribal locations ..." The qualification that he added [earlier] didn't change the substance of it, but if it did, it doesn't matter. You saw from the evidence, you heard from the evidence, you heard from Professor Daly that the Condominium couldn't have begun to define the territory of the Ngok Dinka in 1905; they had no clue, quite literally, about where the Ngok Dinka's territory might start and where it might stop. Professor Daly confirmed that. What they did was wherever the Ngok were, they put administration of the Ngok in the hands of the Governor of Kordofan, and they did it for a very simple and logical practical reason. When you look at what actually happened in the next years, the Condominium took no steps to delimit the territory because they didn't know what the territory might be. The Government concedes: "The southern limit of the transferred area remained to be delimited in 1905." Likewise the Government says that it was only in 1912, seven years after the transfer, that a provincial boundary line was established between Kordofan and Bahr el Ghazal and then, AS we've seen, never more than 25 kilometres from the Bahr el Arab. Mr Bundy also acknowledged this point clearly in his oral submissions on Monday, when he said -- and you can see it on the slide: "The southern limits of the transferred area, and hence the new post-transfer Kordofan/Bahr el Ghazal boundary, were not precisely established in 1905." That's a bit of an understatement. Far from precisely established, they weren't established at all.

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It makes perfect sense for the reasons that we’ve discussed that they couldn’t have. They didn’t have any idea about the territory of the Ngok Dinka, who -- not what, who -- they had transferred. Even after 1912, the southern boundary of Kordofan remained indeterminate and ill-defined because the Government didn’t even at that stage know where the Ngok really were, and you can see what Mr MacDonald called the spaghetti bowl of different boundaries that were there.

It’s also instructive to consider how the Twic Dinka, who we haven’t heard that much about and who were transferred along with the Ngok, were treated by the Government. In 1929 the Twic Dinka, who had been tribally transferred as a people in 1905, were retransferred back to Bahr el Ghazal. That’s undisputed between the parties. Again, everybody treated the Twic’s retransfer just the way they had treated their transfer: namely, as a tribal transfer of people, not of areas. We can see -- and this is the best version of the document that’s in the record; it comes from the Government’s presentation to the ABC experts. It’s the published gazette notice of the alteration of the boundaries of Kordofan and Upper Nile provinces.

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parenthetically I note that this is how boundary changes and boundary creations were noticed in the Sudan. If there was a boundary, it was noticed in the gazette, the way this is done. It is important to look at this report, and look at it closely. It refers as you can see to the transfer of the Ruweng Ajubba, the Ruweng Await and the Ruweng Alorr sections of Dinka from Kordofan to Upper Nile province. Those are transfers of people. What follows from that transfer of people? As a result then there are certain consequential consequences which if you look at the gazette notice are described.

Note down at the bottom of the page the Government’s comment on this: “By then the Twic were already returned to Bahr el Ghazal, probably in 1929.” It’s a sequence. You can look at it up there. There’s a transfer of people, a tribe, the Ruweng, which has a consequence of result as a consequence of transferring people which is to alter the boundaries. It’s no revelation that after you transfer a people there will then subsequently be a boundary adjustment or a territorial consequence; of course. People have to live somewhere.

The Government I think seems to believe that the Ngok don’t really live anywhere: they’re not north, they’re not south of the Kiir. But people do live somewhere, and if you transfer a people there will be territorial consequences.

The essential question that the Government tries to confuse is that what Article 1.1.2 refers to is a transfer of people. That’s what Sudan Intelligence Report No. 128, which was precisely the passage that was used to formulate Article 1.1.2, said. There were subsequent territorial consequences, but the essential guiding point is that there was a transfer of a people, which is just the way the English language of the Abyei Protocol reads.

Again, as the Government describes it here, it’s a transfer of people, the Twic, not of a territory. If that’s not clear enough, we can also look at how the Government has described this retransfer.

Let’s look at their memorial. They talk there about the retransfer of the Twic Dinka to Bahr el Ghazal. They don’t talk about a territory. They use that phrase multiple times in their memorial and you can see it in the slide.

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inevitably lapsing in his case into the plain English language of what the transfer was: it was a transfer of people and tribes. The retransfer of the Twic was exactly on the model of the original transfer of the Twic, and the original transfer of the Ngok Dinka, not of abstract pieces of territory. The simple point is that the description was precisely parallel to the earlier transfer decision that we saw in the Sudan Intelligence Report.

Finally Mr Bundy took us to what he would have defined -- the ABC defined -- the Abyei Area. He took us to Governor-General Wingate’s memorandum, and in particular to the statement that: “The districts of Sultan Rob and Okwai, to the south of Bahr el Arab, and formerly a portion of the Bahr el Ghazal province, have been incorporated into Kordofan.” This is treated as some extraordinary revelation also. That frankly has no more weight than the province boundary references previously discussed.

Of course there would be consequences from the transfer of the people. Those consequences would be the incorporation of an as yet unspecified area of the Ngok and Twic territories into Kordofan. That in no way changed of course the fact that the 1905 transfer was
17:47 a transfer of the Ngok people, not a transfer of
2 a particular area.
3 Wingate did not try to define the boundaries of
4 an area that was supposedly transferred; no, far from
5 it. He didn't try to define the way that the provincial
6 boundaries would be changed, because they didn't know,
7 it would have been impossible.
8 As Mr Bundy told us yesterday, the Condominium
9 officials didn't know what the area of the Ngok Dinka
10 was. That's clearly equally -- even if he hadn't conceded
11 it -- from the actions of the Condominium officials
12 between 1905 and 1911, when they didn't try to change
13 the boundary.
14 Nor did Wingate's reference to the Bahr el Arab in
15 any way purport to fix a northern boundary. As
16 Mr Schofield demonstrated this morning, it's unclear
17 what Wingate meant by the reference to the Bahr el Arab
18 whether it was the Ngol or the Kiir. He made that very
19 clear this morning when he took us through Wingate's
20 full memorandum, not just the bits that we were taken
21 to.
22 More fundamentally, though, in referring to the
23 Bahr el Arab Wingate was merely describing the general
24 location of the Ngok and the Twic. He was not
25 purporting to define the extent of some territory that

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17:50 grammar; Professor Crystal has told us what that means.
2 We look at the purposes, the purposes in 2005; not,
3 as the Government would try to have you do, the purposes
4 in 1905. Those weren't the purposes of the Government
5 and the SPLM/A in 2005. You look at the purposes of the
6 Abyei referendum in interpreting the Abyei Protocol.
7 Then, if you're going to have recourse to the
8 travaux, as we think you can, you pay attention to what
9 it was they paid attention to, what the Government told
10 you they paid attention to. That was not Wingate's
11 memorandum, that was not what Mr Bundy told you about.
12 Instead, as has been repeatedly said by the Government
13 itself, indeed on Saturday, precisely the passage they
14 paid attention to was Sudan Intelligence Report No. 128.
15 Therefore, even if you were to redo what the experts
16 looked at -- it's not an excess of mandate question, but
17 even if you were to redo it -- you would reach exactly
18 the same question that everybody else had.
19 I'd like to move on from that briefly to the
20 question of boundaries. We had a lot of discussion
21 about it this morning. You'll excuse me if I'm
22 cartographically challenged in this. I'll do my best to
23 try to explain my understanding of the boundaries, and
24 if I make mistakes I'm sure you'll ask questions so
25 I can correct myself.

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17:51 The Government's case is that there's
2 a well-established provincial boundary in 1905 between
3 Kordofan and Bahr el Ghazal, which was located on the
4 Kiir/Bahr el Arab. The Government argues that the 1905
5 transfer, as we've seen, was a transfer of a specific
6 area, from south of the boundary to north of the
7 boundary.
8 As we've seen, the Government concludes that the
9 purported provincial boundary is decisive to the
10 definition of the Abyei Area, because only territory
11 south of the boundary could have been transferred north
12 of the boundary to Kordofan.
13 For all the reasons that I've already explained,
14 that argument is irrelevant. That is not what the
15 Abyei Protocol in Article 1.1.2 refers to. You don't
16 need to look -- you can't look, frankly, if you properly
17 interpret Article 1.1.2 -- to that boundary. Instead
18 you look at the territory of the nine Ngok Dinka
19 chiefdoms.
20 But even if we did try to look at the Government's
21 boundary, the Government's boundary that plays such
22 a decisive role in its analysis, we'd see that its
23 argument is wrong. Even if it were a relevant issue,
24 the Government's claim that there was some sort of
25 "established provincial boundary" simply isn't correct.
Day 5 Wednesday, 22nd April 2009

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There wasn't in 1905 any determinate or defined
Kordofan/Bahr el Ghazal boundary. That's because no
such boundary had been established; and because, even if
there had been some reference to the Bahr el Ghazal as
a real boundary, that wouldn't have meant anything.
I'll briefly look at both points. Again, we've
heard testimony on this from Professor Daly and from
Mr Schofield, who have addressed it specifically. I'll
try to summarise as best I can what's in the evidence.
Their expert testimony on it I would suggest is much
more to the point, much more decisive.

Preliminarily, it's clear that in 1905 any
provincial boundary in Sudan was approximate and
uncertain. Professor Daly explained it. You'd just had
17 years of civil war, and Sudan was just coming to
grasp with peace. Nobody was paying attention to trying
to establish boundaries. There were no constitutional,
there were no legislative, there were no executive
pronouncements. There was no gazette that announced the
existence of a boundary.

There are a couple of references in annual reports
to how governors approached their particular
territories. But I would suggest that's not enough to
create a real provincial boundary of the sort that the
Government has relied on.

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two." You can see the rest of his answer there on the
slide.

We also heard how Bahr el Ghazal had only been
established as a province in 1902, less than three years
before the tribal transfer. No boundary between
Kordofan and Bahr el Ghazal was included on any
Government map before 1914, nine years after the
transfer. Even when that happened -- and there's the
cartographic evidence in the record, referred to in our
memorials -- it was only referred to as an approximate
provincial boundary.

The Government claimed that there's not a single
mention in the record of any boundary, other than the
Bahr el Arab, between the two provinces before the 1905
transfer; you can see the cite to that in the previous
slide.

In fact there were multiple references, that
Mr Schofield referred to, to other boundaries that had
been -- albeit in a very indeterminate and uncertain
way -- referred to in the preceding years. I won't
bother to take you to each of them, but Kordofan was
described during the Turkiyya as:
"... towards the south. No definite confines can be
described, as the extent of these dominions increases or

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You can tell that in part from the cartographic
evidence. I'm challenged on it, no doubt, but I'm
comforted because Mr MacDonald agreed with me. The only
Sudan Government cartographic evidence in the record of
any provincial boundaries is after 1905. If you look in
the transcript Day 3, page 166, Mr MacDonald
acknowledges under cross-examination that there wasn't
any Sudan Government map that identified a provincial
boundary at that time.

We can see how there wasn't a provincial boundary in
the Gleichen map. This, as he discussed, was a set of
chapter headings; it was not a provincial boundary. It
wasn't even until 1907 that the Sudan Intelligence
Office even began the process of trying to establish
provincial boundaries in Sudan.

You can see a lengthy quote. I'm not going to try
to read it, because I'd probably get it wrong. But
you'll keep it, and it draws attention to it. This is
how Mr Schofield explained the provincial boundary issue
before you this morning, and he did it very well.
Professor Daly said the same thing. He said:
"It should come as no surprise to the Tribunal that
with no administration in Kordofan in 1905, and no
administration in the northern Bahr el Ghazal, there was
simply no need for a provincial boundary between the

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determines the same kinds of references were made in the 1877
general report; and, if we go on to the next slide, in
similar discussions in 1884; and in Gleichen's handbook,
where it's said that the mudiria was vaguely described,
but may be described as enclosing the entire district
watered by the southern tributaries of the Bahr el Arab
and the Bahr el Ghazal regions.

The truth of the matter is there was historically
a huge degree of uncertainty, not surprisingly, about
where the boundaries might be between whatever the
political entities in this area was. The suggestion by
the Government that the three or four, two or three --
however many there were -- references in annual reports
by the governors created a boundary is simply untenable.
There was a process by which boundaries could be
established. That was a process that hadn't begun, much
less ended, by 1905.

Beyond that, even if one took those references that
the Government seizes on so assiduously to the
Bahr el Arab as a boundary, that itself doesn't work,
because the Bahr el Arab, that reference, those three
words didn't convey a meaning that was definite or
determinate to the Condominium officials. They didn't
have the same understandings of what those words meant.

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Trevor McGowan
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We've seen numerous references from Professor Daly and Mr Schofield to the different meanings. I went through some of the different meanings from Wilkinson and Percival and others. The Government has suggested that this was an isolated error by Wilkinson; that was its first characterisation. It's since become somewhat less isolated: it's in Wilkinson and Percival, and now Mahon and Lloyd and O'Connell and others. But it wasn't an error that had been rectified, as the Government puts it, by 1905. On the contrary, nobody knew what the situation was, nobody knew what the Bahr el Arab was in 1905 in the Condominium Administration. Preliminarily -- and moving on to the next slide -- it was the ABC experts who identified this confusion. We've heard a lot of criticism of their work, but the experts said: "Wilkinson was not alone in erroneously demarcating geographic features in the Sudan ... other reports make it clear that administrative officials mistook the Ragaba ez Zarga/Ngol for the Bahr el Arab and thought the Kiir was a different river." This is the report that has been castigated in such harsh terms, but this was something that the experts themselves identified in their archival research. They identified not just a single error by Wilkinson, as the Government would have had us believe, but a widespread error and a widespread confusion. The experts were right in reaching this conclusion. As you've seen from our reply memorial, it was a confusion that was shared by Percival, Mahon, Boulnois, Gleichen, Lloyd, O'Connell and Wingate himself, whose reports between 1903 and 1907 all proceeded on the premise that the Ngol was described as, referred to as, the Bahr el Arab. That's not surprising when you think about it. The MENAS report explains why that would be the case. Professor Crawford referred to a "featureless plain" on the first day of the proceedings. That in some sense was right. It's completely understandable, given the nature of the watercourses, that the Condominium officials wouldn't know where the rivers were, wouldn't know which river they had reached. Indeed, Mr MacDonald acknowledged the same thing. You can see the language that was used in his cross-examination on the current slide: that it would be very difficult to identify the course of any particular river. The Government tries to pretend that this confusion over what the Bahr el Arab was was a short lived mistake that was identified by 1905, and that's contradicted by essentially all the evidence in the record. The experts correctly concluded that the confusion lasted until at least 1907. If I can quote: "1905 and [1906] surveys correctly identified the Kiir as the Bahr el Arab and the Ragaba ez Zarga/Ngol for what it actually was (and labelled it the Bahr el Homr). It was not until 1908, however, that the local administrators in Kordofan consistent described the Ragaba ez Zarga as Bahr el Homr in their official reports." The historical record, if we go through it briefly -- Mr Schofield did this and I hesitate to repeat it too much, but Mr Schofield did it. If we go through the historical record, we will see that was precisely confirmed. It wasn't just Wilkinson and it wasn't just Percival who made the mistake; everybody was confused. You can see how Percival referred to the Ngol in May 1905, two months after the transfer of the Ngok Dinka people. He said that the wildlife was thick: "... between the Lol, Kiir and Bahr el Arab." He thought still in May 1905 that they were two separate rivers. That's the same reference that Percival had used earlier in his reports in 1905, when he referred to the Ngol as what he took to be the Bahr el Arab. The Government essentially concedes that not just Wilkinson but Percival made that same mistake. Then the Governor of Kordofan, O'Connell, in the 1906 annual report for Kordofan located Hasoba, which everybody agrees is on the Ngol, on what he called the Bahr el Arab. Again, that reference to the Bahr el Arab plainly meant the Ngol, that reference in 1906 by the Governor of Kordofan. The Government put Governor-General Wingate's memorandum front and centre in its case. Mr Schofield walked you through what was in that memorandum and explained how Wingate himself in that memorandum continued to be confused about what the Bahr el Arab was. That confusion was reflected and explained well by Mr Schofield. I am not going to take you through those particular provisions because I'm worrying about my time, but you can see the references there that Mr Schofield took you to. He talked about the much-vaunted question of the Bahr el Arab and the Bahr el Homr. Much of the course of these rivers is still unknown. Doubt still exists, he said. Then, moving on, he also talked about the "various
waterways, known locally as the Arab [the Bahr el Arab], the Lol, the Kiir*; treating the Kiir and the Bahr el Arab as separate rivers.

Again, if you look at the map that accompanied the Gleichen text -- we can see this is the map that Wingate would have had in front of him, this was the map that was created in 1904, this was the map that Mr MacDonald was questioned about -- when you look at the map and how it labels the rivers, you will see how the Ngol is referred to as the Bahr el Arab, the Ngol, the Ragaba ez Zarga.

It's hard to read on this -- I guess we don't have a blowup -- but the Ngol Ragaba ez Zarga continues on the 1904 map, which wasn't replaced until well past 1907, as the Bahr el Arab. Actually here we have the blowup and it's a little easier for all of us to see. You can see there how the Bahr el Arab is clearly referred to as the Ngol.

So the only official map that the Government had at 1907, as the Bahr el Arab. Actually here we have the blowup and it's a little easier for all of us to see. You can see there how the Bahr el Arab is clearly referred to as the Ngol.

The Government didn't produce. They produced other parts of this map; this is the piece they didn't produce. This community mapping report didn't get you up to 10°35'.

I'd like to move quickly on to what all this geographical confusion meant, and then to end.

This geographic confusion on this relatively small part of the case, I would suggest, meant that the references by the Government to the provincial boundary didn't have any force, they didn't have any impact. Even if there had been a provincial boundary that had been established, which there wasn't, the references to the Bahr el Arab were confused; they didn't have any determinate or definite meaning in 1905.

The Government's effort, therefore, to found its case on the notion that something was taken from beneath the boundary and put above the boundary, and that that case on the notion that something was taken from beneath the boundary and put above the boundary, and that that is decisive, simply doesn't hold up.

Article 1.1.2 does not require us to do that. Article 1.1.2 looks to the error of the nine Ngok Dinka chiefdoms, so we don't need to do this. Even if we had to approach this from the perspective of the Government -- which we do not and if we pay attention to the language of Article 1.1.2 would not do -- then the Government's case nonetheless falls apart because there wasn't a boundary in 1905 that had the significance that the Government attaches to it; there was simply confusion. No boundary had been established, nothing had been gazetted. The only references were to the Bahr el Arab, and that didn't, as we saw, mean anything.

I'd like to finally turn to two points about the witness testimony.

I made reference this morning to Whittingham's sketch map which we put in. I was searching desperately for the Ngok Dinka dugdug and couldn't find it on my slide. I've now found it. Here you can see on the map, just to the south of the Ngol, a reference to a Ngok Dinka dugdug. You can just see it in the second white box there.

There's no question but that this was the Ngol river. Obviously this is one dugdug; one dugdug does not a kingdom make. On the other hand, given the extraordinarily sparse and fragmentary nature of the record, this provides yet another piece of the puzzle, another piece of the evidence that contradicts Professor Crawford's repeated assertion that there's not any documentary evidence that shows Ngok Dinka on the Ngol or north of the Ngol. Here you have a Ngok Dinka dugdug exactly on the Ngol.

I would remind you that is the map that the Government didn't produce. They produced other parts of this map; this is the piece they didn't produce. This is the piece that we had to go to the Survey Department and copy on the world's worst copying machine and try and put in front of you. I apologise for the quality, but it's the best that they would give us.

Finally turning, as I promised, just briefly to the witness evidence. We heard a question to Dr Poole this morning, Professor Crawford put to Dr Poole the following question:

"Question: '... the community mapping project, shows permanent Ngok Dinka villages were located throughout the Bahr region extending north to ... latitude 10°35' north, both in 1905 and for decades thereafter.'

"There are two different issues here. One is the Bahr region. But I'm interested in the aspect of that statement that says 'extending north to ... latitude 10°35'. Do you accept the accuracy of the statement that you showed that the Ngok Dinka villages extended to 10°35' north in 1905?"

Then we heard in his submissions just a few moments ago how Professor Crawford said: and look, Professor Poole admitted on cross-examination that the community mapping report didn't get you up to 10°35'.

The truth of the matter was: Dr Poole was dead straight honest. He got asked that question, Professor Crawford read it out to him from our rejoinder, he answered honestly and transparently.

You heard, he said: no, my report didn't go up to
18:11 1 10°35'; I examined a study area that didn't go that far; 2 I couldn't go that far. That's an honest answer, 3 an honest answer to a question that was a little 4 different, to be honest. 5 Let's put up what our rejoinder said at paragraph 5, 6 and let's blow it up. Here's what Professor Crawford 7 didn't read to you. He read to you just the last bit. 8 In fact, here's what we said, and it sort of sums up our 9 case: 10 "In sum, as a fair reading ['a fair reading'] of (a) 11 the pre-1905 and post-1905 documentary records, (b) the 12 cartographic evidence, (c) the environmental and 13 cultural evidence (including the MENAS expert report), 14 (d) the testimony of Professor Cunnison ..." 15 Who the Government could have put on a video link, 16 and who was well enough to give two witness statements, 17 and who at 86 I think could have come here, or at least 18 been on a video link: 19 "... and Mr Tibbs, (e) the Ngok Dinka witness 20 testimony [all 26 statements, and all 48 statements to 21 the experts], and finally (f) ..." 22 And this is where Professor Crawford started reading 23 to Mr Poole: 24 "... the Community Mapping Project, shows permanent 25 Ngok Dinka villages were located throughout the Bahr

18:14 1 accomplished in legal terms. Different possibilities 2 are imaginable, starting from the displacement of 3 persons to the extension of personal jurisdiction or 4 territorial jurisdiction, or both, to these people. 5 So in your view which meaning is conveyed by this 6 term applied in our case, by this term of "transfer"? 7 Thank you very much.

18:15 1 at 12 o'clock, which means that each side, including the 2 10 minutes left to the Tribunal for asking questions, 3 will have 75 minutes. I thank you very much.

18:16 1 (6.16 pm) 2 (The hearing adjourned until 9.00 am the following day)

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