

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.

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09:03 1 Wednesday, 22nd April 2009

2 (8.59 am)

3 THE CHAIRMAN: Mr Born will finish his presentation.

4 Submissions by MR BORN (continued)

5 MR BORN: Yes, Mr President, thank you and good morning.

6 You will recall that I finished yesterday discussing

7 one of Wilkinson's treks.

8 In 1903, going back to the pre-1905 Condominium

9 record, Mahon, the Governor of Kordofan, again toured

10 Kordofan, and again in the dry season, of course. His

11 record, or the account of his trek, is in Sudan

12 Intelligence Report No. 104 which you can see on the

13 screen. This report debunks another one of the

14 Government's earlier claims, namely that Sultan Rob

15 lived to the south of the Kiir/Bahr el Arab in 1905.

16 You can see on the current slide -- and I'm sorry

17 for the previous misreference -- the Government's

18 statement that Sultan Rob was there, the Ngok Dinka's

19 paramount chief, his village was to the south of the

20 river in Bahr el Ghazal. In the wet season he went

21 south to the River Lol, not north; we have seen that's

22 wrong. But the other part of the sentence is also

23 wrong, as we will see.

24 In his 1903 trek Mahon travelled from Muglad, in the

25 north of course, through Turda to Fauwel, which were

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09:01 1 of the Kiir.

2 Again, this does take a degree of what I have

3 referred to openly as detective work, one has to look at

4 the documents, but one can't just pretend that that

5 work, that analysis, doesn't need to be done. One does

6 need to do it.

7 The Government, when it engages in the effort,

8 suggests that Mahon really was an enthusiastic trekker

9 and therefore that he made a big loop to the west of

10 Um Semima, and that therefore when he said he went west

11 it really meant east. I would suggest to you that that

12 makes no sense.

13 When you look at Mahon's report, he describes quite

14 carefully the directions that he takes. He refers to

15 going southeast, to northeast, to southwest at various

16 points in his point. I therefore suggest that when he

17 described going west to Sultan Rob's village, it is very

18 clear that he was going to the new village at Burakol.

19 Mahon's report then goes on to describe how he

20 arrested an Arab sheikh on his return to Bahr el Homr,

21 and this was returning north from Sultan Rob's place.

22 The MENAS report confirms -- and I think

23 Professor Crawford's reference yesterday to the dominant

24 usage of the words "Bahr el Homr" as referring to the

25 Ngol makes it fairly clear -- that in this dry-season

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09:00 1 both, as we know, north of the Ngol. He then turned

2 west and headed towards what he called Sultan Rob's, and

3 he describes his trip as well. Now Sudan Intelligence

4 Report No. 104 is on the screen. He says:

5 "I next went west to Sultan Rob's and was well

6 received ..."

7 He presented a second-class robe of honour. He

8 described the Dinka, and at the end he noted, consistent

9 with the other things that we have seen, they have large

10 herds of cattle.

11 When Mahon reports that he travelled west from

12 Fauwel and Um Semima to Sultan Rob's -- Sultan Rob's

13 village -- it's clear that Sultan Rob had to have been

14 located in what's called the village of Burakol. You

15 can see that on the current map.

16 When you leave Um Semima, Sultan Rob's old village

17 at Mathiang, south of the Kiir, is at least due south

18 and frankly southeast from where you began. In

19 contrast, Sultan Rob's new village at Burakol is to the

20 southwest, clearly to the southwest of Fauwel and

21 Um Semima.

22 Mahon's description of Sultan Rob's village being to

23 the west is thus much more consistent with Sultan Rob

24 being where he had been reported to be before namely at

25 Burakol, north of the Kiir, and not at Mathiang, south

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09:03 1 visit Mahon arrested the Arab sheikh on the Ngol.

2 That's the only reference that one could have been

3 making if one was going north, the only river that one

4 could have been referring to if one was going north from

5 Burakol on the northern side of the Kiir. The river

6 that one come to would be what is today the Ngol, and

7 that would be where he found an Arab sheikh and arrested

8 the sheikh; in the dry season, which is exactly

9 consistent with the evidence we've previously discussed

10 of the Messiriya coming south during the dry season to

11 graze on the Ngol. That makes perfect sense of the

12 documents.

13 The third pre-1905 Condominium report that I'd like

14 to look at was by Captain Percival of the Arab Mounted

15 Infantry, also called the Camel Corps. The full account

16 of this report, it's a dry season December 1904 trek,

17 and you can find the full account of his trek in

18 Gleichen's 1905 compendium.

19 This report provides very clear evidence of

20 substantial numbers of Ngok Dinka settlements well to

21 the north of the Kiir, as well as indirect but I would

22 suggest powerful evidence of Ngok Dinka to the north of

23 the Ngol.

24 You can see on the current slide an excerpt of

25 Percival's trek notes, which are arranged on a daily

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<p>09:04 1 basis. He would describe what it was he encountered, 2 typically, as you can see, in very short, terse accounts 3 but what he encountered each day of his trip. 4 When you look on the trek notes what you see is that 5 a few days' journey from Lake Keilak up in the north he 6 struck "what I take to be the Bahr el Arab". In fact -- 7 and it is, I think, now agreed by everyone -- the only 8 river that Percival could have struck here was the Ngol, 9 not the Kiir. When he referred to the Bahr el Arab 10 here, it's common ground that this was not the 11 Kiir/Bahr el Arab in today's parlance, but rather the 12 Ngol. 13 That's confirmed in the MENAS report and I think it 14 was confirmed yesterday by Mr MacDonald. I would 15 underscore that that's different from the Government's 16 initial submissions, as well as its submissions before 17 the ABC. 18 It's not surprising, of course, that Percival would 19 have had this view; it's exactly the view that Wilkinson 20 had the previous year. We need to read Percival's 21 report with some care, and I'll try to do that and I'll 22 work through it with you, but when you do read it and 23 you read it with care, I think it provides powerful 24 evidence of where the Ngok were to the north of the Kiir 25 and inferential and indirect but nonetheless powerful</p> <p style="text-align: center;">Page 5</p>	<p>09:07 1 going to see explicit reference to how that occurred. 2 Indeed, when we read Percival's notes with care -- 3 and the Government prefers not to; it prefers to pluck 4 out snippets, soundbites if you will, and say, 5 "Uninhabited, therefore no Ngok" -- but Percival goes on 6 and only a few miles from where he had described the 7 area as uninhabited he says he encountered some 8 Ngok Dinka. He wrote: 9 "I surprised them and they thought we were Arabs 10 raiding ..." 11 That's not surprising; it was the Arab Mounted 12 Infantry, and there was a history of slave raiding and 13 cattle raiding in that area. It's not surprising that 14 the way that he found the Ngok Dinka was by surprising 15 them. If they knew he was coming, they would hide. 16 He then wrote: 17 "... but I found them friendly and obtained 18 a guide." 19 After he had been able to assuage their concerns. 20 One I would suggest powerful explanation for why the 21 early Condominium reports such as they are -- and there 22 are virtually none -- don't mention many Ngok in 23 particular areas is that the Ngok hid, for very good 24 reasons. 25 Second, it could well be -- it's not clear because</p> <p style="text-align: center;">Page 7</p>
<p>09:06 1 evidence of where the Ngok were north of the Ngol. 2 When he reached the Ngol, Percival noted: 3 "I have been some miles up and down the river but 4 can find no trace of inhabitants. The country between 5 here and the jebels would appear to be uninhabited ..." 6 And Professor Crawford and the Government of course 7 seized on that. 8 The fact that Percival found the banks of the Ngol 9 uninhabited during the dry season is in some tension, of 10 course, with the reports from Mahon and Wilkinson, who 11 had said they had encountered villagers coming south 12 from the Ngol, between the Ngol and the Kiir. 13 There are various explanations for that. One can't 14 be positive based on these somewhat fragmentary reports, 15 but one has to think about it and try to explain it. 16 One explanation is that Percival was leading, as we've 17 seen, the Arab Mounted Infantry. 18 It was a substantial contingent, 40 men or so with 19 rifles on camels and horses and mules. It was 20 a formidable force for rural villagers in small villages 21 when the major part of the population -- not all of 22 them, but a major part of the population, the males -- 23 were to the south with their cattle herds. It would not 24 be surprising if local villagers were afraid of that 25 Arab Mounted Infantry and chose not -- and indeed we're</p> <p style="text-align: center;">Page 6</p>	<p>09:08 1 this is a terse and fragmentary report -- that when 2 Percival described the river as being uninhabited, he 3 meant the banks of the river rather than the areas set 4 slightly back from the river. 5 Indeed that's consistent with the environmental 6 evidence, which indicates that the Ngok would not build 7 permanent settlements right on the river. Why wouldn't 8 they do that? Because, as we saw previously, there's 9 seasonal flooding. If you build your houses on the 10 river -- people learned that even in this century in New 11 Orleans and other places -- your houses get washed away 12 when the seasonal rains come. 13 Therefore, the houses would be set back in wooded 14 areas somewhat away from the river and therefore 15 Percival, especially if the people who were hiding from 16 them, would not have seen them. 17 Therefore, I would suggest that Percival's notes, 18 when you look at them carefully, in fact provide 19 powerful evidence that this area of the Ngol was in fact 20 inhabited by the Ngok Dinka. That is in particular when 21 you go on and read two other aspects of his reports 22 having to do (a) with the fire and (b) with cattle 23 tracks. 24 First Percival reports seeing a fire not far from 25 where he crossed the Ngol. Again this involves</p> <p style="text-align: center;">Page 8</p>

<p>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</p> <p style="text-align: center;">Page 9</p>	<p>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</p> <p style="text-align: center;">Page 11</p>
<p>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</p> <p style="text-align: center;">Page 10</p>	<p>09:13 1 as they could puts their permanent villages, from which 2 they were coming on their seasonal migrations, up above 3 the Ngol; which is why Percival saw cattle tracks on the 4 Ngol. Those were Dinka cattle tracks coming south as 5 hard as they could to get down to where there was more 6 water. That is a consistent explanation that fits 7 precisely with the environmental evidence, and it's one 8 of the reasons that I took you to the environmental 9 evidence. 10 I would suggest also that it is the first in 11 a number of rather clear documentary indications that, 12 contrary to what Professor Crawford told you, there's no 13 evidence at all of the Ngok being around the Ngol, much 14 less to the north of the Ngol. Here, when you actually 15 read the record with some sensitivity, in light of what 16 the environmental evidence shows about these people's 17 lifestyles, there were Ngok not just on the Ngol, but 18 coming hard south from above the Ngol. 19 Percival then continued southwest, and he reached 20 a village that he called Achak. He said he reached it 21 after passing through cattle grazing country; Ngok 22 cattle grazing country. That's part of where those 23 60,000 cows we heard reference to would be grazing. 24 It's part of what Mahon referred to as "large herds of 25 cattle"; that's where they would be grazing. Again,</p> <p style="text-align: center;">Page 12</p>

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 "bigish" 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 Yamoi 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 with Mahon 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

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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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09:16 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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09:19 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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<p>09:20 1 were only wandered parties of Arabs somewhere, it in no 2 way reflects where the Ngok really were. On the 3 contrary, it suggests that they were exactly there, and 4 just like he told the guide to lead the Condominium 5 officials away from where the Ngok were, that statement 6 in all likelihood was meant to conceal where the Ngok 7 were located.</p> <p>8 It's also important to look at the maps that 9 Percival produced. The Government just to disclose just 10 one part of Percival's full sketch map. Percival took 11 a long trek, as we've seen, coming from Lake Keilak down 12 to Sultan Rob and then going back up to where he 13 started.</p> <p>14 The Government has only disclosed part of that full 15 sketch map, and that is the part that begins at Burakol, 16 in the southern part of where Percival trekked, and goes 17 further south. What the Government discloses, 18 therefore, omits the sketch map for the area north of 19 the Kiir, north of Burakol, up to Keilak; the part of 20 the Abyei Area that the Government says didn't have any 21 Ngok in it.</p> <p>22 The Government has not disclosed those parts of the 23 sketch map, notwithstanding our requests and 24 notwithstanding your order; notably those parts of the 25 sketch map which show what it was that Percival reported</p> <p style="text-align: center;">Page 17</p>	<p>09:23 1 you can see the various small villages that are referred 2 to. Ms Miles took Mr MacDonald through those and he was 3 not at all able to deny that those are very likely 4 depictions of Ngok villages clustered in that region.</p> <p>5 I would also say that the fact -- and note that 6 there are very few -- very, very few -- Ngok villages 7 south of the Kiir on this map; even though it is a map 8 that is focused on the Kiir going south, very few Ngok 9 villages. The reason I would suggest is on the next 10 slide. It is a slide from the Government that shows the 11 area of the Twic. Remember the Ngok aren't alone in 12 this region: the Twic live south of the Kiir.</p> <p>13 Another fundamental problem with the Government's 14 case is: if it's the Ngok who really live only south of 15 the Kiir, where do the Twic live? Actually the 16 Government tells you where the Twic live: the Twic live 17 south of the Kiir. Frankly, the area south of the Kiir 18 on the Government's case gets mighty crowded, it's full 19 of Twic and Ngok, while the area north of the Kiir is 20 dead empty.</p> <p>21 I would suggest to you that both of those 22 propositions are completely improbable. The Twic and 23 the Ngok Dinka don't live cheek-to-jowl in Condominium 24 high-rises south of the Kiir, nor is the area north of 25 the Kiir dead empty.</p> <p style="text-align: center;">Page 19</p>
<p>09:22 1 in those areas. Look at what the Government did: it 2 disclosed the part of the sketch map beneath the Kiir 3 and said, "Ah ha, there are Ngok beneath the Kiir". It 4 did not disclose the part of the sketch map above the 5 Kiir and it now argues that there is no evidence that 6 the Ngok were above the Kiir.</p> <p>7 I would suggest that that use of the document, 8 submission of part of the document and not the whole 9 document, does not provide a basis for concluding that 10 there weren't Ngok up there. I would suggest, on the 11 contrary, that it provides a very powerful negative 12 inference that just as Percival reported that he 13 encountered Ngok driving cattle just south of the Ngol 14 and cattle tracks from Ngok cattle on the Ngol, that 15 those sketch maps which the Government -- and you can 16 see it listed on the Government's own index -- that 17 those sketch maps which were taken and which existed 18 showed the Ngok in exactly those places.</p> <p>19 I'd like to move on. Even the partial sketch map 20 that the Government does disclose clearly identifies 21 a number of villages. Note this is just the bottom part 22 of Percival's sketch map, just the southern part, but 23 even that part shows a whole cluster of villages to 24 north of the Kiir.</p> <p>25 It's a little difficult to note on the slides, but</p> <p style="text-align: center;">Page 18</p>	<p>09:24 1 It's rather just as the environmental evidence 2 suggests: the Ngok lived predominantly north of the 3 Kiir. There are few villages, as the maps showed, just 4 south of the Kiir, and then the Twic occupied the major 5 area between the Kiir and the Lol, while the Ngok occupy 6 the area of the Bahr extending up to the goz.</p> <p>7 Let's go on to the next trek by Percival in 8 March 1905. He went from Wau to Taufikia in Upper Nile, 9 and that trek included a lot of areas not in the Abyei 10 Area but some that are, and it's reported in Sudan 11 Intelligence Report No. 130. He described, and this is 12 just briefly, that:</p> <p>13 "Sultan Rob appears to exercise a certain amount of 14 authority over a large area of country, extending from 15 the Shilluk's boundary in the east to the Chak Chak 16 boundary in the west, with the Bahr el Arab as his Arab 17 frontier on the north and the Lol River both banks and 18 the Bahr el Ghazal in the south."</p> <p>19 It's clear that when Percival referred to the 20 Ngol/Ragaba ez Zarga, he did so by reference to the term 21 Bahr el Arab, and that is both confirmed by the MENAS 22 report and acknowledged by the Government. Thus when 23 Percival surmised that the Bahr el Arab is Sultan Rob's 24 Arab frontier he is referring to the Ngol, not the 25 Kiir/Bahr el Arab.</p> <p style="text-align: center;">Page 20</p>

<p>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</p> <p style="text-align: center;">Page 21</p>	<p>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 Cunnison 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</p> <p style="text-align: center;">Page 23</p>
<p>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</p> <p style="text-align: center;">Page 22</p>	<p>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</p> <p style="text-align: center;">Page 24</p>

09:31 1 with what Professor Cunnison and Professor Allan told
2 you about the environmental evidence.
3 The Gleichen compendium also included a map, and we
4 can see that here, and we're going to blow it up.
5 You'll remember we looked at this with Mr MacDonald.
6 The map has descriptions of the Dar Jange; you can see
7 it down there. The Bahr el Arab is of course the
8 Kiir -- I'm sorry, is of course the Ngol; I've committed
9 Wilkinson's mistake. The map again shows Sultan Rob
10 extending up to the Ngol; it shows the Messiriya far to
11 the north above the goz.
12 That is it, members of the Tribunal, for the
13 pre-1905 record. As I've said, it's fairly limited, but
14 it nonetheless allows us to draw a number of important
15 conclusions.
16 It places the Ngok with permanent villages,
17 prosperous agricultural fields, scattered throughout the
18 Bahr region. It doesn't tell us exactly where they are;
19 it's impossible given the nature of the record. But it
20 does tell you that they're definitely between the Ngol
21 and the Kiir, and it provides strong inferential
22 evidence that they're well to the north of the Ngol.
23 That's exactly the area that the Ngok had migrated
24 into; and the Government claims, without any support,
25 they'd moved out of. The Condominium evidence shows you

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09:34 1 The phrase "Dar Jange" does not mean "the territory of
2 the Ngok"; it means "the territory of the Dinka".
3 It's a general phrase.
4 MR BORN: Mr Chairman, I never once interrupted the
5 Government's presentations --
6 PROFESSOR CRAWFORD: Well, I will on this occasion because
7 that's an outrageous remark.
8 MR BORN: -- and I would appreciate not being interrupted.
9 THE CHAIRMAN: Please, Mr Born, go on.
10 MR BORN: Thank you very much.
11 These two areas point towards the territory, as
12 I said, of the Ngok Dinka, and they're both well up in
13 the north, well above the Abyei Area, and they point
14 towards Ngok Dinka territory.
15 Lloyd also cites a report that says the southern
16 boundary of Dar Homr is between the Bahr el Arab and the
17 River Kiir, the latter being occupied by the Dinkas
18 under Sultan Rob. It's clear here, when he referred to
19 the Bahr el Arab, that he meant the Ngol, as we have
20 seen, and not the Kiir, which he called the
21 "River Kiir". That's the same terminology that
22 Wilkinson, Percival and Gleichen had all used in the
23 preceding years.
24 Thus what we have from Lloyd is the Messiriya going
25 no further south -- he talks about the Dar Homr's

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09:33 1 that in fact they hadn't moved out of it; they were
2 still there. Gleichen's compendium, which sums up what
3 we know about the pre-1905 record, puts their southern
4 boundary on the Kiir/Bahr el Arab, which makes perfect
5 sense. It also puts Sultan Rob to the north of the
6 Kiir/Bahr el Arab, in Burakol, from 1902 to 1905.
7 The pre-1905 Condominium records don't let us
8 identify every Ngok village, or all the Ngok territory,
9 with precision. They couldn't; that's in the nature of
10 the record. But they give us powerful evidence to
11 support the SPLM/A's claim, and to completely contradict
12 the Government's suggestion that the Ngok were either
13 entirely or predominantly south of the Kiir. That makes
14 no sense at all.
15 As we will see, the post-1905 evidence, which we're
16 now going to turn to, does that even more emphatically.
17 What the post-1905 evidence shows is that the Ngok were
18 scattered widely throughout the Bahr, extending up to
19 the goz.
20 Let's start with Lloyd, who prepared a map in 1907
21 which is on the current slide. It shows -- and it will
22 be highlighted for you -- that there were two references
23 to Dar Jange, which means the territory of the Ngok.
24 Again, these are limited references --
25 PROFESSOR CRAWFORD: I'm sorry, sir, this is repeated.

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09:35 1 grazing territory coming south -- no further south into
2 Dar Jange, the Ngok Dinka territory, during the dry
3 season, than approximately the Ngol. That description,
4 the Messiriya coming down and grazing around the Ngol,
5 is exactly right. It has the Messiriya coming to the
6 Ngol. That is in no way inconsistent with the Ngok
7 being there. On the contrary, as we're going to see, it
8 is precisely consistent with the Ngok being there.
9 There's another fire report by Lloyd at the same
10 time. I'm not going to spend much time on that because
11 we've already looked at what the sources of fire are.
12 Again, though, it's a confirmation of Ngok Dinka
13 agricultural practices in the area.
14 I'd like to move on quickly -- because I've used
15 a bit more time than I would have liked, I'm told --
16 through Hallam's report. It's another instance where
17 the Government has only provided partial copies of maps,
18 and not the full copy showing all of Hallam's trek
19 reports. I would suggest in these circumstances it's
20 very difficult to draw conclusions about where the Ngok
21 were not.
22 I would also point out though that Hallam's map,
23 which the Government relies on, again confirms that in
24 1997 the Ngok Dinka paramount chief, at this point
25 Kuol Arop, was in Burakol, to the north of the river.

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<p>09:36 1 As we've seen, that's exactly what Percival and Mahon 2 had previously reported. 3 The Government suggests that there are Arab 4 settlements shown to the north of the Kiir here. That 5 is completely wrong. When you read the route report by 6 Hallam he talks about not settlements, but Arab "camps" 7 in the dry season, Arab "camping ground" in dry season. 8 These are not villages. 9 That's another one of the reasons that I spent so 10 much time with the environmental evidence. These are 11 seasonal nomadic camping grounds. When the Messiriya 12 came south from their area above the Muglad, they would 13 spend six days or so at particular camps; not villages. 14 Again, that's precisely consistent with the 15 environmental evidence. 16 The Government goes on and makes much of a sketch 17 map and a letter by Whittingham, a British officer who 18 toured the area in 1909. These materials support not 19 the Government's case but our case. The Government once 20 more only provides selective portions of Whittingham's 21 map. 22 Whittingham trekked through several areas: (1) the 23 country north of Turda and south to Dawas and Abyei; (2) 24 Turda to Koak, and Bara to Mellum; and (3) Abut off Bari 25 to Wul.</p> <p style="text-align: center;">Page 29</p>	<p>09:39 1 First, if you look on the left, you will see something 2 marked "cult", cultivation. That is a cultivated area. 3 It is to the north of Koak, in the region of Nyama, to 4 the north of the Ngol. A cultivated area, and that's 5 another reason that I spent so much time on the 6 environmental evidence. 7 Who cultivates in the Bahr? We know who cultivates 8 in the Bahr, and you can see on that map cultivated area 9 up there in the north. That is Ngok Dinka agricultural 10 lands. It's not Messiriya agricultural lands because 11 (a) as we saw, the Messiriya don't like farming, and (b) 12 when the Messiriya do farm, they do it with millet up in 13 the north in the goz, where their crops grow. They 14 don't do it in the Bahr down here. 15 That is Ngok Dinka, and that is one of the reasons 16 that the Government I would suggest did not disclose 17 that map, because that map provides clear evidence of 18 Ngok Dinka cultivation well to the north. 19 The map also shows something else: it shows a Dinka 20 dugdug on the south bank of the Ngol in the region of 21 Bara, to the east of the Abyei Area. As we've seen, 22 dugdugs are characteristic of the Ngok Dinka and not of 23 the Messiriya. 24 Finally, there are repeated uses of Ngok Dinka 25 terminology here. One can scoff at toponymy, as</p> <p style="text-align: center;">Page 31</p>
<p>09:38 1 The Government only disclosed a partial sketch map 2 of the first section of Whittingham's trek; it did not 3 disclose anything else. We made requests for it, the 4 Tribunal ordered production of it, and nothing was 5 produced. 6 The focus of Whittingham's trek was to mark 7 locations of watering spots. This has been scoffed at 8 in previous discussions, saying: "Oh, of course 9 everything would be noted." But when you look at 10 Whittingham's map it omits numerous villages in places 11 we know from other sources there had to be villages. 12 Therefore the fact that Whittingham's map doesn't show 13 particular things doesn't mean they weren't there; it 14 means he was making a drawing for other purposes. 15 Finally, perhaps the most important point: although 16 the Government didn't disclose it, when we got the very 17 limited access that we did to the Survey Department 18 records, we obtained -- pretty much by chance, 19 frankly -- part of the Whittingham sketch map for the 20 area between Turda and Koak to Bara and Mellum. This 21 was what the Government did not disclose, including 22 after the Tribunal's order. I apologise very much for 23 the poor copying that is there, but that is all that we 24 were given access to in the Survey Department. 25 This sketch map identifies some important points.</p> <p style="text-align: center;">Page 30</p>	<p>09:41 1 Professor Crawford did, but the repeated use of 2 Ngok Dinka names in this area I would suggest is, 3 together with the other evidence, fairly probative. 4 Again, it's important to note the Government didn't 5 disclose this part of the trek report and instead 6 disclosed other parts to the south, and I would suggest 7 that one can draw a powerful inference from that. 8 I'd like to move on to a 1912 publication by the 9 Sudan Intelligence Department. This was an exhaustive 10 book-length study of the Kordofan, it's titled Kordofan 11 and the Region to the West of the White Nile, and it's 12 an important work which summarised the existing 13 Condominium knowledge at the time. 14 It described the relevant parts of Kordofan as 15 follows, and you can see it on the slide: 16 "To the south of Dar Nuba and living in the open 17 plains which extend to the Bahr el Arab there is 18 a considerable Dinka population. As the country dries 19 up and the mosquitoes disappear they move slowly south, 20 watering at the various rain pools to the Arab or Gurf 21 river [that's the Kiir], along the banks of which they 22 form innumerable small settlements of two or three huts 23 each." 24 We have seen those descriptions before. This is 25 exactly consistent with the environmental evidence. It</p> <p style="text-align: center;">Page 32</p>

<p>09:42 1 shows the Ngok living throughout the Bahr region, the 2 plains, and moving south to around the rivers during the 3 dry season. 4 There's then a reference in the next slide to the 5 Ngok Dinka, specifically under Sultan Rob, and then 6 another reference to the fact that it was very difficult 7 for the administrators to go to this region. We have 8 seen that quote previously and I won't read it out. 9 As with pre-1905 reports, this account by the Sudan 10 Intelligence Department places the Ngok entirely north 11 of the Kiir, not to the south of it. It describes 12 a considerable Ngok population living throughout the 13 plains of the Bahr, north of the Kiir and the Ngol and 14 northeast towards Lake Abyad. 15 That population moves south to the Kiir in the dry 16 season, which would be expected, and it lived in 17 characteristic Ngok villages. That's consistent with 18 what Professor Cunnison described, it's consistent with 19 the environmental evidence and it's another powerful 20 documentary indication, contrary to what 21 Professor Crawford said, of the Ngok living throughout 22 the Bahr region. 23 There is a map that accompanied the Kordofan land 24 book; it's dated 1913 and it's a Survey Office map. It 25 places the Dinka -- and you can see on this slide</p> <p style="text-align: center;">Page 33</p>	<p>09:45 1 occupy an area -- and you can see this on the slide -- 2 on the Bahr el Arab, extending northwards along the main 3 watercourses, of which the largest is the Ragaba 4 Umm Biero; that's the Nyamora. Again, focusing on the 5 Ngok living to the north of the Kiir, not to the south 6 of the Kiir. 7 It's important to recall also -- going back to 8 Professor Crawford's statements about the documentary 9 record -- the 1965 and 1966 Abyei Agreements which were 10 between the Messiriya and the Ngok. In those agreements 11 the Messiriya provided, the Messiriya themselves agreed 12 to the fact that the Ngok could return to their 13 homesteads at Ragaba ez Zarga and other places where 14 they used to live. 15 This is an agreement by the Messiriya referring 16 specifically to the Ragaba ez Zarga, to the Ngol. 17 Again, recall Professor Crawford's statement that there 18 was no documentary evidence of the Ngok living around or 19 to the north of the Ngol. That is simply not true. 20 There is documentary evidence both here, and the things 21 we looked at previously. 22 It is difficult documentary evidence to be sure, but 23 that's because it's a difficult documentary record and 24 a sparse one. But when you look carefully at all the 25 pieces, it provides a consistent set of observations of</p> <p style="text-align: center;">Page 35</p>
<p>09:43 1 referred to parenthetically as Dar Jange, and we can go 2 back to Professor Crawford's interruption of me -- it 3 places the Ngok Dinka squarely in the area between and 4 above the Kiir and the Ngol. 5 It extends up to around 10°20' latitude, and it is 6 precisely consistent with the environmental evidence and 7 what we've otherwise described. It extends barely at 8 all beneath the Kiir/Bahr el Arab, and it puts the 9 Messiriya far up in the north, just the way the 10 environmental evidence and Professor Cunnison described. 11 I am going to skip the next slide, which shows 12 a number of Ngok Dinka villages that you can look at, 13 but I'd like to move on to the next slide. This is 14 Dupuis's map, which shows a substantial number of 15 Ngok Dinka dugdugs in a number of locations throughout 16 the region; you can see them called out there. The 17 dugdugs again are the Ngok Dinka characteristic cattle 18 camps and luaks. 19 The Government argues that Dupuis's sketch map fails 20 to identify Ngok villages elsewhere, but again this is 21 based on dry-season observations and one wouldn't expect 22 it to do so. 23 I'd like to move on now. We are up to 1951. Howell 24 wrote in 1951 that the Ngok lived along the rivers north 25 of the Kiir/Bahr el Arab. He observed that the Ngok</p> <p style="text-align: center;">Page 34</p>	<p>09:46 1 the Ngok: virtually always to the north of the Kiir, 2 sometimes to the north of the Ngol; always 3 consistently -- consistently -- between the Kiir and the 4 Ngol and a significant number of references to the Ngok 5 north of the Ngol. 6 That is based on a limited set of observations which 7 necessarily could not include the Ngok during the wet 8 season. It's a little bit like saying, "I went out in 9 July and didn't see any snow". Of course you don't see 10 any snow in July, because it doesn't snow in July. And 11 you don't see any Ngok Dinka in particular areas because 12 that's the wrong season of the year. 13 When you think about it, the fact that the 14 Condominium administrators never went during the wet 15 season provides powerful indications of why there 16 wouldn't be any observations of where the Ngok Dinka 17 were during the wet season. 18 Finally I'd like to move on and spend some time with 19 one of the most important witnesses in the record: 20 Professor Cunnison. Professor Cunnison lived for two 21 years with the Messiriya. He was put forward by the 22 Government as their only fact witness accompanying their 23 first memorial. What he has to say is very important, 24 and I think it is telling that of all their fact 25 witnesses Professor Cunnison was the one who was not</p> <p style="text-align: center;">Page 36</p>

<p>09:48 1 identified to be brought here. 2 He has written extensively on the area, and I would 3 refer you to his books. His books don't put you to 4 sleep, his books are actually riveting. I find them 5 exciting. If you read -- and the names are on the 6 screen, but he is a learned man. He wrote The Homr and 7 their Land, The Social Role of Cattle, Baggara Arabs, 8 Some Social Aspects of Nomadism in a Baggara Tribe, and 9 one of my favourite is on giraffe hunting by the 10 Messiriya in the region, which is a particular specialty 11 of his apparently. But he knows this area quite well. 12 He describes the region, geographically first of 13 all, in a way that is quite consistent with what 14 Professor Allan did. He divides the region, this entire 15 area, into four zones. 16 First there's the Babanusa, which he describes as 17 a sandy area in the north and northwest of the country 18 which is used by the Messiriya for grazing during the 19 rains. 20 Second, he describes the Muglad, which stretches 21 from Babanusa in the north to the goz, the sandy, arid 22 strip. He describes that as the headquarters of the 23 Messiriya. 24 Third, he refers to the goz. He describes it as 25 being between Muglad and Wadi el Ghalla in the north and</p> <p style="text-align: center;">Page 37</p>	<p>09:50 1 Kiir. It is the black clay soil where the Ngok built 2 their culture. 3 When we move on from that, we can see that 4 Cunnison's description of the goz continues in other of 5 his works. He also defines more specifically a part of 6 the goz as the Bahr el Arab, and he distinguishes that 7 from the Bahr itself. The Bahr el Arab itself, as part 8 of the Bahr generally, is the area between the Kiir and 9 the Ragaba ez Zarga; it's that strip between the Ngol 10 and the Kiir/Bahr el Arab. 11 When we look at a 1953 article he wrote on the Homr 12 and their land, he quotes: 13 "The river system is known to the Arabs as the Bahr, 14 although they subdivide the area into the Ragaba, 15 consisting of the Ragaba ez Zarga and the 16 Ragaba Umm Biero, and the Bahr, or the Bahr el Arab, 17 which consists of all riverbeds between the 18 Ragaba ez Zarga and the main river. The nomenclature of 19 the rivers is confusing", he says. 20 He is clear that the Bahr el Arab is not just the 21 Kiir/Bahr el Arab down at the southern boundary of the 22 Ngok Dinka territory, but instead it's the waterways 23 between the Kiir and the Ngol. 24 He repeats this description of the term Bahr el Arab 25 in his giraffe hunting article. He says:</p> <p style="text-align: center;">Page 39</p>
<p>09:49 1 the river system, the Bahr, in the south. He describes 2 the goz as a transit stage between Muglad and the Bahr. 3 Finally, of most importance to the Ngok, he 4 describes, south of the goz, the Bahr itself. He 5 describes it as the area -- which I previously referred 6 to -- of dark, deeply cracking clays and numerous 7 winding watercourses, all connected eventually with the 8 Bahr el Arab. It contains also two permanent lakes: 9 Keilak, which lies slightly southeast from the Muglad, 10 and Abyad in the southeast corner of the country. 11 Cunnison notes that north of the Bahr is the goz. 12 Recall this is exactly what Professor Allan 13 described and showed you on the satellite imagery. It 14 shows starting at the southern boundary of the goz the 15 Bahr begins. The Bahr is the dark, rich, deeply 16 cracking clay soil that extends down to the Kiir. That 17 is how Professor Cunnison described the region. It is 18 the description that Professor Crawford you will 19 remember stumbled on; that's because they didn't have 20 an expert on this topic and because they didn't want to 21 focus on Professor Cunnison. 22 When you look at the evidence which you see on the 23 slide in front of you now and when you look at what 24 their own fact witness said, the Bahr is the region that 25 starts from the goz; it stops when it goes down to the</p> <p style="text-align: center;">Page 38</p>	<p>09:52 1 "Giraffe move from Upper Nile province in the early 2 rains and distribute themselves over the wide area known 3 as the Bahr el Arab, penetrate north over the 4 Ragaba ez Zarga and Ragaba Umm Biero and enter the goz 5 district between there and Muglad ..." 6 We can make light of the fact -- the Government no 7 doubt will -- that this is an article about giraffe 8 hunting. What's important about it is that it tells you 9 about the region, and what it says is that the region of 10 the Bahr is the region that extends south from the goz 11 down to the Kiir. 12 That makes perfect sense because that is a region 13 that is defined environmentally as the black clay 14 fertile soils that are damp and subject to seasonal 15 flooding. You can see it from the satellite imagery. 16 Professor Allan, whose evidence has not been challenged, 17 explained it to you: the goz starts to the north, the 18 Bahr starts to south. Cunnison and Allan agree. Nobody 19 disagrees. 20 Cunnison goes on and then repeatedly describes the 21 existence of numerous permanent Ngok Dinka settlements 22 throughout the Bahr region. This squarely supports the 23 SPLM/A's case and squarely contradicts the Government's 24 case, which I would suggest is why Professor Cunnison 25 isn't here. His 1962 article is titled "Some Social</p> <p style="text-align: center;">Page 40</p>

<p>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:</p> <p style="text-align: center;">Page 41</p>	<p>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.</p> <p style="text-align: center;">Page 43</p>
<p>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</p> <p style="text-align: center;">Page 42</p>	<p>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,</p> <p style="text-align: center;">Page 44</p>

<p>09:58 1 there are no Ngok people there, they are all south of 2 the Kiir. 3 This is why the witnesses talk about a brotherhood. 4 This is why the Ngok have to be in this area: because 5 when the Messiriya come south into the Bahr, they camp 6 next to the Ngok Dinka permanent houses; they leave 7 their belongings in those houses; they get food from the 8 Ngok. That's why they're brothers: because they live 9 together during part of the year. 10 If, on the Government's case, as Professor Crawford 11 would have you believe, that can't be because there 12 aren't Ngok there, that's just not true. And Cunnison, 13 their own witness, who they didn't bring here, tells you 14 it's not true. 15 Let's look at the Abyei Protocol; it tells you the 16 same thing. If you look in the Abyei Protocol, Abyei -- 17 and I showed you this before -- is the bridge between 18 the people. It's not a bridge that stops in mid-air 19 with nobody on it; it's a bridge that has both people on 20 it together. That's why it's a brotherhood. 21 It's the same thing in the other provisions of the 22 Abyei Protocol that the parties agreed to, contrary to 23 what Professor Crawford told you. You look at it and 24 you see in Article 1.1.3 that: 25 "The Messiriya are nomads and they will be entitled</p> <p style="text-align: center;">Page 45</p>	<p>10:00 1 environmental evidence, and it's exactly consistent with 2 the SPLM/A case. 3 There's one point on which Cunnison disagrees with 4 both the ABC experts and the SPLM/A, and it's 5 a disagreement that was created by the Government and 6 which is wrong. Cunnison says that he was: 7 "... informed that the effect of the ABC's decision 8 would be to exclude the Homr from the summer grazing and 9 living areas in the Bahr." 10 And that he believed that that would be 11 "fundamentally unjust". 12 It would be. It would be fundamentally unjust. 13 That should not happen. And that's what the experts 14 held: it would not happen. 15 We looked at what they said. They said that the 16 Messiriya, precisely consistent with Article 1.1.3 of 17 the Abyei Protocol, would retain their traditional 18 grazing rights in the Bahr, in the Abyei Area. 19 The parties foresaw this. Professor Cunnison was 20 misinformed by the Government. He was told what the 21 effect of the ABC decision would be. In fact, what the 22 experts said -- and you can read this; this comes from 23 their report: 24 "The experts want to stress that the boundary that 25 is defined and demarcated will not be a barrier to the</p> <p style="text-align: center;">Page 47</p>
<p>09:59 1 to exercise their traditional grazing rights in the 2 area." 3 That's what the experts said and that's what the 4 Abyei Protocol says. 5 Third, Cunnison also describes -- and I'll go 6 through this quickly -- the nomadic character of the 7 Messiriya's life. You can see the slides that describe 8 this. It describes how nomadism is the only way of 9 life, a proud way of life to which they are attuned, how 10 the tribesmen are continually on the move. 11 He goes on and in the next slide describes where the 12 Messiriya have their home. He says: 13 "The Muglad is regarded by the Homr as their home. 14 Their arrival there from the Bahr ['from the Bahr'] is 15 the occasion for great rejoicing and anticipation. This 16 is almost the only place where the people have anything 17 like permanent homes. It is where they cultivate [where 18 they cultivate: not down in the Bahr] and store their 19 grain, as their forefathers did. If people are away, 20 they want to return to it." 21 "It", Muglad, up in the north, above the goz. 22 Similarly he wrote elsewhere that nearly all 23 Messiriya cultivation is in the Muglad; their 24 cultivation is otherwise in Babanusa, further north. 25 Once more, this is exactly consistent with the</p> <p style="text-align: center;">Page 46</p>	<p>10:01 1 interaction between the Messiriya and the Ngok 2 communities. The decision should have no practical 3 effect on the traditional grazing patterns and the two 4 communities." 5 That goes back to the notion of brotherhood, to the 6 notion of a bridge, and to Article 1.1.3 of the 7 Abyei Protocol, which preserves those traditional 8 grazing rights. 9 Professor Cunnison's only disagreement was on this 10 point. It was a legal point, as to which he was given 11 a legal conclusion which was wrong, by the Government. 12 Taken together, Cunnison's writings, his witness 13 statement and his other statements, are frankly 14 devastating for the Government's case. He describes the 15 existence of permanent Ngok Dinka homes throughout the 16 Bahr region. That is precisely consistent with the 17 environmental evidence. It is consistent with the 18 documentary record, so far as one can elicit useful 19 conclusions from that record. 20 He describes the Messiriya as coming south into that 21 region to live as brothers with the Ngok Dinka. They 22 couldn't live as brothers if the Ngok Dinka weren't 23 there, like the Government tells you. 24 Cunnison isn't here for a reason. His evidence, 25 though, is extraordinary powerful, and I would suggest</p> <p style="text-align: center;">Page 48</p>

<p>10:02 1 that you pay close attention to it. 2 His evidence is also supported by Mr Michael Tibbs, 3 somebody who the Government has not referred to in the 4 slightest. Looking at the next slide, Mr Tibbs refers 5 to the fact that to the west the Ngok went all the way 6 to the boundary with Darfur: 7 "As I note in Sudan Sunset, Grinti, I believe, 8 though I'm not sure, is on the north bank of the Kiir 9 River [is within the Ngok territories]. Travelling from 10 Abyei Town to Grinti I would see Ngok villages, just 11 clusters of two or three tukuls [you'll remember that] 12 and luaks [you'll remember that also] to the north of 13 the watercourse we travelled along. I find myself 14 unable to give an eastern boundary to the Ngok's lands, 15 as my travels throughout the district did not take me 16 through the eastern part of the Ngok's lands." 17 I should apologise: I recall now as I read the 18 reference to Sudan Sunset that there was a reference to 19 that book being self-published by Tibbs, so I think 20 there must have been some reference in the Government's 21 presentation. 22 But let's return to the Tibbs description. He 23 explained that: 24 "There was no defined boundary between the Ngok and 25 the Messiriya in the north. Abyei was the centre of the</p> <p style="text-align: center;">Page 49</p>	<p>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 16 Harvard Development Project told us. That's what 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</p> <p style="text-align: center;">Page 51</p>
<p>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</p> <p style="text-align: center;">Page 50</p>	<p>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 throughout 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</p> <p style="text-align: center;">Page 52</p>

<p>10:08 1 Ragaba ez Zarga. 2 And we have the Harvard Development Report 3 describing the Ngok living up to where the sandy regions 4 stop. 5 Professor Crawford is just wrong. When you actually 6 look at the record and try to think about it, when you 7 don't just pull soundbites out of it that suit you, what 8 the record shows you is, undeniably, the Ngok living 9 throughout the entire Bahr region. 10 It's also not surprising that the more time people 11 spent out in the field, the more detailed and the 12 further north their descriptions of the Ngok go. Think 13 about it: who tells you most about the Ngok? 14 Professor Cunnison, the Harvard Development Report, 15 Mr Tibbs; people who actually lived there. 16 Who doesn't tell you much? People like Henderson, 17 who Professor Crawford relies on, who rode in a truck 18 from Muglad down to Abyei. The people that actually 19 lived there are the ones that can tell you most. 20 With that I suggest we turn to the people who lived 21 there most, the Ngok Dinka themselves. Contrary to what 22 Professor Crawford would tell you, this is not evidence 23 that we ought to look at from the perspective of 24 Rudyard Kipling. I'm sure there was no intended irony, 25 but Rudyard Kipling isn't necessarily the best source to</p> <p style="text-align: center;">Page 53</p>	<p>10:10 1 conclusions that they drew from the witness testimony 2 are powerful. 3 They were educated, smart people. Their work, their 4 efforts, demand respect; and not, as I said before, 5 contempt. We should show humility towards what they 6 did. Think about it if you could spend six days with 7 witnesses from all these areas. Wouldn't that tell you 8 a lot more than those snippets of testimony that you got 9 yesterday? I think we all saw the quality of the 10 interpretation. We saw that, right? 11 The experts didn't complain about that. They had 12 immediate access to all those witnesses. I think the 13 judgments that they drew are entitled to the greatest of 14 respect. We should approach those with humility and not 15 with contempt. 16 I'm not going to spend a lot of time -- because I've 17 used too much time already -- on going through the 18 witness testimony. It's on the slides, and if we can 19 just quickly show those. 20 There are a number of specific descriptions from 21 different of the Ngok Dinka elders in the chiefdoms 22 about particular events in their lives. You can 23 conclude, as I think Professor Crawford tries to 24 insinuate, that it's all made up. I wouldn't do that. 25 These witnesses are honest, they told the truth there,</p> <p style="text-align: center;">Page 55</p>
<p>10:09 1 choose in either evaluating oral evidence or looking at 2 a colonial people, a tribal people. 3 I would suggest that the views of the Canadian 4 Supreme Court, which we've referred to in our written 5 submissions, which underscore the importance of paying 6 respect to the testimony of indigenous people, is a lot 7 more useful than Rudyard Kipling's poem in the late 8 19th century. The Canadian Supreme Court has moved on 9 a fair bit since Rudyard Kipling's views in the late 10 19th century. 11 Again, you can see on the current slide the faces of 12 the various Ngok Dinka who have given testimony here. 13 I'm going to move on relatively quickly through that. 14 I would note that we have seen some difficulty in 15 the formalities of this particular proceeding of having 16 oral testimony. I would suggest that that doesn't in 17 the slightest devalue oral testimony. I would suggest 18 that it instead underscores the wisdom of the parties 19 agreeing to the ABC experts' means of procedure. 20 You will recall that the ABC experts spent six days. 21 You got six minutes; they spent six days in the Abyei 22 Area. They met with 100 people; you'll have seen one or 23 two. They met with 100 people in open meetings, with 24 lots of interpreters. They were able to ask whatever 25 questions they want. I would suggest that the</p> <p style="text-align: center;">Page 54</p>	<p>10:12 1 they told the truth in the proceedings before the ABC 2 experts, and the ABC experts believed them. 3 With that I think I would like to move on to the one 4 witness that we will present, Deng Chier. 5 (10.13 am) 6 MR DENG CHIER AGOTH (affirmed) 7 (Evidence interpreted) 8 Examination-in-chief by MR LINDSAY 9 Q. Can you please confirm for the Tribunal that you have in 10 front of you the witness statement that you have made in 11 this arbitral proceedings? 12 A. Honourable court, we have come here, it is a very far 13 distance, and nobody can move such a long distance if he 14 is not moving with the facts. So I'm coming with real 15 facts. 16 Q. I want to ask you some questions about the places of 17 your people during the time of paramount chief 18 Arop Biong. Before we get to that can you please tell 19 the members of the Tribunal which of the nine Ngok Dinka 20 chiefdoms you belong to. 21 A. I belong to Abyior sub-tribe. 22 Q. Can you please tell the Tribunal where you were born? 23 A. I can tell them where I was born; even where my 24 grandfathers were born. 25 Q. Can you please tell the Tribunal where you were born?</p> <p style="text-align: center;">Page 56</p>

10:16 1 A. I was born in Abyei.
 2 Q. Do you know how old you are?
 3 A. I'm 75 years old.
 4 Q. Would you be able to tell the members of the Tribunal
 5 where your father was born?
 6 A. I can tell them.
 7 Q. Can you please tell the members of the Tribunal where
 8 your father was born by specific reference to the
 9 village or place where he was born?
 10 A. My father was born in Wun Bial, a place called Wun
 11 Ameth, between the river and the village Wun Bial.
 12 Q. Can you please, if you're able, describe for the
 13 Tribunal how far that place is from Abyei Town?
 14 A. In actual fact Wun Bial and Wun Ameth are practically
 15 part of Abyei; it is the same. It is just the names of
 16 small further locations.
 17 Q. Could you please tell the Tribunal where your father's
 18 father was born?
 19 A. I will tell them. My grandfather, the father of my
 20 father, was born in a place called Kol Arouth.
 21 Q. And where is Kol Arouth?
 22 A. This is a place the Arabs refer to as Mellum in the dry
 23 land, but we call it Kol Arouth, beside the river.
 24 Q. Does the name Kol Arouth have any meaning in the Dinka
 25 language?

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10:23 1 the Ngok lived during the time of your father's father;
 2 how do you know that?
 3 A. Well, we came to know those places. We are in Abyei,
 4 and when we are children we move along with cattle and
 5 we -- as we go to those areas we will be told, "These
 6 are the places where we were staying here". We were
 7 herding cattle and we had a continuous movement.
 8 Q. So which of the places would you take your cattle?
 9 A. Those days, when things were normal, no conflicts, no
 10 disputes, we used to go as far as the north. We graze
 11 alongside -- we graze in the areas of the Arabs during
 12 the rainy season, and in the dry season the Arabs also
 13 come down to our areas. But when things went wrong,
 14 there were conflicts, we shifted the pattern of herding
 15 southwards. We go up to Rek.
 16 MR LINDSAY: Thank you. That's all we've got time for
 17 today. So thank you very much, Deng-dit, you may
 18 return to your seat.
 19 THE CHAIRMAN: Thank you. The Government?
 20 MR BUNDY: We have no questions, Mr Chairman.
 21 THE CHAIRMAN: Questions from the Tribunal? There are no
 22 questions, thank you.
 23 MR BORN: Thank you for coming from so far.
 24 (The witness withdrew)
 25 MR BORN: Mr Chairman, in terms of organisation, how am

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10:19 1 A. The Dinka referred to a number of hippopotamus. When
 2 there are many we call them "routh" and when there is
 3 one we call it "rou".
 4 Q. Just so the Tribunal is clear, is Kol Arouth a reference
 5 to a village or a wider area?
 6 A. Kol Arouth is an open area. It is in the same area
 7 where a railway station has been built, and after that
 8 the name Mellum came.
 9 Q. During the time of your father's father, did the
 10 Ngok Dinka have any villages or settlements north of
 11 Kol Arouth?
 12 A. Yes. North of Kol Arouth you would be confronted with
 13 Awol Beth and Dhony Dhoul Beth, and furthermore there is
 14 Mienway and Malith. And in fact those days we were just
 15 bordering the Maalia and Rizeigat tribes.
 16 Q. Can you please confirm for the Tribunal which of those
 17 places you just spoke of, Deng, is the furthest north?
 18 Can you please confirm which of the places you referred
 19 to, Deng, is the furthest north, the most farthest away
 20 from Kol Arouth?
 21 A. They are not very far. They are places where you can go
 22 in morning, you spend the day, and if you intend to
 23 return by the evening, you can do so.
 24 Q. Thank you.
 25 Now, you've described that these are places where

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10:26 1 I doing on time? I think I've used 90 minutes now.
 2 THE CHAIRMAN: You have used 90 minutes.
 3 MR BORN: Should we take a break at this point?
 4 THE CHAIRMAN: Yes.
 5 MR BORN: Very well, thank you.
 6 THE CHAIRMAN: We will be back in 25 minutes.
 7 (10.27 am)
 8 (A short break)
 9 (10.54 am)
 10 THE CHAIRMAN: Mr Born.
 11 MR BORN: Thank you., Mr President. Perhaps I will use
 12 30 seconds of my time to allow the people of the
 13 region to return. I think they've had their chance.
 14 I'd like to go back and look then, as I say, at the
 15 people of the region in a little bit more detail. As
 16 you know, there are 26 witness statements from
 17 Ngok Dinka chiefs, elders, the paramount chief, women,
 18 others, in the record before you.
 19 The nature of these proceedings doesn't give you the
 20 chance, the way the ABC experts had the opportunity, to
 21 see or hear all of those people, but I would like to
 22 walk you through a few of the things that they say, with
 23 a little less haste than I used before the break.
 24 That testimony collectively describes -- by the
 25 people who know the land best, by the people who didn't

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<p>10:55 1 just ride in a truck through it or lead a contingent of 2 40 Arab cavalry men through it -- where the Ngok Dinka 3 people were. 4 I'd like to look first at what the chief of the 5 Abyior, Kuol Alor Makuac Biong, says. You can see on 6 the current slide he describes the Abyior lands 7 extending as far as Wun Deng Awak in the northwest and 8 Rumthil or Antila -- you will recall Antila is where 9 Mr Tibbs had first seen, on the road coming down from 10 Muglad, Ngok Dinka homes, and that insofar as the Abyior 11 one -- just one -- of the nine subsections or chiefdoms 12 of the Ngok Dinka is concerned. 13 I'd like to move on and look just briefly at what 14 an Abyei Area resident and elder of the Alei says. He 15 described how the Alei moved to Thuur, which is Turda, 16 far in the north, and also to Nyama, also far in the 17 north. The Alei made this move during the time of 18 Paramount Chief Arop Biong and when Chol Lual was the 19 paramount chief of the Alei. He described how it was a 20 good life because there was lots of water, good crops 21 and fishing. 22 An Achak elder -- this is another one of the nine 23 chiefdoms -- it took me, I have to say, as I became 24 familiar with it, some time to understand and come to 25 terms with the nine separate chiefdoms. I suppose it's</p> <p style="text-align: center;">Page 61</p>	<p>10:58 1 we had reference to Noong yesterday from one of the 2 government's witnesses -- to Riet, Kol-Lang, Dagak, 3 Awol, and other places. There are further references to 4 the Ngok along the river; that's the Ngol of course. 5 North of the Alei, the Achueng had more settlements, 6 and there are references there, and then there's 7 a description of what the biggest village is. 8 The current slide is what I promised you previously: 9 this is a base map of the Abyei Area and it shows in red 10 various locations. The villages that are above the 11 Ngol, you can see they're shown on the current slide, 12 and I apologise for the quality of it. 13 These are the locations that are identified in the 14 various witness statements that are before you. I'm 15 going to bring you back to another map, a community 16 mapping map; this is just the witness statement 17 references to the villages above the Ngol that we've 18 already talked about. 19 The Government has challenged the evidence before 20 you in the Ngok witness testimony on the basis that it 21 was taken for the purpose of this litigation. That's 22 hardly surprising; it was taken for the purpose of this 23 litigation. 24 Litigations around the world are conducted on the 25 basis of witness testimony, on the basis of witnesses</p> <p style="text-align: center;">Page 63</p>
<p>10:57 1 a little bit like one of the people from the Abyei 2 region coming to Europe and coming to terms with the 19 3 or 27 or however many states there are here, but they 4 have their own separate areas, their own separate 5 cultures, their chiefdoms. 6 But an Achak elder describes how when the British 7 came the Achak were at Nyama, Ruba, Kol Lang and other 8 place, and recites when that was. There's also in the 9 other witness evidence further descriptions of other 10 villages that you can see on the current slide. 11 The Bongo chief -- and we've heard reference to the 12 Bongo in the Percival and Wilkinson descriptions -- were 13 in settlements such as Mabek, Ahany, which is near 14 Nyama, again far to the north -- Amiet, Miyen, Todac and 15 other permanent settlements. 16 Again, I won't read out the names because in some 17 sense it's not so meaningful to you, it's just 18 a number of names on a list, but I'm going to show you 19 a map at the end of this review of what the witnesses 20 said that show you where the places are. 21 The same witness describes how in his grandfather's 22 time, in the time of Arop Biong and the Mahdiyya, there 23 had been certain movements. 24 Then if we can go on to the chief of the Achueng, he 25 says going further north and the northwest of Noong --</p> <p style="text-align: center;">Page 62</p>	<p>11:00 1 coming and providing evidence about the current 2 proceedings. There's no reason to disbelieve that 3 evidence, and I would recall for you the fact that the 4 ABC experts had a chance to consider that testimony at 5 some length. 6 I'd like to move on and look at some of the 7 Government's specific criticisms of the witness 8 testimony. The Government describes that testimony as 9 lacking specific details, and has complained about the 10 existence of vague and generic terms. 11 If in fact you look at the witness testimony, it 12 does no such thing. It contains a number of specific 13 descriptions of particular places -- we've already seen 14 some previews of that -- and personal recollections 15 about doing particular things in particular places. 16 We can look first at the slide describing the 17 testimony of an Abyior elder. He was born in 1914 or 18 1915, he was Sultan Rob's grandson, and he explains how 19 he was born in Abyei Town, his father was Kuol Arop, the 20 paramount chief of the Ngok Dinka, from 1906 to 1945. 21 He explained how: 22 "We would graze to Nyama ..." 23 Which was a permanent Ngok settlement of the Mareng, 24 Manyuar, Achak and Bongo: 25 "... and then further northwest to Wun Deng Awak and</p> <p style="text-align: center;">Page 64</p>

<p>11:01 1 then to Meiram. The Abyior of my father's age and my 2 grandfather's age would also use this grazing route and 3 meet the same settlements of the Ngok." 4 An Achueng chief, Ajak Malual Beliu, who was born in 5 the mid-1930s, recalls the birthplaces of his father and 6 grandfather. He says: 7 "The following are some of the Achueng permanent 8 settlements that I know of and have been told by my 9 father and grandfather. Mading and Agany were permanent 10 settlements southeast of Abyei Town and north of the 11 River Kiir. North of Abyei Town, Noong [which we heard 12 reference to previously] was a village of the Achueng." 13 An elder of the Mareng chiefdom, Malual Alei Deng, 14 who was born in 1940, recounts: 15 "The lands of the Mareng chiefdom have traditionally 16 been centred in the place called Nyama, in the north, 17 and further south of Nyama towards Abyei Town. I lived 18 in Nyama and so did my Mareng from my father's and 19 grandfather's time." 20 As we've seen, Nyama is well to the north of the 21 Ngol. 22 Adol Kwot Mual, a Manyuar elder, testified: 23 "I was born in the ... 1940s ... My grandfather was 24 born in Thuba and lived there until he was a man. 25 I have been told that my grandfather was initiated in</p> <p style="text-align: center;">Page 65</p>	<p>11:04 1 remained in the north. 2 I won't read out the rest of the slide, but he gives 3 a detailed description of what he has been told by his 4 family, what he knows, what he learned from the tribal 5 elders, and that is the way that information was 6 conveyed. They didn't have written records. One can 7 criticise them perhaps in the sense that that doesn't 8 provide a sort of documentary record the way that 9 Percival or Wilkinson might, had we had a full access to 10 it, but it is the way they record their history. 11 As we have seen from the Supreme Court of Canada in 12 the Inter-American decisions that we've referred to in 13 our written submission, there is not any basis for 14 devaluing those oral traditions and this sort of oral 15 testimony. 16 One has to look at it with care, of course. One has 17 to recognise that these statements were prepared for 18 a litigation, of course. On the other hand, one can't 19 simply dismiss it because that was what was done. This 20 is how those people, who we must respect and show 21 humility towards, record their past, record their 22 present. That is how they live. It is their land, 23 those people, their land that you must decide about, and 24 in doing that taking into account how they describe 25 their history is among the paramount tasks before you.</p> <p style="text-align: center;">Page 67</p>
<p>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 chieftaincy 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</p> <p style="text-align: center;">Page 66</p>	<p>11:05 1 We have put in significant numbers of witness 2 statements which coincide exactly with what the ABC 3 experts themselves -- five impartial men, three of them 4 African, two of them African experts, the three picked 5 by IGAD, chosen by the parties, congratulated by the 6 parties, including the Government, at the end of the 7 proceedings for being impartial and doing the 8 proceedings right -- they looked at this witness 9 evidence and reached the same conclusions that we say 10 you should reach, and I would suggest that that judgment 11 is entitled to the greatest of respect. 12 I could go on through more witness statements, but 13 I suspect that that would not be enormously helpful for 14 you. I would urge, though, that you read the witness 15 statements and give deference to the fact that that is 16 the way that these people speak. They didn't keep 17 documentary records, they didn't do trek reports; that's 18 not how they did it. Instead they have oral traditions 19 that must be taken into account and deserve to be taken 20 into account. 21 If we could look at a map, though, that tries to 22 give modern description to what is on the witness 23 statements. Here is a map that shows the locations of 24 the towns that are referred to in the witness 25 statements. The black dots that you see on the map are</p> <p style="text-align: center;">Page 68</p>

<p>11:06 1 the towns that are referred to in the various witness 2 statements. That's also included in our materials. 3 This is not vague or generalised testimony. There 4 are a number of specific villages and settlements that 5 are referred to. Consistent with Cunnison and 6 consistent with the Harvard Development Report and 7 consistent with everything else that we've seen, these 8 are villages dotted throughout the Bahr. They are north 9 of the Ngok, south of the Ngok; there are very few of 10 them beneath the Kiir. 11 What I'd like to do next is to briefly address the 12 so-called "Civsec map" which was referred to by 13 Professor Crawford at some length. You'll recall this 14 was a 1933 sort of cartoon sketch. It looked something 15 like this, and it's in the arbitrators' daily bundle, 16 and much was made of it by the Government. 17 First, it's somewhat curious in that the Government 18 submitted this twice. It was submitted first with their 19 counter-memorial at Annex 39, and it was called "Civsec 20 66/4/35, minutes of the meeting 28th October 1933". 21 Then it was submitted again at Annex 40 of the 22 counter-memorial, and it was described as "An agreement 23 made at Wunrog, 7th March 1935". 24 Obviously the SPLM/A and the Ngok don't know what 25 the provenance of the meeting was or the map was, but</p> <p style="text-align: center;">Page 69</p>	<p>11:10 1 That's consistent with what I said prior to the break 2 about how the Messiriya and the Ngok would be in similar 3 areas. It's inaccurate because it so sort of crudely 4 segregates the two peoples when in fact, as we know from 5 all the evidence, they in truth overlapped. 6 Importantly, what the map doesn't show is what 7 happened in the wet season. And for all the reasons we 8 talked about [before] the break, we know that if the 9 dry-season grazing was in the south, then the wet-season 10 home areas and permanent settlements that Cunnison 11 described so graphically were in the north, scattered 12 throughout the Bahr. That, I would suggest, is the true 13 value of this map, whatever its provenance. 14 The idea, though, that you can from a dry-season 15 grazing area in the south deduce what the territory of 16 the Ngok Dinka was is childish. That map does nothing 17 of the sort. It is a dry-season reflection of uncertain 18 provenance that has no bearing at all on where the Ngok 19 themselves lived for most of the year. 20 I'd also like to turn on, though, to a map that does 21 have more value. We were mindful of the Government's 22 criticisms of the witness evidence which, because it was 23 only 26 witnesses and because it was prepared to some 24 extent under the time pressures of this case, couldn't 25 fully capture -- we would have liked to fully capture</p> <p style="text-align: center;">Page 71</p>
<p>11:08 1 it's somewhat peculiar that the Government would have 2 submitted it twice, describing it in a different way. 3 Be that as it may, the map shows nothing about the 4 territory of the Ngok Dinka that has any value for these 5 proceedings. 6 First, it concerned disputes between other tribes: 7 the Malwal, the Rizeigat and the Homr. It didn't 8 involve discussions with the Ngok in the slightest. 9 Therefore, whoever it was -- and, as the Government 10 says, they have no idea who drew it -- whoever it was 11 didn't have information from or, so far as the record 12 indicates, about the Ngok that has the slightest 13 veracity. 14 Second, it is completely obvious from the map -- and 15 Professor Crawford at the end of the day couldn't and 16 didn't really try to deny that -- that it shows 17 dry-season grazing areas. The reason you know it shows 18 dry-season grazing areas is, when you look at it, it has 19 the Homr substantially down in the south. That, 20 Cunnison tells us and all the environmental evidence 21 tells us, is where the Messiriya would come in the dry 22 season. 23 Therefore, to show, as that map did, the Ngok in 24 a particular area of the south, basically in the same 25 latitude as the Messiriya, is not at all surprising.</p> <p style="text-align: center;">Page 70</p>	<p>11:11 1 all the Ngok Dinka villages that one could; we couldn't 2 do that in the time allowed. So we also have submitted, 3 for the Tribunal's assistance, a community map. 4 The Government has scoffed at this, but community 5 mapping is a recognised and sophisticated means of 6 trying, in a scientific manner, to identify where it is 7 that people live. 8 One can criticise the methodology of this, one can 9 question the way that it was conducted; that's fair 10 enough, that's litigation. One should examine this 11 evidence like the other evidence in the record with care 12 and discretion, and try to assess where it's stronger 13 and where it's weaker; we don't dispute that in the 14 slightest. What one can't do, though, is just dismiss 15 it. One has to look at it and try to understand what it 16 shows. 17 What this shows, I would suggest, is a very powerful 18 picture of Ngok Dinka villages scattered throughout the 19 area that the community mapping group was able to study. 20 We are fortunate to have with us today 21 Dr Peter Poole. Dr Poole is one of the world's leading 22 community mapping experts. He in fact, I'm told, 23 prepared the world's first community map. There is 24 a recognised methodology and technique for preparing 25 community maps. It is a technique that has been</p> <p style="text-align: center;">Page 72</p>

11:13 1 developed to address exactly the evidentiary problem
2 that the Canadian Supreme Court and the Inter-American
3 Court identified in their judgments. It is the problem
4 of: how do you determine where a people that do not have
5 written records, and who do not have the sorts of
6 technological instruments for record-keeping that we do,
7 where they live, where they lived in the past? How does
8 one do that?

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

17 Again, one can challenge how this is done; the
18 Government is free to cross-examine Dr Poole. But it
19 provides a way to respond to the Government's criticisms
20 of the witness testimony.

21 Unfortunately Dr Poole, given the exigencies of this
22 arbitration process, didn't have time to spend the same
23 period that he might ordinarily have done. One might
24 ordinarily spend a year to study an area three-quarters
25 of the size of Belgium. He nonetheless was able to

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11:16 1 conscience that my statement will be in accordance
2 with my sincere belief.

3 Presentation by DR POOLE

4 THE WITNESS: On the slide you are going to see the topics
5 that I'm going to address one by one over the next
6 10 minutes or so. I'm going to spend a little more
7 time on community mapping, that's item 2, because
8 there's quite a lot of unfamiliarity with it, and
9 there are people doing it in different ways in
10 different places. So I'm going to take care to
11 describe the methodology that myself and my colleagues
12 developed in the early 90s.

13 My academic background: the last item there doesn't
14 have a date on it. I actually got the PhD in 1980, and
15 I spent the preceding six or seven years as the director
16 of national parks planning for the Canadian Arctic.
17 During that time I spent pretty well six months of every
18 year visiting Inuit in their communities, and Dene,
19 Gwitchen and other peoples of the Canadian Arctic,
20 talking about conservation, talking about their issues.

21 In fact I wrote my thesis on relationships between
22 indigenous peoples and conservation, good and bad.
23 After that I spent the rest of the 1980s working on
24 a series of projects, again with indigenous peoples, not
25 just in Canada but then throughout Central and South

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11:14 1 spend a significant period of time in the region, with
2 a significant number of Ngok Dinka people, aimed at
3 recording permanent villages and other sites which would
4 be of assistance to the Tribunal.

5 All told he came up, in a study area with a radius
6 of some 40 miles, with 150 permanent settlements,
7 56 burial sites, 74 grazing sites, 35 cultivation sites,
8 45 community meeting and court locations, and 11 sacred
9 sites.

10 Again, the Government can cross-examine him and
11 challenge those various points, but it is a substantial
12 and more detailed picture than the witness testimony
13 itself was able to present. That's not surprising: we
14 could only put in 26 witness statements; he was able to
15 draw on a much broader range of material.

16 The Government has challenged both the entire
17 concept of community mapping, but also the way that
18 Dr Poole conducted that particular study. The best
19 person in the world to answer that is, Dr Poole who
20 I would now like to invite to address you. Thank you.

21 (11.16 am)

22 DR PETER POOLE (called)

23 THE CHAIRMAN: I welcome Dr Poole. Please read the
24 affirmation.

25 THE WITNESS: I solemnly declare upon my honour and

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11:18 1 American. Towards the end of that decade I, by a series
2 of chances, was asked to conduct an experiment in the
3 Arctic with a new form of search-and-rescue device,
4 which had been invented by a Canadian company.

5 I had just heard about GPS from one of the research
6 scientists. So I managed to get hold of one of the
7 first civilian GPS units that were becoming available.
8 And I spent a year or so in the community of Pangnirtung
9 in Baffin Island with the Hunters and Trappers
10 Association, who'd set up their own search-and-rescue
11 system, and they did very well.

12 The whole complex we were dealing with was
13 a Russian-American rescue satellite, rescue procedures
14 in Canada, and the GPS itself, radio communications, and
15 so forth. And within a year they had developed a very
16 efficient methodology for doing community-based search
17 and rescue, which cost about 100th of the cost of
18 airborne search and rescue in the Arctic at that time.

19 So about a year or so later the price had dropped
20 from 30,000 to less than 1,000 and I was invited to work
21 with the Ye'kuana people of the Cunucunuma in the
22 Venezuelan Amazon. I wasn't sure what it was about, but
23 I went down and said "So, what's the plan?"

24 They said, "We're going to unilaterally demarcate
25 our territory, and then the Government will start paying

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<p>11:20 1 attention to us and we will negotiate with them". It 2 was quite a smart move because there was no law for 3 indigenous peoples in Venezuela at the time. So I said, 4 "Well, what do you want me to do?" And they said, 5 "Well, we want you to make the white man's map, because 6 if we make our map the Government won't pay any 7 attention to it". 8 So I had one of these new units with me and I said, 9 "Look, I can teach you to make your own white man's 10 map". They said, "Well, let's do the demarcation 11 first", so we did that and mapped that, and then they 12 took the GPS and I spent about three weeks training 13 a group of about 12 Ye'kuana who didn't have any 14 concepts of north/south, our familiar concepts of 15 orientation, and within that period they were fully 16 conversant with using a GPS unit. 17 I had made them a huge map of their territory which 18 I had stripped off all the names, everything except the 19 rivers, and the rivers are people's way of -- it's their 20 latitude and longitude, the rivers. So all they had was 21 a big, blank, no-name map with latitude and longitude 22 and the rivers on it, and I left them with that for 23 a year, and when I came back they had the whole map 24 covered with their names, their resources. 25 This was basically a method that myself and my</p> <p style="text-align: center;">Page 77</p>	<p>11:23 1 that is communities mobilising to gather information 2 from elders, other authorities and from the environment 3 and to compile themselves, to compile maps which depict 4 their forms of resource use and enable them to deal on 5 an equal footing with outside interests or competing 6 interests. 7 These are not all -- originally a lot of what we 8 call tenure mapping was about land claims, but as these 9 methodologies became more varied and commonplace they 10 started to address other issues. 11 Like, for example, last year in the Democratic 12 Republic of Congo, the Rainforest Foundation from London 13 coordinated a very large project involving more than 100 14 communities to do mapping of their resources, and the 15 express purpose of this project was to persuade the 16 Congo Government to change the laws and policies 17 regarding forestry in order to accommodate indigenous 18 interests and community possibilities for doing their 19 own forestry. 20 I just made a short list here of the four main 21 characteristics that spring to mind. 22 We always did the training within the community, and 23 what was interesting about the training process is that 24 that process, which would take anything from two to 25 three or four weeks, started a process of reflection</p> <p style="text-align: center;">Page 79</p>
<p>11:21 1 colleagues worked on over the next few years, and we 2 worked on about -- well, I was involved in about ten 3 projects in Venezuela, Colombia, Guyana and Surinam. 4 The last project in Surinam, which I think was 5 finished in 2001, was very successful insomuch that the 6 NGO that I was working with, the Forest Peoples 7 Programme in England, successfully took it to the 8 Inter-American Court human rights tribunal. 9 After about five years of back and forth, during 10 which I had to go to the Tribunal myself with the two 11 maps I had made of Saramaka territory, or they had made, 12 they were successful. They got a judgment in their 13 favour about two years ago. 14 During the 1990s community mapping got globalised, 15 and I was glad to see that a lot of people in other 16 countries were sort of getting the same sort of 17 technology and putting it to the same sort of uses that 18 we were. It was very encouraging. 19 There's a list of projects on the board, which 20 I won't go into detail now because it will simply take 21 too long, but I think you could say that even though in 22 each of these cases, and other cases, the political 23 legal situation differed from country to country, as 24 well as the propensity or readiness of the government to 25 recognise land rights, they all had a common theme, and</p> <p style="text-align: center;">Page 78</p>	<p>11:25 1 within the communities that we were passing through as 2 we did the training. That in itself generated a lot 3 more interest. 4 They were saying such things as, "Look, this is for 5 our land claim, but when we've done it we can start 6 doing forestry or we can start doing water or fisheries 7 management". A lot of them have done that in fact, 8 because they owned the map, they had the capacity; they 9 didn't rely on somebody else outside to make the map for 10 them. 11 Even if they did -- some of them do rely on me and 12 still ask me to help out with the computer side of 13 things, but they control the content. Every time 14 I change something, I send it back to them. I would say 15 over the years that of all the groups I've trained or 16 worked with, 80% now have their own little -- they are 17 in complete control of the whole mapping process, from 18 gathering the data to printing the final map. 19 So these are the four major attributes. 20 The information comes more or less exclusively from 21 community informants. 22 We localised the technology as much as possible. 23 Sometimes there are choices between tracing on huge 24 sheets versus digitising, which requires a digitising 25 table and lot of money, so we do tracing. Tracing is</p> <p style="text-align: center;">Page 80</p>

<p>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</p> <p style="text-align: center;">Page 81</p>	<p>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</p> <p style="text-align: center;">Page 83</p>
<p>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</p> <p style="text-align: center;">Page 82</p>	<p>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</p> <p style="text-align: center;">Page 84</p>

<p>11:33 1 there were nine of them, each one with 25 elders who had 2 been invited on the basis of previous involvement in the 3 case or the fact that they were local authorities who 4 had something to contribute. 5 During those meetings the trainees and Kwol Biong, 6 who was sort of the lead trainee, had a list that had 7 been drawn from various sources, a sort of working list 8 of potential sites in that area, in that chiefdom, and 9 simply went through them. 10 This sort of generated a discussion which lasted 11 anything from five to six or seven hours, and it was 12 a long, thorough discussion. You could tell there was 13 a tremendous amount of interest and response to the 14 points that were made: no, it's not here, it's there, 15 and: it should be there, and so forth. 16 So by the end of the community meeting we had 17 a pretty good idea where the sites were that needed 18 visiting, and at the end of the meeting three or four 19 elders came forward or were selected to accompany the 20 mappers. 21 So what happened next was the mappers went to that 22 area, and in each case they made two visits. One was 23 a sort of reconnaissance visit to find out how 24 accessible the sites were; because the elders couldn't 25 put them on a map because we weren't sure whether the</p> <p style="text-align: center;">Page 85</p>	<p>11:36 1 radius from Abyei. 2 As my colleague has already pointed out, the list of 3 settlements, which I would say, from all the mapping 4 projects I've done, this is pretty good. 5 The first one or the second and third one I ever did 6 took people a year, a solid year, and they came up with 7 4,000 observations, but that's never been equalled since 8 in my experience. Some of the people who do community 9 mapping come back with like 20 observations. In Africa 10 and Bolivia I've seen examples where the data is fairly 11 skimpy. 12 Now, on that kind of continuum I would say this is 13 in the upper half, quite good, and I have the strong 14 impression that if we hadn't had the problems of access 15 and mobility that a lot more sites would have been 16 recorded; but that is speculation, of course. 17 Finally we come to the map. One of these we've 18 already gone over. The second one was the quality of 19 the data. 20 Now, my point of comparison for this is other 21 projects that I've worked on, and a very strong 22 indicator is how disciplined the mappers are in filling 23 out their logbooks. The whole thing has to be focused 24 on the record, which has to be transparent and has to be 25 something that they can come back to later, or somebody</p> <p style="text-align: center;">Page 87</p>
<p>11:34 1 map was accurate, so they said, "Well, we will take you 2 there by this road and that road". 3 So they took us there, and I would say that in most 4 cases the sites that were registered in the logbooks 5 were sites that had already been talked about or 6 discussed. There were only a few cases where someone 7 said, "Oh, there is also a grave", or there was 8 a village that we missed. But by and large the elders' 9 meetings covered pretty well a large proportion of the 10 data that was eventually mapped, so in that sense they 11 were very, very useful. 12 I think the next slide refers back to the decision, 13 based partly on the fact that we couldn't depend upon 14 the maps being reliable, based on the fact that it 15 wasn't possible to say, "All these points we've talked 16 about are here, here and here" -- it's easy in the 17 Amazon, you're always on a river, but in this case it 18 was completely the opposite in terms of access. 19 Then there were problems of visibility. The burning 20 hadn't taken place in some areas where we expected it to 21 have taken [place], so there was not good visibility, 22 and there were the problems of the roads, the rivers 23 being flooded and not passable. 24 So all of these factors combined led to the decision 25 to concentrate on a limited area of 40 kilometres'</p> <p style="text-align: center;">Page 86</p>	<p>11:38 1 else can inspect if they wish. 2 So in that sense I looked really hard at the way the 3 people filled out their logbooks, the things they put 4 in, the diligence and the care, and in that respect 5 I thought that they were very good, I would say. 6 The methodology -- they didn't really -- this is one 7 of the first times that I'd used cameras, or trainees 8 had used cameras, and we set the cameras at a very low 9 resolution so that the whole -- I thought, "Well, you're 10 not going to take more than 2,000 photographs", so each 11 camera was set at a resolution where they could get 12 2,000 photographs without having to change the disk or 13 anything else like that, which made it a lot easier to 14 record the photographs because it went from one to 15 several hundred. 16 I think that the contribution of the elders was 17 really interesting. It came in two batches. One was in 18 the meetings, which were extraordinarily lively; they 19 were lively, but at the same time people listened to 20 each other, and that was always interesting. 21 The other one was that during the trips itself there 22 was a continual conversation going on about what 23 happened here, what used to happen there. It's very 24 much like the conversations I alluded to earlier: one 25 would be in one place for a while and people would start</p> <p style="text-align: center;">Page 88</p>

11:40 1 talking about all the kinds of things they would like to
2 do with their territory if they could. This happened in
3 the vehicles. If you spend all day in a vehicle,
4 there's a lot of information flying back and forth.
5 So that convinced me that the people with whom we
6 were travelling had a deep knowledge and familiarity
7 with their landscape, not just their personal -- from
8 their lives, but from their ancestors' lives and what
9 their fathers had told them.
10 As I said, I thought that the team did very well.
11 It was a great advantage that some of them speak
12 English, or most of them spoke English, and we had the
13 languages split between the teams, so the trainees who
14 spoke Arabic only, or Arabic Dinka but not English, were
15 not disadvantaged in any way.
16 I think the results are consistent. I am very
17 satisfied with the results. I am, in fact, surprised
18 because, given the obstacles that were confronting us in
19 terms of access and bad base maps and so forth, I was
20 not optimistic, and having seen the results that they
21 achieved, I think they were excellent.
22 Thank you.
23 THE CHAIRMAN: I thank you.
24 Questions from the part of the Government?
25 PROFESSOR CRAWFORD: Thank you, sir.

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11:43 1 and the time for gathering the data, it's been up to
2 a year, in the Ye'kuana case, but it could be as short
3 as three months.
4 The time after that for the compilation of
5 a provisional final map, going back to the community so
6 they can review it and make sure it's exactly what they
7 want, and then the final printing, you could add about
8 a couple of months, simply because of the problems of
9 getting big packages back to remote places, back and
10 forth.
11 So I think six months is a good period, but it
12 wouldn't be six months of continual activity.
13 Q. You say in page 7 of your report:
14 "... I would ordinarily expect a project of this
15 type to require at least a year of work."
16 What you've said in effect confirms that that's what
17 your expectation was.
18 A. Yes, that was before I got on the plane.
19 Q. Right. What was the total period of time from the
20 beginning of training to the completion of the report?
21 A. The completion of the report? Well, it started in
22 November --
23 Q. The report is dated February.
24 A. Yes, so it would be four months.
25 Q. Thank you.

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11:42 1 (11.42 am)
2 Cross-examination by PROFESSOR CRAWFORD
3 Q. Dr Poole, we met informally yesterday; I now introduce
4 myself formally. My name is James Crawford and I am
5 counsel for the Government in this matter. I have a few
6 questions to ask you.
7 What's your extent of previous experience of the
8 Sudan?
9 A. I haven't been to the Sudan before.
10 Q. How significant is your method in terms of your knowing
11 the place you are working in?
12 A. It hasn't proved an obstacle because pretty well all the
13 places in which I have done community mapping projects
14 are places that I haven't been to before.
15 Q. How long would a community mapping exercise last as
16 a matter of desirability?
17 A. It's a bit like saying, "How long is a piece of string?"
18 I know that's not perhaps a very good answer. But my
19 estimate that I was asked to give before coming out to
20 the Sudan and getting a sense of how large the area was
21 and not having too many ideas about how much access
22 there was, I said a year, it could take up to a year for
23 an area that size.
24 I would say that the average time for training for
25 the projects I've done is about three to be five weeks,

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11:45 1 Did you instruct the team to enquire about any sites
2 or locations other than those of the Ngok Dinka?
3 A. No.
4 Q. You're aware, of course, that the context in which you
5 were asked to produce this report is of a very vigorous,
6 we should say, litigation between the SPLM/A and the
7 Government?
8 A. Yes.
9 Q. And you're aware that the Ngok are deeply involved in
10 that litigation?
11 A. Mm-hm.
12 Q. Did the 12 Ngok members of your enquiry teams stand to
13 gain from the outcome of your report?
14 A. I -- I don't know. I don't know. I had never thought
15 about them gaining.
16 Q. Do you know if any of them are witnesses in this case?
17 A. I don't think so. I'm not sure. I don't believe they
18 are.
19 Q. The mapping team coordinator is Kwol Biong?
20 A. Yes.
21 Q. Is he a witness in this case?
22 A. I don't think so, because I got an email from him
23 yesterday.
24 Q. On the assumption that one way or another individual
25 members of the team may have felt that they had

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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

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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 So 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 10°7' 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 10°7'.
21 Q. They way we achieved 10°7' 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".
8 You say that -- sorry, it's figure 21, just before
9 page 25 of your report.
10 A. Taj Alei, okay, yes.
11 Q. The bottom figure on that page.
12 A. Mm-hm.
13 Q. How do you know that that grave dates from 1905?
14 A. That -- the -- when the mapping team were in the field,
15 they were there with elders, and the elders would have
16 said, "That is the grave site", and even if it doesn't
17 look like a grave site, that for the mappers was the
18 authority upon which they were resting.
19 Q. So the mapping team simply worked on the basis that they
20 were told that that was a grave site?
21 A. Yes. I imagine that that grave site was the subject of
22 the -- a community meeting, the relevant community
23 meeting for whichever chiefdom it is in, and that came
24 up in discussion. There was a whole list of grave sites
25 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 10°7' 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 10°3' north.
24 A. Okay.
25 Q. You're happy with that?

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<p>11:52 1 A. Yes. 2 Q. The SPLM/A at paragraph 51 of the rejoinder states: 3 "... the community mapping project, shows permanent 4 Ngok Dinka villages were located throughout the Bahr 5 region extending north to ... latitude 10°35' north, 6 both in 1905 and for decades thereafter." 7 There are two different issues here. One is the 8 Bahr region. But I'm interested in the aspect of that 9 statement that says "extending north to ... latitude 10 10°35' north". Do you accept the accuracy of the 11 statement that you showed that the Ngok Dinka villages 12 extended to 10°35' north in 1905? 13 A. I'm sorry, who made that statement? 14 Q. That was made by the SPLM/A in a comment on your report. 15 A. Ah. I wasn't involved in taking the mapping project 16 that far north, so -- 17 Q. Let me just read the sentence again, as it relates to 18 the area furthest north. Community mapping project, 19 paragraph 51 of their rejoinder: 20 "... the community mapping project, shows permanent 21 Ngok Dinka villages were located ... extending north to 22 ... latitude 10°35' north ... in 1905." 23 Do you accept that the community mapping project 24 shows that? 25 A. That information may have been gathered, but it wasn't</p> <p style="text-align: center;">Page 97</p>	<p>11:56 1 southwestern Kordofan and the northern Bahr el Ghazal. 2 The peoples of those regions, including the 3 Ngok Dinka, were in effect sovereign. The 4 Anglo-Egyptian colonial administration, which had just 5 been proclaimed in Khartoum, was only very gradually 6 widening the area it claimed to control, and that 7 nominal control did not include actual "government" in 8 any sense that we would understand the word today. 9 While the beginnings of administration can be seen 10 in a few towns along the Nile north of Khartoum and in 11 the central region, there was literally no government 12 administration of any kind in southern Kordofan and the 13 northern Bahr el Ghazal before the transfer of 1905. 14 British officials in Khartoum had very little or no 15 idea of who the Ngok Dinka were, where they were, their 16 population, the extent of their territory, the nature of 17 their society, or the relations with their neighbours. 18 A few points about the vast Bahr el Ghazal basin 19 illustrate what I have just said. You will recall that 20 the Anglo-Egyptian Condominium was established only in 21 1898, and until 1902 there was not even a province 22 called Bahr el Ghazal. In fact, Bahr el Ghazal remained 23 under marshal law until at least 1907. 24 Only a few British administrators were posted in the 25 entire Southern Sudan, of which the Bahr el Ghazal was</p> <p style="text-align: center;">Page 99</p>
<p>11:54 1 included in the study area. That 10°35' would have been 2 outside the study area. 3 Q. And the community mapping project, to which that 4 sentence refers, is your community mapping project? 5 A. Yes. 6 MR CRAWFORD: Thank you, I have no further questions. 7 THE CHAIRMAN: I thank you. No questions? I thank you 8 very much, Dr Poole. 9 (11.54 am) 10 (The witness withdrew) 11 MR BORN: Thank you, Mr President. That took a little bit 12 longer than I'd anticipated, and I'm going to move 13 directly to Professor Daly, who will address some of 14 the Condominium historical issues. Thank you. 15 THE CHAIRMAN: I thank you, and I call Professor Daly. 16 (11.55 am) 17 PROFESSOR MARTIN DALY (called) 18 THE WITNESS: I solemnly declare upon my honour and 19 conscience that my statement will be in accordance 20 with my sincere belief. 21 Presentation by PROFESSOR DALY 22 THE WITNESS: Perhaps the most salient point to bear in 23 mind when considering the mountains of evidence that 24 both sides have produced is that in 1905 there was no 25 authority of any kind above the tribes themselves in</p> <p style="text-align: center;">Page 98</p>	<p>11:58 1 only a part, and until the 1920s, their role was largely 2 what was called loosely "pacification". So, 3 appropriately, most of the officers in Southern Sudan in 4 this period were soldiers rather than civil servants. 5 By 1905, the year that most concerns us, the Sudan 6 Government was still notifying indigenous peoples of its 7 existence, and the province had not even been organised 8 into districts with military and police posts. As for 9 administration, in the sense of an actual active 10 government involvement in the lives of local peoples, 11 there was none at all. I repeat, there was no 12 administration at all. 13 Because Kordofan on the map is adjacent to the 14 modern metropolitan area of Khartoum, people might think 15 that it was more modern or advanced than the 16 Bahr el Ghazal. This was not the case. Kordofan itself 17 was a vast region extending from the Nile to Darfur, and 18 from the Sahara to equatorial regions. It was 19 established as a province only in 1900. El Obeid, the 20 provincial capital, had been destroyed during the 21 Mahdiyya, and was occupied by Anglo-Egyptian forces only 22 in 1900/1901. 23 Efforts at administering the province were largely 24 limited to the area around El Obeid, the nucleus of the 25 original area of Kordofan, which was about</p> <p style="text-align: center;">Page 100</p>

<p>12:00 1 500 kilometres from the Abyei area; and to the main 2 east-west route far to the north of the region that 3 concerns us. 4 Southern Kordofan, in particular, was isolated and 5 remote. During the rainy season it was almost 6 impassable by outsiders. More to the point, 7 outsiders -- and here I mean the British -- had no 8 reason to go there. The few officers who were stationed 9 in the province's capital, El Obeid, were fully occupied 10 there, and had no particular reason to pay attention to 11 the province's remote south. 12 Until long after 1905 there was no British 13 administrative process or presence of any kind in 14 southwestern Kordofan, the Abyei region. This bears 15 repeating: there was no British administrative presence 16 of any kind. There were no posts, no soldiers, no 17 police, no representative of the Government. 18 It should have come as no surprise to the Tribunal, 19 therefore, that with no administration in southern 20 Kordofan in 1905, and no administration in the northern 21 Bahr el Ghazal, there was simply no need for 22 a provincial boundary between the two. What would such 23 a boundary have accomplished? Since there was no 24 colonial government in either place, there were no 25 government services, there were no revenues to be</p> <p style="text-align: center;">Page 101</p>	<p>12:03 1 general was certainly true of the Abyei Area in 2 particular. There was no administration of any kind 3 other than what the Ngok Dinka provided for themselves. 4 The British had no interest in the Abyei Area in 1898, 5 in 1905, or for that matter in 1920 or 1930. The 6 British established no government post there, no school, 7 no health clinic; indeed no presence at all. There was 8 no economic development. The Ngok Dinka were left on 9 their own, the way they had always been. 10 As long as the colonial Government heard no reports 11 of tribal fighting, the British stayed away. The Abyei 12 region was remote and inaccessible except in the dry 13 season and, I emphasise again, simply of no interest. 14 The little the British did know of the Abyei region 15 in 1905 was based on what a few British officers had 16 seen while passing through for a few days from El Obeid 17 to the Bahr el Ghazal. 18 Because they had no interest in the region, they 19 naturally have left very brief records of their brief 20 treks. There were in fact only three British officials 21 who passed through before 1905. These three aimed to 22 see the Ngok paramount chief, whom they called 23 "Sultan Rob". Otherwise they saw only a tiny part of 24 the huge Abyei Area. By the time of the 1905 transfer 25 most of the region remained entirely unexplored. The</p> <p style="text-align: center;">Page 103</p>
<p>12:01 1 collected or divided, there were no social services. 2 There was, simply put, no point in delimiting 3 a boundary. 4 For this reason, when British officers in far away 5 El Obeid or Wau, or even more distant Khartoum, refer to 6 one province or another, to Kordofan or to the 7 Bahr el Ghazal, their terms of reference were vague and 8 uncertain. Instead the British were simply practical, 9 a hallmark of British imperialism all over the world, 10 dealing with local peoples from whichever post or 11 barracks was closest or most convenient when the need 12 arose. In this way a working boundary was conceived. 13 This is why no boundary is found in the 1904 14 Intelligence Office map of the Sudan which is in the 15 1905 Gleichen handbook. This is also why we see no 16 references to a provincial boundary in the official 17 Sudan Government gazettes, which is where definitive 18 acts of the colonial regime were published. 19 There is nothing surprising or even unusual about 20 this lack of a definite boundary. The colonial regime 21 had very few officers, very few funds, and a great deal 22 of practical work to do. Lines on maps dividing 23 internal regions of the vast country were of no concern. 24 Provincial boundaries simply did not matter. 25 What was true of Kordofan and the Bahr el Ghazal in</p> <p style="text-align: center;">Page 102</p>	<p>12:04 1 British had no idea of what was in the areas they had 2 never visited. And the areas they had never visited 3 accounted for the vast majority of the territory. 4 It is worth remembering that the reason for these 5 few British treks was simply to show the local people 6 that the British had arrived in the Sudan, or "to show 7 the flag", as it's often put. British officials on 8 treks knew nothing of the Ngok Dinka language or 9 customs, and there is no evidence they were interested 10 in learning anything about them. 11 It is very likely that the Ngok Dinka would have 12 been afraid of British officers who did visit the 13 region. I refer now to some of the comments that have 14 been made in the last two days. As those British 15 officers travelled in sizeable groups with armed -- 16 often -- northern Sudanese or Arab soldiers, and on 17 horseback, just as slave raiders had done in the past. 18 In fact, the Anglo-Egyptian colonial regime was 19 known throughout the northern Sudan as the "second 20 Turkiyya", referring to the era of the Turko-Egyptian 21 regime of the 19th century that had been overthrown in 22 the nationalist revolution of the Mahdiyya. This was 23 the slang expression for the new regime, the "second 24 Turkiyya" since, as far as the Sudanese were concerned, 25 the British were just another foreign exploiter. They'd</p> <p style="text-align: center;">Page 104</p>

<p>12:06 1 seen them before, like the Turko-Egyptians from the 2 north, or the French and Belgians encroaching from the 3 west and south. 4 The Ngok Dinka are likely to have been concerned for 5 their and their community's safety in the presence of 6 European officers. And they had no reason, certainly, 7 to trust them. 8 Because the British administration was so 9 rudimentary and focused on practical issues rather than 10 with details, the 1905 transfer decision was clearly 11 about people, not land. The stated purpose of the 12 transfer was to place slave raiders and the people they 13 raided under one administration. No effort was made to 14 define the territory that this decision would involve. 15 There was no reason to define that territory. 16 The covering letter transmitting to Cairo the 17 material for the 1905 Governor-General's report on the 18 Sudan was a typical summary of information in many 19 departmental and provincial reports. The Sudan 20 Government, or the Anglo-Egyptian Condominium, was 21 highly bureaucratic. This 178-page cover letter was no 22 doubt compiled in the usual way by Sir Reginald 23 Wingate's civilian and military staff officers, then 24 likely drafted by the private secretary of the Sudan 25 Government, Lee Stack; whose career, incidentally, was</p> <p style="text-align: center;">Page 105</p>	<p>12:09 1 We have to bear in mind that these treks were not 2 for the purpose of recording the location and identity 3 of local inhabitants. The purpose of these few British 4 treks was nothing more than reconnaissance, showing the 5 flag, announcing the existence -- literally the 6 existence -- of the new regime in Khartoum, a week's 7 journey away. 8 Because the documentary record is so scanty, Ngok 9 witness testimony becomes important. The detail and 10 breadth of that testimony is, as I think you've seen to 11 some extent this morning already, impressive. In many 12 cases the Ngok witness statements are the only evidence 13 we have on the issue of who inhabited the Abyei region 14 in 1905. In other words, for large parts of the Abyei 15 Area before and in 1905 we have no contemporary 16 documents, and no witness testimony from anyone else. 17 Indeed, for all the reasons I have already 18 discussed, this is simply not surprising. Given this 19 meagre record, the Ngok witness testimony is 20 particularly interesting and important to the historian 21 of the region and the historian of the period, providing 22 evidence of Ngok land use well north of the river 23 systems of the Bahr and up into the goz in the period 24 around 1905. 25 Thank you.</p> <p style="text-align: center;">Page 107</p>
<p>12:07 1 the subject of my London PhD thesis. 2 The important point, however, is that this cover 3 letter changed nothing. It merely noted that the Ngok 4 people would forthwith be under the authority of 5 Kordofan, as a people. 6 In that cover letter there was nothing about 7 a provincial boundary. Why would there be? There was 8 still no reason for a provincial boundary. There is no 9 evidence that Wingate or anyone on his staff had any 10 idea of the extent of Sultan Rob's lands. 11 Moreover, we know that by the time of the transfer 12 there still was confusion about the location and names 13 of the local rivers. We therefore still do not even 14 know what was meant then by the Bahr el Arab, and 15 Wingate confesses as much in this very cover letter of 16 which so much has been made. 17 The few British officers who trekked through the 18 Abyei Area before 1905 saw only a fraction of the region 19 that they passed on the route they had travelled. It is 20 absurd to imply that the Ngok must have been absent from 21 the remaining areas. It is likewise unhistorical and 22 unreasonable to think that because a few British trek 23 notes do not mention the Ngok Dinka as present in 24 a certain area during a certain season, then they must 25 not have used that land during another season.</p> <p style="text-align: center;">Page 106</p>	<p>12:11 1 THE CHAIRMAN: I thank you very much, Professor Daly. 2 Questions on the part of the Government? 3 (12.11 pm) 4 Cross-examination by MR CRAWFORD 5 Q. Professor Daly, my name is James Crawford, and I'll be 6 asking you some questions. 7 You said -- and I hope I don't misquote you -- that 8 there was in effect no British administration of the 9 Ngok Dinka under Sultan Rob at the period of the 10 transfer? 11 A. Yes. 12 Q. In 1903 the Kordofan administration gave him 13 a second-class robe of honour? 14 A. Yes. 15 Q. Which he subsequently wore when he went to the capital 16 of Kordofan. Do you know that that is true or not? 17 A. I know that the second-class robe of honour was 18 bestowed. I did not know he wore it on a subsequent 19 trip. 20 Q. It is in fact recorded that he did. He was apparently 21 extremely versatile, I understand, and he wore the 22 second-class robe of honour when that was appropriate, 23 and nothing at all when that was in accordance with what 24 the Dinka would do. 25 A. You are equating the two garments, I believe. No,</p> <p style="text-align: center;">Page 108</p>

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
 10 Sudan, 1821-1881, published Oxford, I think, 1959.
 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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12:13 1 A. Yes.
 2 Q. My understanding, and you'll correct me if I'm wrong, is
 3 that when the Condominium Administration was established
 4 they basically took the existing provincial
 5 boundaries -- or the existing provinces, let me put
 6 it -- let me rephrase that: they took the existing
 7 provinces as they were?
 8 A. No, I think that is wrong. They did, as you began to
 9 correct yourself, take the existing names, or took some
 10 of the existing names from the previous pre-Mahdiyya
 11 region. Kordofan is an example of that.
 12 The name "Kordofan" extends at least back to about
 13 the 1820s, if not earlier, but originally referred only
 14 to the area around Jebel Kordofan, just to the south of
 15 El Obeid, the capital. As the 19th century progressed
 16 the term "Kordofan" expanded, as control of the
 17 Turko-Egyptian regime from El Obeid expanded.
 18 But as Hill, the recognised source on the period,
 19 has stated in his classic book "Egypt in the Sudan"
 20 there is still to this day no map from the Turkiyya,
 21 from the 19th century, that shows provincial boundaries,
 22 including provincial boundaries between Kordofan and the
 23 Bahr el Ghazal.
 24 Q. Hill also says -- and I'm sorry that in the context of
 25 this cross-examination I'm not in a position to take you

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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.

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12:17 1 Q. Can I take you to Percival's route report of
2 December 1904.
3 A. Yes.
4 Q. This is at tab 31 of the common bundle. He's talking
5 about Sultan Rob, who he met at Burakol, he says "where
6 Sultan Rob is at present living". He makes some remarks
7 about the region. Then he says:
8 "There are no Dinkas west of Burakol as far as
9 I could see, and Sultan Rob told me that there were only
10 Homr Arabs west of him. He told me the
11 Bahr el Arab ..."
12 By which I think we agree that he meant the river or
13 part of the river to the north, not what we now call the
14 Bahr el Arab?
15 A. Yes.
16 Q. "... is uninhabited, he told me, except for occasional
17 wandered [is what he says] parties of Arabs."
18 A. I know the passage.
19 Q. "He knew Chak Chak, which he said was the next lot of
20 natives to those he ruled."
21 For someone who couldn't communicate, that's a fair
22 bit of information?
23 A. As I say, there must have been some means of
24 translation. It's possible of course -- and likely
25 I think, in fact -- that Sultan Rob spoke something of

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12:20 1 Q. Yes, since one writes a lot, it's true.
2 Then we know from the 1904 annual report that
3 Lieutenant Bayldon was told by Wingate to go and work
4 out the little-known rivers, the Bahr el Arab, the Kiir,
5 the Lol; that comes from the annual report for the Sudan
6 of 1904, and he did in fact do that?
7 A. Mm-hm.
8 Q. So there is some evidence, isn't there, of a concern by
9 the British Government to discover the hydrology of the
10 rivers?
11 A. There was certainly an interest. I think it's worth
12 pointing out that the basin of the Bahr el Arab was the
13 last, or certainly one of the last, of the river systems
14 in the Southern Sudan to be so opened up by the British.
15 I think we tend to telescope things because of the
16 concern over Abyei in this particular litigation, but
17 the Blue Nile had been completely opened earlier, the
18 White Nile entirely opened as far as the Ugandan border,
19 the Sobat, the Pibor, the Bahr el Ghazal, the Jur to
20 Wau, other tributaries of the Bahr el Ghazal.
21 So what really this was is a way of tidying up, if
22 you like, opening up through sudd clearance one of the
23 last river systems.
24 Q. Let's turn to the question of Ngok population. Would
25 you agree with the estimate of 50,000 for the population

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12:18 1 what we would call today Juba Arabic, the sort of
2 lingua franca of the borderlands, and certainly some of
3 the British officials' entourage would have spoken
4 Arabic.
5 Q. In your second report at page 3, fourth bullet point,
6 you say:
7 "Southern Kordofan's complex hydrology was of little
8 or no concern to the Sudan Government in 1905."
9 Do you agree with that still?
10 A. Yes.
11 Q. In The Empire on the Nile, which I have to say -- and
12 this isn't a question -- I enjoyed very much, you say at
13 page --
14 A. I won't thank you, since it's not a question.
15 Q. At page 135 -- I think we're having comments as well as
16 questions.
17 MR BORN: On both sides.
18 PROFESSOR CRAWFORD: Page 135, Empire on the Nile, you
19 say:
20 "The first task of the Government in the south was
21 to extend and secure its river communications."
22 You refer to a command by Kitchener to Peake to
23 reconnoitre the Bahr el Ghazal and the Bahr el Jebel;
24 you recall that?
25 A. I'm sure I wrote it.

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12:22 1 of the Ngok in 1905?
2 A. No.
3 Q. How would you go about estimating that population?
4 A. I am not a demographer, I don't have a way. I have only
5 the historical sources. I have looked extensively
6 through the nine volumes of the 1955/56 Sudan census --
7 Q. Yes.
8 A. -- and taken to heart its findings. I have no reason to
9 argue with them.
10 The only way to go back and look at population
11 statistics before that is to use very complicated
12 mathematical formulae to extrapolate backward, if you
13 like, from a census.
14 Q. You would expect --
15 A. It's hard to do that, especially for someone untrained
16 in demography, because these involve epidemic diseases,
17 migration, other factors, so I wouldn't attempt it.
18 Q. You would expect that the population of the Ngok, like
19 other population groups in Kordofan, would have
20 increased after 1900?
21 A. Yes.
22 Q. Thank you. Can we turn to Wilkinson's route report.
23 Here's a clean copy of it. (Handed)
24 A. Thank you.
25 Q. In your first report at page 49, third paragraph, you

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<p>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-Zarqa." 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.</p> <p style="text-align: center;">Page 117</p>	<p>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 18 terminology that we might use in order to establish the 19 boundaries' various degrees of health. 20 I was reminded of the way in which the government's 21 expert, Mr MacDonald, stated at the time of the transfer 22 that the Bahr el Arab was fit for the purposes of 23 delimitation, ie hadn't yet been delimited, but the 24 feature was robust enough to be considered for 25 delimitation.</p> <p style="text-align: center;">Page 119</p>
<p>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</p> <p style="text-align: center;">Page 118</p>	<p>12:28 1 I think I would have to say that I must take issue 2 with that particular comment for the critical region of 3 the river along the borderlands, the indeterminate 4 borderlands, simply on the first hand because there was 5 confusion as to its identification held at the highest 6 levels between the governors and the governor-general 7 themselves, and that was during the dry season. You can 8 imagine that the picture would have been a lot more 9 complex during the wet season, as Tony Allan's slides 10 would have attested yesterday. 11 Yesterday Professor Crawford of Cambridge University 12 made the point that state boundaries are drawn by state 13 actions, drawing our attention and reinforcing the 14 centrality of the state in establishing boundaries, 15 whether they be international or internal. 16 Now, this may seem like a geographer trying to talk 17 to lawyers, and I suppose it is in many ways, but what 18 I say here is back to basics: what is a boundary and 19 when is it delimited? 20 Well, I am going to take a functional definition of 21 a boundary which may be applicable at either the 22 international or the provincial level. It's one 23 provided by the leading geographer to have written about 24 international boundaries, Victor Prescott. He says that 25 it is:</p> <p style="text-align: center;">Page 120</p>

<p>12:30 1 "... a line separating areas of different political 2 administration, authority or jurisdiction." 3 Of course, if we are actually going to talk about 4 delimitation then we ought to look at the other 5 recognised stages very briefly in a boundary's 6 evolution. 7 Recognised by de Lapradelle in 1928 and refined by 8 the American geographer Stephen Jones in 1945, there are 9 three stages to this. Generally the stage of allocation 10 allocates the territory in a line will in future be 11 drawn. Note that it doesn't allocate a boundary as 12 such. 13 The second stage would be delimitation, where the 14 line is established, and of course, as we know, the line 15 has no width; it needs to be specified. A demarcation, 16 although there are many instances of confusion, simply 17 physical marks out that line on the ground. Let's go 18 on. 19 Delimitation requires, I would purport at, both 20 levels, inasmuch as the way I described it, an executive 21 act determining a boundary line, geographic 22 identification of the boundary line, the line being the 23 point here, detailed description of the location of 24 a boundary line, ideally to the degree that it can be 25 mapped, and a fourth stage will often be taken: a survey</p> <p style="text-align: center;">Page 121</p>	<p>12:32 1 references didn't constitute a central defining action 2 by the Condominium government allocating or establishing 3 a boundary. Of course, as we'll find, there was actual 4 confusion as to the course of the feature purporting to 5 represent the provincial boundary, in our opinion -- and 6 my opinion -- rendering the territorial limit both 7 indeterminate and indefinite. 8 A legacy of uncertainty. Again, in many, many ways 9 we can say that the Bavarian traveller Ignatius Pallme, 10 his description in 1844 of an Ottoman boundary which 11 contracted and retreated, and did so regularly over 12 a period of years, as recorded in many Ottoman 13 salnameh -- not here, but elsewhere in the Ottoman 14 world -- that was a fairly standard depiction of 15 an Ottoman provincial boundary. Some were more firmly 16 established than others, it must be said, depending 17 where you looked. 18 But certainly by 1898 we had the definition at the 19 bottom. This mudiria was vaguely defined, but may have 20 been described as enclosing the entire district water by 21 the southern tributaries; very vague, and certainly 22 a zonal implication. 23 Uncertainty continued to rein into the 1900s. Abyei 24 had not been defined, numerous Condominium officials, as 25 we've heard very eloquently over the last few days, had</p> <p style="text-align: center;">Page 123</p>
<p>12:31 1 of the immediately surrounding borderlands so that 2 a delimited line can in fact be demarcated. 3 Now, we can say -- and I don't think anyone will 4 particularly challenge here -- that as of 1905 there had 5 been no delimitation of a provincial boundary. There 6 had been no Sudan action establishing or determining 7 a boundary line. There had been no geographic 8 identification of a boundary line and no detailed 9 description of the location of that boundary line. No 10 boundary line certainly was capable of being mapped and 11 demarcated. On to the next. 12 Now, if we haven't had delimitation, let's go back 13 to that earlier stage of allocation and let's think 14 about the putative definition of a provincial 15 territorial divide which appeared in the early years of 16 the 20th century. Remember, an allocation prescribes 17 a boundary zone or an area, or an area in which the 18 boundary will be drawn. 19 References to the Bahr el Arab were uncertain in 20 1905, and therefore I would say that any identification 21 of the Bahr el Arab as the boundary must therefore have 22 been indeterminate and indefinite. 23 The Bahr el Arab was referred to in absolutely 24 minimal terms: three words, "Bahr el Arab", as 25 a boundary in provincial administrative reports. These</p> <p style="text-align: center;">Page 122</p>	<p>12:34 1 referred to the Ngol/Ragaba ez Zarga as the 2 Bahr el Arab. The Government seems to have accepted 3 this designation, and that the following officials made 4 such an admission: Wilkinson, Percival, Boulnois -- 5 I don't know if it's an anglicised or a French -- 6 O'Connell and Lloyd. 7 Whatever the reason, they did acknowledge that 8 reality. The important thing is that the Government 9 appears to suggest that references by the governors of 10 Kordofan and Bahr el Ghazal, separate ones in each of 11 their administration reports to the Bahr el Arab as 12 a provincial boundary, were sufficient to establish 13 a boundary. 14 I would reckon, although I couldn't be absolutely 15 sure, that provincial boundaries cannot be unilaterally 16 determined by provincial governors. Some centralised 17 executive action is probably needed. Even then, both 18 Kordofan and Bahr el Ghazal governors were demonstrably 19 confused as to the location of the Bahr el Arab at the 20 time of transfer. So any putative boundary surely, by 21 extension, could only be indeterminate and indefinite. 22 Reflecting this uncertainty. I don't need to spend 23 too much time on it, other than to say: he was the 24 governor of the Bahr el Ghazal at the time of transfer. 25 Unfortunately he would die in the Bahr el Ghazal region</p> <p style="text-align: center;">Page 124</p>

<p>12:35 1 actually in May 1905. But again recounting Percival's 2 march in late 1904, he acknowledged that the Kiir was in 3 fact 50 miles south of the Bahr el Arab. 4 James O'Connell. I know this was acknowledged as 5 a mistake by Government the other day, one which they 6 said was quickly corrected. Nonetheless, he was the 7 Governor of Kordofan, the top dog if you like, and he 8 located Hasoba on the Bahr el Arab, meaning the Ngol or 9 the Ragaba ez Zarga. 10 Here are the words from the appropriate report: 11 "I at once proceeded to Hasoba on the Bahr el Arab." 12 Uncertainty: cartography. The point was: in 1905 no 13 Sudan Government map had determined, delimited or 14 designated any provincial boundary. This has been 15 established, but we'll have another look at the 1904 16 War Office map. And the insert of course there: the 17 Bahr el Arab is running along the Ngol. 18 On to the next one. Uncertainty: Wingate. This was 19 noted in the Government's representations over the last 20 two days, that there was uncertainty in the 1904 annual 21 report. I refer to some of the highlighted sections 22 there, particularly the individual specification in the 23 first paragraph of the quote as Bahr el Arab, Kiir and 24 Lol are separate rivers. 25 On to the next one, please. There's still some</p> <p style="text-align: center;">Page 125</p>	<p>12:39 1 the Arab, the Lol and the Kiir; again the Kiir 2 distinguished differently and clearly from the Arab. 3 If we go on a few years later -- and I'm not 4 providing any context for this statement; it's on the 5 record -- it confirms a reality that was alluded to by 6 my colleague Martin Daly, where Wingate says even in 7 1909 that much of the course is the Bahr el Arab is 8 still unexplored. 9 So if we come to a conclusion, clearly there was no 10 delimited boundary between Kordofan and Bahr el Ghazal 11 provinces in 1905. I would say that both the Kordofan 12 and Bahr el Ghazal Governors were confused as to the 13 location of the Bahr el Arab at the time of transfer in 14 1905. If we were charitable we would say that the 15 governor-general himself was confused in late 16 January 1905; but perhaps later, as I've alluded to. 17 I still said still some uncertainty; perhaps less 18 uncertainty, but uncertainty nonetheless. 19 Logically, therefore, any putative Bahr el Arab 20 boundary must have been indeterminate and indefinite. 21 There had been no central allocation, never mind 22 delimitation; while significant leading Condominium 23 personnel didn't know where it was. 24 There was uncertainty as to the extent of provincial 25 administration in the emerging territory's undefined</p> <p style="text-align: center;">Page 127</p>
<p>12:37 1 uncertainty, it must be said, in the 1905 annual report, 2 which was dated January 1906. We were taken through -- 3 very, very eloquently again -- by the Government counsel 4 elements of this report. I refer to pages 10 and 11 of 5 the annual report for 1905. But if we look at page 10, 6 the Bahr el Ghazal exploration, the last sentence says: 7 "Much of the course of these rivers is still 8 unknown ... and doubt still exists as to the correct 9 names of the intricate waterways which intersect this 10 part of the Sudan." 11 On the next page, of course page 11, which we heard 12 about yesterday, we had a very full treatment of the 13 sudd clearing in the Bahr el Arab. It was very evident 14 from this that Wingate, the governor-general, had begun 15 to think about clearing up the question of identifying 16 rivers in the Southern Sudan. That's been addressed 17 yesterday. The point I would make is that we'd only got 18 so far in this process. 19 If we look at the second paragraph of page 11 of the 20 report, there is still an indication that Wingate is 21 confused in January 1906, whereupon he repeats almost 22 the same phrase as was made in the previous annual 23 report, saying that the various waterways -- he asked 24 Lieutenant Walsh to go back to penetrate as far as 25 possible along the various waterways known locally as</p> <p style="text-align: center;">Page 126</p>	<p>12:40 1 margins therefore. 2 So I would say that Mr MacDonald's assertion that 3 the Bahr el Arab's pre-transfer depiction of the river 4 was fit for the purpose of boundary delimitation at the 5 time does not hold, other than perhaps in its western 6 reaches, west of the Kordofan/Bahr el Ghazal borderlands 7 themselves. 8 I'd leave it there, thank you. 9 THE CHAIRMAN: I thank you very much. 10 Questions? 11 (12.41 pm) 12 Cross-examination by MR BUNDY 13 Q. Mr Schofield, I know we know each other very well, but 14 for the record I'll introduce myself: Rodman Bundy, 15 counsel for the Government of Sudan. 16 You will probably be aware that I asked 17 Professor Allan yesterday about your primary conclusion 18 in your report at paragraph 2. You state: 19 "Our primary conclusion is that in 1905 there 20 existed no provincial boundary between Bahr el Ghazal 21 and Kordofan provinces." 22 Is it your opinion that Condominium officials at 23 that time considered there was no provincial boundary? 24 A. Well, there was certainly no provincial boundary 25 delimitation. If there was a putative boundary</p> <p style="text-align: center;">Page 128</p>

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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12:44 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 distinguishment 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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12:43 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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12:45 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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<p>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</p> <p style="text-align: center;">Page 133</p>	<p>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 10°35' 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 Schwebel.</p> <p style="text-align: center;">Page 135</p>
<p>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</p> <p style="text-align: center;">Page 134</p>	<p>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 Diyin 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</p> <p style="text-align: center;">Page 136</p>

<p>12:55 1 adjourned until 3 o'clock. 2 MR BORN: Thank you, Mr Chairman. 3 (12.55 pm) 4 (Adjourned until 3.00 pm) 5 (3.00 pm) 6 THE CHAIRMAN: A question was asked by Judge Schwebel just 7 before the break to Mr Born, with the possibility, of 8 course, for the Government to answer it if they want. 9 Reply to the Tribunal by MR BORN 10 MR BORN: Thank you, Mr Chairman. 11 Turning to the relevant paragraph, 33 of 12 Zakaria Atem's witness statement which was read out, the 13 question is: what was the thesis of that paragraph and 14 what factual inferences might be drawn from it? 15 The thesis we would submit is almost identical to 16 the Government's legal case, and one can surmise how the 17 Government's legal case found its way into Mr Atem's 18 witness statement. That legal case is, of course, that 19 the Abyei Area is defined as a transferred area that lay 20 to the south of what the Government takes to be the 21 Kordofan/Bahr el Ghazal boundary in 1905, what they call 22 the Bahr el Arab or the Kiir/Bahr el Arab, and that the 23 transferred area can only be that area to the south of 24 the Kiir. 25 The thesis as well -- and this is going to take me</p> <p style="text-align: center;">Page 137</p>	<p>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</p> <p style="text-align: center;">Page 139</p>
<p>15:01 1 some time I think to work through in Atem's statement -- 2 is that that was by no means all of the Ngok Dinka 3 territory, which instead, for reasons that I've already 4 explained today at some length, extended substantially 5 to the north, above the Kiir/Bahr el Arab, above the 6 Ngol, and that not just the SPLM/A but indeed Mr Atem 7 himself thought that that was unfair. 8 He draws a conclusion from that in paragraph 33 that 9 it caused political difficulties for the SPLM because 10 when they realised in effect, in his view and the 11 Government's legal view, that they had given up their 12 traditional ancestral homelands to the north of the 13 Kiir/Bahr el Arab, people were angry with them. 14 That is what I would submit quite clearly is the 15 thesis of Atem's witness statement. I'd like to take 16 you to paragraph 23 of his witness statement, and we can 17 look through at how that thesis is elaborated: 18 "Before the 1965 conflict the Ngok Dinka lived 19 around Abyei, with some to the north and west and some 20 to the east. All nine chiefdoms were intermingling, 21 there were no boundaries among them either. The 22 settlements were in Thigai, Dawas, Antila, the Rgaba 23 Zerga and Fawel." 24 Then he goes on, and I'd just like to pause there. 25 That is a substantial chunk of the Bahr; he doesn't</p> <p style="text-align: center;">Page 138</p>	<p>15:04 1 and which is uncontroverted. 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</p> <p style="text-align: center;">Page 140</p>

<p>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 they brought 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</p> <p style="text-align: center;">Page 141</p>	<p>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.</p> <p style="text-align: center;">Page 143</p>
<p>15:06 1 something we didn't even know about the lisaig grass. 2 The last thing that he said isn't in his statement 3 but I'd like to read from page [45, line 24, to page 46 4 line 5] of his witness [testimony], in response to 5 questions from the Tribunal. He said in reference to 6 the Abyei Area: 7 "Danforth ... said that this is the place where the 8 Dinka have been transferred, but this is a small 9 triangle ..." 10 This is in reference to what took to be the 11 transferred area beneath the Kiir: 12 "... this is a small triangle, so it is not enough 13 to accommodate even the owners of the area." 14 That takes us back to what I told you about the 15 Government's theory that you really need high-rise 16 condominiums in the 14 miles of swampland underneath the 17 Kiir to accommodate all the Ngok Dinka that would need 18 to live there. There's not enough room there, Mr Atem 19 told us; "it is not enough to accommodate even the 20 owners of the area". 21 Then he went on and said, and this is very 22 important: 23 "So as a Dinka tribe member I think that this is 24 unfair, because Dinka used to extend from the south -- 25 from the north and to the south as well."</p> <p style="text-align: center;">Page 142</p>	<p>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</p> <p style="text-align: center;">Page 144</p>

<p>15:10 1 course is unfathomable, but the Government affirms the 2 truth of what he is saying in the paragraph to which you 3 refer, and then the context of the testimony that he 4 gave allowed him to say what he thought on all fronts. 5 Thank you, sir. 6 THE CHAIRMAN: I thank you very much. We are now to begin 7 the second round of replies, this time on the 8 delimitation issue. I recall that each side will have 9 80 minutes and the Government begins. 10 Please, Mr Bundy, you have the floor. 11 (3.11 pm) 12 Submissions by MR BUNDY 13 MR BUNDY: Thank you, Mr President, distinguished members 14 of the Tribunal. I shall begin the Government's reply 15 to the SPLM/A's first-round pleading on the question: 16 what was the area of the nine Ngok Dinka chiefdoms 17 transferred to Kordofan in 1905? I'll be followed by 18 Professor Crawford, who will discuss the SPLM/A's 19 tribal case. 20 We've heard two very different accounts of what 21 happened at the time. The SPLM/A has painted a picture 22 of confusion, ignorance, uncertainty in the minds of 23 Condominium officials as to the area that was 24 transferred from Bahr el Ghazal to Kordofan in 1905, and 25 the people of that area.</p> <p style="text-align: center;">Page 145</p>	<p>15:14 1 interject a brief comment. Yesterday afternoon Mr Born 2 purported to quote something that I said yesterday 3 morning in my first-round presentation. At page 183 of 4 the transcript counsel said that I said: 5 "It is self-evident that as of 1905 Government 6 officials would have had no knowledge of tribal 7 locations." 8 That's what counsel said that I said: that as of 9 1905 Government officials would have had no knowledge of 10 tribal locations. 11 As an advocate I can certainly have no objection if 12 opposing counsel tries to cite my words against me. But 13 when he does so, I'd prefer it if he could quote me 14 correctly. I did not say that it's "self-evident that 15 as of 1905 Government officials would have no knowledge 16 of tribal locations". 17 If one checks the actual transcript at page 20 -- 18 Mr Born's reference to the transcript was incorrect, but 19 if one checks the actual transcript, it will be seen 20 that what I actually said was: 21 "It is self-evident that as of 1905 Government 22 officials would have no knowledge of tribal locations or 23 other factors that only emerged after that date." 24 By dropping the final words that I said, counsel 25 seriously distorted my point.</p> <p style="text-align: center;">Page 147</p>
<p>15:12 1 According to our opponents there was no provincial 2 boundary between the two provinces at the time. That, 3 as you'll recall from this morning, was the principal 4 conclusion of MENAS: no provincial boundary. The 5 location of the pre-transfer boundary and the 6 post-transfer boundary is thus irrelevant to your task. 7 That was repeated by Mr Born on Sunday. 8 Boundaries have not been established pursuant to any 9 decree or proclamation; a point raised by 10 Professor Daly. There was no administration on the 11 ground; a point also raised by Professor Daly this 12 morning. 13 No one knew for sure which river was which, or where 14 the rivers lay, a theme that permeates the SPLM/A's 15 pleadings; and that the Governor-General's views that 16 the districts transferred, that were formerly part of 17 the Bahr el Ghazal province, and that lay to the south 18 of the Bahr el Arab, that those were incorporated into 19 Kordofan should be disregarded; which is precisely what 20 the SPLM/A's memorial and counter-memorial did, along 21 with the MENAS report and the first daily report. 22 They also say that Condominium officials had little 23 idea where the Ngok Dinka were really located. That's 24 from paragraph 114 of their rejoinder. 25 On that last point, Mr President, I need to</p> <p style="text-align: center;">Page 146</p>	<p>15:15 1 As both Professor Crawford and I have shown, by 1905 2 Condominium officials did have a good idea of where the 3 Ngok Dinka were located, and of the area that was 4 transferred in that year. 5 The litany of points of confusion, lack of knowledge 6 and uncertainty posited by our opponents brings, at 7 least to my mind, the eloquent words of Yeats in his 8 poem "The Second Coming": 9 "The falcon cannot hear the falconer; 10 "Things fall apart; the centre cannot hold; 11 "Mere anarchy is loosed upon the world, 12 "The blood-dimmed tide is loosed, and everywhere 13 "The ceremony of innocence is drowned; 14 "The best lack all conviction, while the worst 15 "Are full of passionate intensity." 16 It's a moving verse, but it's not the way 17 Condominium officials viewed the situation at the time. 18 The transfer decision was not controversial in 1905, 19 and it was not complicated. Condominium officials had 20 a well articulated intention. There had been complaints 21 from Sultan Rob and Sheikh Rihan of raids of Baggara 22 Arabs living in Kordofan on Dinkas living in 23 Bahr el Ghazal. It was thought that this situation 24 could be better controlled if those territories of the 25 Ngok Dinka and the Twic, those territories situated in</p> <p style="text-align: center;">Page 148</p>

<p>15:17 1 the Bahr el Ghazal province at the time, were 2 transferred to Kordofan so that all the protagonists 3 would be under the same administrative authority of the 4 Governor of Kordofan. 5 There was no dispute in 1905 over these issues. 6 Condominium officials were not trying to settle 7 a territorial dispute where different positions have 8 been advanced. No one was posturing for litigation 9 purposes. All that was involved was a straightforward 10 administrative transfer of an area from one province to 11 another. It did not involve large-scale change to 12 Sudan's provincial boundaries. Relatively limited -- 13 though nonetheless important -- areas were at stake. 14 This was not a complex matter for Condominium 15 administrators in 1905, and we would submit that it does 16 not need to be a complicated task for this Tribunal 17 either. The pieces of the documentary record fit 18 together like a jigsaw puzzle; they add up. The 19 essential task for this Tribunal, we would respectfully 20 submit, is to examine that record as a whole in 21 assessing the parties' positions. 22 Does it really support the proposition that 23 Condominium officials in 1905 intended to transfer from 24 Bahr el Ghazal to Kordofan areas that extended up to the 25 10°35' north latitude, or even the 10°22'30" north</p> <p style="text-align: center;">Page 149</p>	<p>15:20 1 not diminish its importance, although it may say 2 something about the ABC's work. The centre does indeed 3 hold; nothing falls apart. Perhaps, if I may be 4 permitted to say so, this Tribunal is in a very real 5 sense the second coming when compared to the ABC 6 experts' report. 7 Now, we have been told by the SPLM/A not to 8 second-guess or rewrite what Government administrators 9 wrote at the time, and that the most reliable approach 10 is to look at what Government administrators said they 11 transferred to Kordofan in 1905. 12 The SPLM/A memorial in fact, at paragraph 1579 13 called the 1905 Condominium official documentary records 14 "decisive". Precisely. And we encourage the Tribunal 15 to take that approach. 16 Yet yesterday afternoon counsel for the SPLM/A took 17 exactly the opposite approach. He now emphasises that 18 the documentary evidence should be looked at with 19 scepticism because of its so-called limitations. 20 From what we heard for a good part of yesterday 21 afternoon, what is more important is to look at what 22 Condominium officials did not say, rather than what they 23 said, and the Tribunal is invited to play detective and 24 speculate as to the alleged missing gaps. 25 In short it turns out that we should second-guess</p> <p style="text-align: center;">Page 151</p>
<p>15:19 1 latitude? Is that what the record really shows? Or 2 does the record support the proposition that the 3 transferred area was viewed by Condominium officials 4 themselves as much more limited, and as lying along the 5 Bahr el Arab and to its south? 6 Unlike many boundary disputes dating from more than 7 a century ago, the basic facts relating to the transfer, 8 and the evidence of the intention of Government 9 officials who effectuated the transfer, are well 10 documented. 11 Despite counsel's complaint that there are only two 12 dozen or so documents referring to the Ngok Dinka or 13 Messiriya from the time, the fact is that we have 14 numerous intelligence reports prepared on a monthly 15 basis, annual reports for the relevant provinces of 16 Bahr el Ghazal and Kordofan for each of the significant 17 years; very detailed accounts from Government officials 18 who visited the area, including with their sketch maps, 19 and the views of the seniormost Government administrator 20 which he recorded contemporaneously and which referred 21 specifically to the transfer and its location. 22 It is a rich and informative body of documentary 23 evidence. We know what happened at the time because the 24 relevant documents are on the record. The fact that the 25 ABC experts did not refer to much of this record does</p> <p style="text-align: center;">Page 150</p>	<p>15:22 1 the Condominium officials after all, and today we've 2 actually heard virtually no discussion whatsoever of the 3 documents that the SPLM/A previously said were decisive. 4 There's been no mention today, for example, of the 5 March 1905 Sudan Intelligence Report, no mention of the 6 1905 annual reports. These were documents that even 7 Professor Daly in his first report termed "foundation 8 texts", and yet he couldn't even remember the annual 9 reports in questions put to him this morning. 10 Now, we also have had by Mr Schofield, my good 11 friend and colleague, a passing reference to Wingate's 12 memorandum, but nothing at all focusing on what Wingate 13 actually said about the transferred area. That was the 14 passage we all recall where Wingate said that the 15 transferred areas comprised the districts of the two 16 Sultans to the south of the Bahr el Arab, and formerly 17 a portion of Bahr el Ghazal province, that had been 18 incorporated into Kordofan. 19 In considering the evidence it's perfectly clear 20 that Government administrators were not relying on oral 21 tradition or on post-1905 events when they described the 22 transferred area; nor did they feel that they needed to 23 know where all the areas were that the Ngok Dinka 24 allegedly occupied or used. 25 They didn't need to know and they weren't interested</p> <p style="text-align: center;">Page 152</p>

<p>15:24 1 in connection with the transfer in climatic conditions, 2 soil, vegetation and other environmental elements. They 3 weren't interested in those, and those did not figure 4 into their decision and their description of the 5 transfer. 6 Condominium officials make no mention of these kinds 7 of factors in relation to the transfer decision, and 8 indeed Professor Allan confirmed in response to 9 a question put to him that there's no document 10 evidencing that Condominium officials considered these 11 kinds of environmental factors relevant at all to the 12 transfer decision or to their description of the 13 transferred area. 14 Those officials were focused on a much more limited 15 exercise: transferring the districts, the areas, the 16 territories, the country -- those are the terms that are 17 used -- of two tribal chiefs previously located in 18 Bahr el Ghazal to Kordofan. The location of the 19 transferred area must be viewed in the light of the 20 object and purpose behind the transfer. 21 That purpose was only to transfer an area that was 22 previously in Bahr el Ghazal province to Kordofan so 23 that the area would be placed under the same 24 administration, and the only areas transferred were 25 those necessary to fulfil that purpose, ie areas that</p> <p style="text-align: center;">Page 153</p>	<p>15:27 1 Bayldon was in the relevant area. It was Bayldon who 2 was the one that Sheikh Rihan of the Twic had complained 3 to as reported in the February 1905 intelligence report 4 about raiding. Bayldon was the one -- in fact the only 5 one -- who explored the Ragaba ez Zarga in any details. 6 He went up 40 miles. He also had been engaged obviously 7 on the Bahr el Arab, the real Bahr el Arab. 8 What is clear is that there is not a single document 9 on the record -- there's not one -- suggesting that the 10 transfer decision was motivated by and contingent on 11 identifying the extent of the territory occupied or used 12 by the Ngok Dinka in 1905. Condominium officials were 13 simply not concerned with that issue. They were solely 14 concerned with the transfer of an area from one province 15 to another to control raiding in areas that formerly had 16 formed part of the province of Bahr el Ghazal, and to 17 accomplish that task they were only concerned with the 18 Ngok Dinka and Twic areas situated in Bahr el Ghazal, 19 since it was only this area that would be transferred. 20 As I said, areas or even people already in Kordofan 21 did not need to be transferred to Kordofan in order to 22 achieve the object and purpose of the transfer. Hence 23 Wingate's description in his 1905 memorandum that it's 24 the districts of the two sultans to the south of 25 Bahr el Arab, and formerly in the Bahr el Ghazal</p> <p style="text-align: center;">Page 155</p>
<p>15:26 1 previously had been in Bahr el Ghazal. People already 2 living in Kordofan did not need to be transferred to 3 Kordofan. 4 On Sunday counsel for the SPLM/A said that the 5 decisive issue for the ABC experts was to locate: 6 "... the extent of the territory of the nine 7 Ngok Dinka chiefdoms as they stood in 1905, not the 8 location of the putative provincial boundary ..." 9 I don't intend to return to the question put to the 10 ABC experts -- it's possible that Professor Crawford may 11 in closing tomorrow -- but what I would say is that that 12 formula, simply "the territory of the nine Ngok Dinka 13 chiefdoms as it stood in 1905", is most certainly not 14 a correct description of this Tribunal's delimitation 15 mandate. The words "transferred to Kordofan" cannot 16 simply be suppressed, as counsel does, and that is 17 certainly not the way that Condominium officials in 1905 18 viewed the situation. 19 Officers such as Wilkinson, Percival and Bayldon 20 were not dispatched to investigate the location of areas 21 occupied or used by the Ngok Dinka. Bayldon, as we 22 know, was sent with very different instructions: 23 specifically to explore the relevant rivers, which was 24 the primary interest of Government officials. 25 Contrary to the submissions of our opponents,</p> <p style="text-align: center;">Page 154</p>	<p>15:29 1 province, that have been transferred to Kordofan. 2 Nor were colonial administrators trying to divide up 3 the goz, or to allocate permanent or secondary grazing 4 rights in an equitable manner, or to apply African 5 principles of law. The Tribunal will search the record 6 in vain for any trace of evidence that these kinds of 7 considerations were in the minds of Condominium 8 administrators when they carried out and when they 9 reported on the transfer. Such concepts were utterly 10 alien to the whole raison d'être underlying the transfer 11 decision. 12 Let me turn to the actual transfer documents, 13 despite the fact that they've been virtually ignored by 14 our opponents in their first round presentation. What 15 do they tell us was the Condominium's contemporary 16 understanding of what they were doing, and which areas 17 they considered they were transferring? Surprisingly 18 the March 1905 Sudan Intelligence Report first reporting 19 on the transfer has not, at least as far as I'm aware, 20 been even referred to by our colleagues in the 21 delimitation phase of these proceedings. 22 Even to the extent it referred to Sultan Rob or 23 Sultan [Rihan's] people -- and it's not clear that 24 "people" is in the large sense, or just referring to 25 Sultan Rob and Sultan Rihan -- but even if it referred</p> <p style="text-align: center;">Page 156</p>

<p>15:31 1 to Sultan Rob's people, those people had a country. The 2 Sudan Intelligence Report of March 1905 clearly states 3 that the country of Sultan Rob is on the Kiir. There's 4 never been any confusion about where the Kiir was. It 5 didn't say his country was on the Ragaba ez Zarga or the 6 Bahr el Homr further north; it said it was on the Kiir. 7 Then of course we have, as I've explained, 8 Governor-General Wingate's description of the 9 transferred area. On Monday counsel for the SPLM/A 10 asserted -- and this is in the transcript at page 90 -- 11 that Condominium officials had: 12 "... no idea of what the territorial boundaries of 13 the thing that they would have been transferring was." 14 Well, that's certainly not the case for 15 Governor-General Wingate; he had a very good idea of the 16 thing. It wasn't a thing; it was two districts that was 17 being transferred to the south of the Bahr el Arab. 18 It can't be disputed that Wingate was the most 19 senior official in the Sudan. Let me just recall how 20 Professor Daly has described him: his power was 21 absolute; he was a virtual dictator; the supreme 22 military and civil command in Sudan was vested in him; 23 and lastly, the governor-general in Khartoum was "the 24 only official who mattered". The only official who 25 mattered. That's in Professor Daly's second report at</p> <p style="text-align: center;">Page 157</p>	<p>15:34 1 subsequently carried out in the same year by Sciplini 2 and Walsh. We know that because he referred to these in 3 his 1905 memorandum. And yet, as is clear from the 4 submissions of the other side, either by omission or by 5 denigration, the description of the only official who 6 mattered, his description of the transferred area should 7 be given no weight. Once again, I'd respectfully ask: 8 which party is now trying to rewrite or second-guess 9 what Condominium officials said? 10 I turn to a related issue which concerns the 11 relevance of the provincial boundary. It's obviously 12 another issue on which the parties remain divided. The 13 SPLM argues that the location of the provincial boundary 14 is irrelevant to the question posed. We say it's not. 15 Indeed we believe an assessment of the northern limits 16 of the transferred area is inextricably linked to the 17 question of the provincial boundary, and it's linked 18 both before and after the transfer, and that that is how 19 Condominium officials at the time viewed the situation. 20 As I've already noted in my first round 21 presentation, three of the four transfer documents, 22 three of the four documents from 1905 specifically 23 referring to the transfer do so under headings/rubric 24 dealing with provincial boundaries and changes to 25 provincial boundaries.</p> <p style="text-align: center;">Page 159</p>
<p>15:32 1 page 19. 2 Wingate was not thus merely some administrative 3 official, as was intimated by the SPLM/A's presentation 4 the other day; he was the only official that mattered. 5 Moreover, he was interested in where the relevant rivers 6 lay, as his 1904 memorandum and the annual report for 7 that year clearly shows. And even Professor Daly 8 acknowledged this this morning. 9 Previously in Professor Daly's written statements he 10 had said, quite categorically, that the hydrology of the 11 region we're concerned with was of little or no concern 12 to Condominium officials in 1905. This morning he said, 13 and I quote, "there was certainly an interest". 14 It's been suggested in the MENAS report, although 15 not repeated in testimony this morning, that Bayldon's 16 March 1905 report, where he correctly identified the 17 Bahr el Arab River, would have been kept secret for 18 months and even years. That is pure speculation, but 19 I'd note that if that was the case than the transfer 20 decision which was reported in the same intelligence 21 report would have been kept secret for months and for 22 years as well, and we know that that is not the case for 23 either of those. 24 Wingate knew about the transfer, and Wingate knew 25 about Bayldon's 1905 explorations, as well as those</p> <p style="text-align: center;">Page 158</p>	<p>15:36 1 In contrast we have the SPLM/A's complaint, repeated 2 by their expert, that there was no administration to 3 speak of in the area in question, and that therefore the 4 very existence of a provincial boundary was 5 inconsequential. We would respectfully suggest that 6 that line of argument is ill-founded on a number of 7 grounds, both legal and factual. Let me start with the 8 legal. 9 As was pointed out as far back as the Island of 10 Palmas case, but it's a passage that has been cited with 11 approval in the court's recent case in Singapore v 12 Malaysia, state authority should not necessarily be 13 displayed in fact at every moment or every point of 14 territory. As Max Huber stated in his award: 15 "... in the exercise of territorial sovereignty 16 there are necessarily gaps, intermittence in time and 17 discontinuity in space ... The fact that a state cannot 18 prove display of sovereignty as regards such a portion 19 of territory cannot forthwith be interpreted as showing 20 that sovereignty is in-existent. Each case must be 21 appreciated in accordance with the particular 22 circumstances." 23 We submit that these same considerations apply to 24 administrative boundaries. Displays of sovereignty or 25 of administration vary according to the nature of the</p> <p style="text-align: center;">Page 160</p>

<p>15:37 1 territory being administered. When territory is 2 relatively remote, a display of modest amounts of 3 administration does not imply that a province is not 4 administered as a unit, or that provincial boundaries do 5 not exist or were not deemed to be important. 6 Factually we know that Sultan Rob was given a robe 7 of honour; it's actually reported in gazetted documents 8 that the SPLM/A is so fond of, an administrative act. 9 We know that both he and Sheikh Rihan approached the 10 Government to control raiding; we know that the 11 Government responded; and we know that one of the 12 responses was the transfer. That transfer decision was 13 quintessentially an administrative act. 14 MENAS's primary conclusion, which I can only assume 15 that the SPLM/A shares, is that in 1905 there existed no 16 provincial boundary between the two provinces. And this 17 morning Professor Daly asserted that in Wingate's cover 18 letter -- he called Wingate's memorandum Wingate's 19 "cover letter". In speaking of Wingate's cover letter 20 he said: 21 "There was nothing in there about a provincial 22 boundary." 23 We disagree with that, and based on Condominium 24 accounts and contemporary accounts of the situation it's 25 quite clear that Government officials of the day did not</p> <p style="text-align: center;">Page 161</p>	<p>15:41 1 one province to another? If you haven't got 2 a provincial boundary, why do you need a transfer from 3 one province to another province? 4 In a situation where there are no provincial 5 boundaries, it would have been meaningless to carry out 6 an administrative act the sole purpose of which was to 7 transfer the districts of two sultans from the 8 administration of Bahr el Ghazal to that of Kordofan in 9 order to place them under the same governor. 10 Condominium officials would not have needed a transfer 11 if there was no provincial boundary. 12 It's precisely because the districts of the two 13 sultans, as so clearly shown in Wingate's memorandum, 14 had formerly been situated in the province of 15 Bahr el Ghazal that they were incorporated in the 16 transfer into Kordofan, and it's why he discusses it 17 under the heading "Changes to Provincial Boundaries", 18 and it's one of his principal changes. 19 As I noted in my first-round presentation, it's true 20 that prior to 1905 there were large portions of the Bahr 21 el Arab that remained unexplored, but Condominium 22 officials knew that. That was the whole reason why 23 Lieutenant Bayldon was sent to explore the river at the 24 end of 1904. 25 Nonetheless, the Condominium officials were aware</p> <p style="text-align: center;">Page 163</p>
<p>15:39 1 share that view either. Certainly, as Professor Allan 2 confirmed yesterday, there's no document that can be 3 pointed to, referenced during the relevant period, in 4 which Condominium officials said there was no provincial 5 boundary. In fact, quite the opposite is the case. 6 Frankly, I cannot see, Mr President and members of 7 the Tribunal, how, when the pre-transfer annual reports 8 for the two provinces contain a specific 9 section entitled "Province Boundaries" -- these are the 10 ones that Professor Daly could not recall this 11 morning -- and when they state that the boundary is the 12 Bahr el Arab, and when Wingate makes reference to the 13 changes in that boundary brought about by the transfer, 14 and when he discusses the transfer under a section of 15 his memorandum, or covering letter if you prefer, 16 entitled in bold type "Changes to Provincial Boundaries 17 and Nomenclature", I do not see in the light of those 18 materials that it can be maintained that there existed 19 no provincial boundary or that such a boundary was 20 irrelevant to the transfer or to assessment of where the 21 transferred area lay. 22 But there's a further point: if in 1905, just before 23 the transfer, there really had been no provincial 24 boundary between the two provinces, then why would there 25 have been a need for a transfer in the first place from</p> <p style="text-align: center;">Page 162</p>	<p>15:42 1 that areas remained unexplored, but that did not prevent 2 them from still considering the Bahr el Arab to 3 constitute the provincial boundary between the two 4 provinces, just as it was the provincial boundary 5 further west between Bahr el Ghazal and Darfur, 6 a boundary which cannot be questioned. 7 First of all, rivers can and do represent 8 administrative boundaries and even international 9 boundaries, and there is no general principle of law 10 that requires rivers to be surveyed in their entirety to 11 be considered delimited administrative or international 12 boundaries, and I would suggest that the Honduras v 13 El Salvador case to which I have made reference before 14 supports that proposition. 15 When the Bahr el Arab was correctly identified by 16 Bayldon in March 1905 and later referred to by Wingate 17 in his memorandum, there was no suggestion that that 18 river was somehow no longer thought to have been the 19 pre-transfer boundary. 20 Why else would Wingate, under his section entitled 21 "Changes to the Provincial Boundaries", state that the 22 two districts of the sultans south of the Bahr el Arab 23 had formerly been part of Bahr el Ghazal province and 24 that they were being transferred? That necessarily 25 implies that the Bahr el Arab, the Bahr el Arab that he</p> <p style="text-align: center;">Page 164</p>

<p>15:44 1 had referred to in his long paragraph at page 11 as 2 where Bayldon, Walsh and Sciplini were carrying out 3 their operations, that implies that the Bahr el Arab had 4 been the pre-transfer boundary. 5 We have, in short, four key factors relating to the 6 provincial boundary. 7 Prior to 1905 it was expressly recorded in the 8 annual reports for both provinces that the provincial 9 boundary was the Bahr el Arab; not the putative 10 Bahr el Arab, the Bahr el Arab; not a parallel of 11 latitude, the Bahr el Arab. That was the case for the 12 Kordofan/Bahr el Ghazal boundary and it was equally the 13 case for the Darfur/Bahr el Ghazal boundary. It was the 14 only river in this area that fit that description going 15 east to west from Darfur to its origins in the east 16 surveyed by Saunders and Peake. 17 Secondly, we have the 1905 annual reports. They 18 show the description of the provincial boundary changes, 19 and instead of referring to the Bahr el Arab now as the 20 provincial boundary, they record the transfer. Those 21 are foundation texts that we should pay close attention 22 to; "essential" is the word that the SPLM uses. 23 We then have Wingate's memorandum talking about the 24 transfer in connection with the provincial boundaries, 25 and we have after the transfer the new provincial</p> <p style="text-align: center;">Page 165</p>	<p>15:47 1 Tribunal, the Government of Sudan submits that when the 2 documents are looked at as a whole, the documents that 3 shed light on and evidence what Condominium officials 4 intended with respect to the 1905 transfer and the 5 location of the transferred area, the following 6 conclusions emerge. 7 First, there was a clear purpose behind the 8 transfer. 9 Second, that purpose was to transfer areas belonging 10 to the two sultans, and necessarily the people living in 11 those areas or districts, that formerly had been 12 situated in the province of Bahr el Ghazal to the 13 province of Kordofan, so that such areas would be under 14 the administration of the same provincial governor, the 15 Governor of Kordofan. 16 Third, there was no need and no intention to 17 transfer anything that was already in Kordofan before 18 1905. That would have been meaningless. 19 Fourth, the transferred area as described by Wingate 20 is consistent with the fact that the March 1905 21 intelligence report situates Sultan Rob's country on the 22 Kiir, as to which there's no dispute, and Sheikh Rihan's 23 between the Kiir and the Lol. The Percival and 24 Wilkinson sketches show Sultan Rob's territory, a great 25 swathe of it, lying, particularly in the Percival</p> <p style="text-align: center;">Page 167</p>
<p>15:45 1 boundary, not fully delimited because the southern area 2 of the transferred districts had not been precisely 3 identified -- it did not necessarily follow a river like 4 the northern limits which were transferred -- but you 5 had the new southern boundary, the new 6 Kordofan/Bahr el Ghazal provincial boundary, starting to 7 be shown on maps like the Lloyd map I projected and the 8 whole series of sheet 65 maps that are in the record. 9 That's the boundary that ultimately becomes the 1956 10 boundary on independence. 11 That is why, for example, the 1911 Anglo-Egyptian 12 Sudan Handbook, when it describes the northern 13 boundaries of Bahr el Ghazal province, states as 14 follows: 15 "The actual boundary line is not yet delimited, but 16 it follows the course of the Bahr el Arab or Rizeigat 17 from the Nile/Congo watershed [that's in Darfur] until 18 the frontier of Kordofan is reached, when the boundary 19 divides certain tribal districts to Lake No." 20 Previously, in 1903, the boundary had been the 21 Bahr el Arab to Lake No. Now it's saying the boundary 22 divides certain tribal districts. That's because of the 23 transfer. The southern limits had not been precisely 24 identified, but the northern limits were. 25 So in conclusion, Mr President, members of the</p> <p style="text-align: center;">Page 166</p>	<p>15:48 1 sketch, to the south of the Kiir. 2 Next, the transfer decision was obviously related to 3 the location of the provincial boundary. Had there been 4 no such boundary, there would not have been any areas 5 which could have been said to have been in the province 6 of Bahr el Ghazal that needed to be transferred to 7 Kordofan. 8 Sixth, the transfer documents, the so-called 9 foundation texts -- the decisive documents, according to 10 the other side -- refer to the transfer in connection 11 with the provincial boundary and the change in that 12 boundary that the transfer gave rise to. 13 Seven, Wingate's memorandum: Wingate, the only 14 official who mattered, bears this out. His memorandum 15 also provides the clearest and the best description of 16 the location of the transferred area: the area of the 17 two sultans situated to the south of the Bahr el Arab 18 that had formerly been in Bahr el Ghazal province. 19 Eighth, that is why the post-1905 provincial 20 boundary changes and is situated on maps to the south of 21 Bahr el Arab. 22 Finally, our conclusion on this is that it follows 23 that the transferred area in 1905 that was intended and 24 carried out by Condominium officials was the area 25 between the Bahr el Arab and the new provincial boundary</p> <p style="text-align: center;">Page 168</p>

<p>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</p> <p style="text-align: center;">Page 169</p>	<p>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</p> <p style="text-align: center;">Page 171</p>
<p>15:52 1 an unwillingness to actually address our real argument. 2 On the latter point they almost seem to have abandoned 3 any claim to area 1, which seems to have been given over 4 wholly to the Twic. 5 One need only look at the article he discussed at 6 length yesterday -- one by scientists, he stressed -- by 7 Stubbs and Morrison regarding the Ngok agro-pastoral way 8 of life. The opening sentence of the article reads as 9 follows: 10 "The western Dinkas, who now number some 140,000 11 persons living along the Lol, the Chel, the Pongo and 12 the Bahr el Arab." 13 "Along", I stress. These four rivers paint a rough 14 geographic box, with the Bahr el Arab forming the 15 northern side. And yet it is suggested that a country 16 the size of Belgium sits on top of them. 17 A third remarkable fact for someone who believes as 18 rigidly as Mr Born does in the rules of English grammar 19 is the complete tone-deafness to the critical date in 20 this case. 21 He purported to accept my characterisation of the 22 anthropological fact, although characteristically there 23 is no sentence of Mr Born that doesn't involve some 24 twisting of the argument and he didn't accept the point 25 I was making. But he said: yes, there is</p> <p style="text-align: center;">Page 170</p>	<p>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</p> <p style="text-align: center;">Page 172</p>

<p>15:56 1 things that their experts do not agree. We saw that 2 this morning with community mapping as well. 3 It's remarkable that Professor Allan who answered 4 questions entirely fairly and openly yesterday, accepted 5 that he was not an environmental determinist. He said 6 and I quote: 7 "As a geographer as part of my professional 8 experience, geographers learn that environmental 9 determinism doesn't work. You can't say, 'Well, that 10 particular tract of land will lead to that particular 11 livelihood' ... So I'm not at all suggesting that the 12 Bahr region determines anything, or the goz region 13 determines anything." 14 That's a perfectly fair statement, and yet that of 15 course is precisely what the SPLM/A counsel did: to 16 determine that, on the basis of an inflated definition 17 of the Bahr and of the goz, all the Bahr and half the 18 goz belongs to the Ngok on environmental grounds. 19 The SPLM/A's environmental claim is essentially 20 based on two points. The first is that because the Ngok 21 crop, dura, is ideally suited to the Bahr region, they 22 must necessarily have lived throughout the Bahr region. 23 The same argument is made with respect to the cattle 24 being adapted to the Bahr region's damp climate and 25 terrain.</p> <p style="text-align: center;">Page 173</p>	<p>16:00 1 black soil predominates." 2 We entirely accept that that may be true as a matter 3 of geographic fact; it doesn't determine where the Ngok 4 were in 1905. It doesn't even begin to do that. What 5 Mr Born omitted to say yesterday was that he was citing 6 from a 1907 Lloyd article, "Some Notes on the Dar Homr", 7 in which Lloyd says: 8 "Dar Homr, or the country of the Homr Arabs, is 9 situated in the southwest corner of the province of 10 Kordofan." 11 If the ABC experts are right, it's not situated 12 there anymore. 13 With regard to the heralded black soil, Lloyd later 14 writes: 15 "The southern half of Kordofan, which included 16 Dar Nuba, consists of black soil in the centre of which 17 rise the Nuba Mountains. The plains are inhabited by 18 cattle-owning Baggara Arabs and the mountains by 19 numerous tribes of Nuba." 20 He doesn't mention the Ngok. I accept that the Ngok 21 live also on black soil, but they didn't have a priority 22 right to it. There are no patent rights of the Ngok in 23 the black soil. This is a sort of agricultural 24 determinism. MacMichael, the prolific Sudan scholar and 25 former Condominium governor, refers to the Homr living</p> <p style="text-align: center;">Page 175</p>
<p>15:58 1 Now, there is of course an important point here. We 2 accept entirely that the environment of the region does 3 influence the movement patterns of the groups that live 4 there, both with respect to the cattle of the Homr and 5 the cattle of the Ngok. But that doesn't mean, and it 6 doesn't establish, that the Ngok are in any place in 7 which dura can be grown or their cattle can survive. 8 In particular, whatever may have happened since 9 1905, it doesn't establish that that was the case in 10 1905. There are all sorts of reasons why the Ngok may 11 have been further to the south in 1905 than the 12 environmental capacity of their main crop and their main 13 form of livelihood, which was milk from cattle, would 14 have sustained, including political factors; the 15 Mahdiyya itself, which forced them towards the south, 16 and which also forced the Messiriya towards the south, 17 as we will see. 18 Moreover, the whole area is much more variegated 19 than the simplistic black and white picture presented of 20 it by counsel for the SPLM/A. Mr Born cited an article 21 by Governor Lloyd, who said: 22 "In the north the soil is reddish sand, interspersed 23 with tracts of sand and clay mixed. This gradually 24 increases further south until the red sand disappears 25 and black soil commences. South of latitude 10°30'</p> <p style="text-align: center;">Page 174</p>	<p>16:01 1 on black soil; it was not exclusive to the Ngok. Nor 2 was cultivation, as Lloyd equally points out. 3 Nor does the environmental cattle argument sit 4 comfortably with the assertion that the Ngok had 5 permanent villages as far north as 10°35'. A large part 6 of this area is the goz, a sandy, waterless area. Ngok 7 cattle do not move well in that area. Of course the 8 Ngok may move around it for various purposes, but the 9 idea that they live there permanently is fantastic, and 10 the idea that the Messiriya should have to divide that 11 area on a 50/50 basis because of only somewhat different 12 lifestyles is equally fantastic. 13 I turn to Professor Cunnison. He defines, in 14 paragraph 6 of his first witness statement, the Bahr as 15 "the riverine area around the Bahr el Arab and the 16 Ragaba ez Zarga". That was his translation. 17 There is, it is fair to say, a slight degree of 18 imprecision in that language. The reason is quite 19 obvious: that a ragaba doesn't stop a soil type. If you 20 are in an area of soil type and you come to an important 21 river channel or a channel of an important khor, the 22 chances are that soil patterns will continuous at least 23 for some period of time. 24 But I remind you again that the area we are talking 25 about is 11,000 square kilometres to the north of the</p> <p style="text-align: center;">Page 176</p>

<p>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.</p> <p>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.</p> <p>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.</p> <p>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:</p> <p>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."</p> <p>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</p> <p style="text-align: center;">Page 177</p>	<p>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:</p> <p>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."</p> <p>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:</p> <p>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'."</p> <p>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</p> <p style="text-align: center;">Page 179</p>
<p>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.</p> <p>6 I do not take kindly to the suggestion that I'm 7 engaged in the suppression of evidence.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>24 We had taken the view that we would not read out to 25 you large slabs of witness statements and other</p> <p style="text-align: center;">Page 178</p>	<p>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.</p> <p>6 He said much the same thing in paragraph 3 of his 7 second statement, which I will not read.</p> <p>8 I made the point yesterday that there is 9 an extraordinary problem. Let's accept for the sake of 10 argument that the Civsec area is simply a description of 11 where the Ngok are in the dry season. I'll come back to 12 the Civsec area in a little more detail later on, but 13 the point is this: the Civsec 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 somehow exploded?</p> <p>17 Assume for the sake of argument that the purple area 18 shown on the Civsec map represented the area of the Ngok 19 in 1905; we don't concede that, but let's assume it. Is 20 it suggested that in 1905, without a trace of evidence 21 except the odd wisp of smoke in the distance, that the 22 Ngok exploded from this 500 square miles to occupy 23 23,000 square kilometres? That is a fantastic 24 suggestion, and there is no basis in the evidence for 25 it.</p> <p style="text-align: center;">Page 180</p>

<p>16:08 1 Counsel quoted Cole and Huntingdon, a modern account 2 based on fieldwork in Abyei in the 1970s of agricultural 3 patterns in the region. Cole and Huntingdon shed light 4 on the difficulties of the region and its extremely 5 variegated character, which anyone who knows anything 6 about the geography of riverine areas will find is not 7 surprising. This is what they say at page 88 of their 8 study: 9 "First, it was generally assumed [they mean it was 10 generally assumed before they began their study] that 11 there was a huge amount of cultivable land just waiting 12 to be utilised with the available technology in the 13 general area around Abyei. In part this myth was 14 fostered by the northern Ministry of Agriculture 15 officials, who compared the apparently fertile open 16 lands of Abyei to the drier and sandier lands to the 17 north. The supposed vast sources of land on the flood 18 plains of Western and Southern Sudan were a myth under 19 existing technologies, at least in the Abyei Area and 20 probably to a greater or lesser extent in the rest of 21 the region as well." 22 In fact Willis and Wilkinson knew where the Ngok 23 went in the wet season. They were more congregated 24 together; and, at the time Willis and Wilkinson were 25 writing, more or less immediately after the transfer,</p> <p style="text-align: center;">Page 181</p>	<p>16:11 1 broadly northwest. Then he walks back on a somewhat 2 different route, again to the river that he calls the 3 Bahr el Arab. 4 The two small villages which Mr Born said were Ngok 5 villages on the Ragaba ez Zarga are El Jaart and 6 Um Geren. He said they were Ngok villages because they 7 have the characteristic mode of there only being three 8 or four houses in a rather separate area. This is 9 a wonderful example. This would be an architectural 10 monopoly. No one else is allowed to have three houses 11 in a small village; it has to be six or eight or some 12 other number. 13 If you look at how it's described, he talks about 14 a series of settlements. It's true that he mentions 15 some being Arab settlements, but he's giving general 16 descriptions. He refers to a few Homr Arabs living in 17 various places. While he's north of Fauwel -- so far as 18 one can tell the whole area up to now has been Arab -- 19 he says: 20 "Fula Hamadai with a little water [is] sufficient to 21 water animals ... dry on 9.2.02." 22 It's amazing how these administrators who didn't 23 administer were concerned about the availability of 24 water for the locals. 25 He then says:</p> <p style="text-align: center;">Page 183</p>
<p>16:09 1 that was very much in the south. 2 I turn to the second issue of cartographic 3 incompetence. Here I want to deal in the first place 4 with Wilkinson's report. There are three points. The 5 first relates to the alleged Ngok villages of El Jaart 6 and Um Geren. 7 It's fair to say -- and one does try to be fair, 8 even under provocation -- that counsel for the SPLM/A 9 accepted that this was an inference or a hypothesis. 10 I have to say, when counsel for the SPLM/A accepts that 11 something is an inference, he would, on the other side, 12 take that as a definite admission. His normal forensic 13 mode is that of carpet-bombing, so to suggest something 14 is an inference is already to admit a high level of 15 doubt. But curiously enough there's not much doubt at 16 all if you look at the document. 17 This is of course taken from the volume 2 routes of 18 the Anglo-Egyptian Sudan, and it's the route report 19 which begins at page 151 of volume 2, Major Wilkinson, 20 the route report of January and February of 1902. 21 There are basically three stages to the route that 22 Wilkinson took. There's the stage south, where he meets 23 a river which he is told is the Bahr el Arab, and then 24 goes further south to see Sultan Rob. There's a short 25 stage in a direction which we'll come back to, which is</p> <p style="text-align: center;">Page 182</p>	<p>16:13 1 "Small villages: mere collection of three or four 2 huts passed to the El Jaart and Um Geren." 3 And that is said to be an acknowledgement of the 4 Ngok. 5 Then he refers to: 6 "Fula Hamadai ... a village named 'Fut'. 7 Well, these are villages. There's absolutely no 8 evidence that they're Ngok villages at this time. And 9 one would infer from the text of the report that they're 10 not, because he goes on to say, after reaching Fauwel 11 with its large Arab settlements, and crossing the 12 Bahr el Arab", he finds the road to a Dinka chief named 13 Ruweng; bearing in mind of course, there were other 14 Dinka in this area, though this was the Ruweng. 15 Then he says: 16 "The first Dinka village of Bombo is reached." 17 According to counsel that should have been the 18 fourth or possibly the third Dinka village. When he 19 said "first" he meant first; that's what he said. There 20 was no reason to refer to every clutch of a few houses 21 at an earlier stage as being Arab for them to be Arab 22 from the context; and there's no indication that they 23 were not, in particular because they're described as the 24 first Dinkas. And the first Dinkas he sees are even 25 later, at Etai.</p> <p style="text-align: center;">Page 184</p>

<p>16:14 1 It's pure supposition to suggest that because 2 Condominium officials didn't describe a clutch of huts 3 north of Fauwel, they're somehow presumed to belong to 4 the Ngok. 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 17 do it. 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 25 cultivated."</p> <p style="text-align: center;">Page 185</p>	<p>16:17 1 of any human presence found by Wilkinson north of the 2 real Bahr el Arab on this trip, on the return leg of his 3 journey, was a Homr settlement. 4 I make the point, incidentally, that that particular 5 village, Abu Kareit, if you look very carefully at the 6 map -- I'll leave it to your cartographical consultants 7 to do so -- is actually not on the real Ragaba ez Zarga; 8 it's on a tributary. It lies on a stream which runs 9 into the Ragaba at Mellum. 10 In any event, our basic proposition is this: we have 11 never said that there was a mistake of the whole course 12 of the Ragaba ez Zarga in or around 1905 for the 13 Bahr el Arab; there was not, for the perfectly good 14 reason that the course of the Ragaba ez Zarga in general 15 was not known at the time. That was why it was possible 16 for people like Wilkinson to mistake the Bahr el Arab: 17 they weren't looking for another river. 18 But I would draw the attention of your consultants 19 to the fact that the river which is identified as the 20 river on which Abu Kareit lies, the Ragaba ez Zarga, is 21 actually not the Ragaba ez Zarga but a tributary of it. 22 Mr Born called for detective work and scientific 23 appreciation. Looking at a map would have been a good 24 start. 25 I would also refer to the concession -- no, I'm</p> <p style="text-align: center;">Page 187</p>
<p>16:16 1 It is not in dispute that this country was Ngok 2 country: 3 "Dinka dwellings are dotted about, and the country 4 presents a most prosperous aspect." 5 Even the quickest look at Wilkinson's map 6 demonstrates that what he was doing was walking along 7 the Bahr el Arab. He crossed the Bahr el Arab from 8 Sultan Rob's village on the south bank, then headed 9 northwest, along or close to the north bank of the 10 river. He only turned away from the river at the 11 village of Gohea, which he described as on the 12 riverbank. So of course he encountered Ngok villages 13 and cultivation, but they were on the Bahr el Arab; to 14 the north of it, of course, but on it. 15 Heading northeast and then north, the next three 16 things he mentioned were the Regabet el Lau, 17 a watercourse; El Niat, described by Wilkinson as 18 a large swamp, now dry, but referred to, as Mr Born 19 claimed it yesterday, to be a Ngok village; and then 20 Abu Kareit, a Homr settlement. 21 The inference is that where he's been talking about 22 settlements of one particular group, and then comes upon 23 a settlement of a different tribe, he says at that 24 point, as he did on the way down -- he does it on the 25 way back when he comes to Abu Kareit -- the first sign</p> <p style="text-align: center;">Page 186</p>	<p>16:19 1 sorry, I won't use that word. I will also refer to the 2 response made by Professor Daly this morning to my 3 question in relation to Percival's report. The Tribunal 4 will remember I asked him: where in Percival's report do 5 you find an express reference to Ngok settlements on the 6 Ragaba ez Zarga? Professor Daly said he couldn't find 7 an express reference; it was simply his interpretation. 8 I pause in what I have to accept is a slightly 9 disconnected presentation -- the Tribunal will forgive 10 me for this -- to make two other historical remarks. 11 The first concerns the differential impact of the Mahdi. 12 We have dealt with this in our pleadings, but it was 13 trotted out in the last day and it needs to be 14 mentioned. 15 The suggestion is that the Ngok were immune to the 16 factors which, it is true, had a very material adverse 17 impact on the Homr during the Mahdi period, for reasons 18 we don't need to go into, but the suggestion that the 19 Ngok were immune is without foundation, for the reasons 20 stated in our rejoinder. 21 Professor Cunnison writes of this period -- and he 22 had obviously looked at the history rather carefully 23 himself: 24 "The tribe [he is referring to the Homr at the end 25 of the Mahdi period] lived among the riverbeds north of</p> <p style="text-align: center;">Page 188</p>

<p>16:20 1 the Bahr el Arab [that is in the riverine area] and 2 rebuilt their stocks of cattle by trading ivory they 3 hunted for cattle from traders who established buying 4 centres there." 5 So they were well to the south at that time, hiding 6 from the impact of the Mahdi and the extremely disturbed 7 conditions to which that had given rise. 8 A second point in the immediately post-Condominium 9 period related to the Government's concern about the 10 river system. I would simply make the point, in 11 supplement to the questions that I asked Professor Daly, 12 that the Sudan Intelligence Report for November 1904 13 makes it clear that Bayldon was beginning to investigate 14 areas to the north. 15 In February 1905, the month before the transfer, 16 there was a report in Bayldon's progress reproduced in 17 the Sudan Intelligence Reports which refers to the raids 18 on Sultan Gorkwei of the district of Toj, and says that: 19 "The Camel Corps Company, now in Bahr el Arab, will 20 investigate their case on the way to Kordofan." 21 Professor Daly presented this picture as one of 22 complete absence of Government administration. All 23 I would say is: read the documents for yourself. They 24 may be colonial documents; they are colonial documents. 25 One doesn't like colonialism in principle. What is</p> <p style="text-align: center;">Page 189</p>	<p>16:23 1 yourself. 2 Mr Born did not refer to the majority of the route 3 reports and associated information which I took you 4 through yesterday. He has a rather snotty and selective 5 view about colonial administration, it seems. 6 Instead the primary basis on which the SPLM/A 7 constructed its case is the combination of its 8 environmental argument, its form of environmental 9 determinism, with oral history. 10 I have already commented on oral history. I don't 11 deny its value in determining a general position, but it 12 has to be checked against the other evidence. It's said 13 that Sultan Rob, who was himself of course a direct 14 actor in the event, was lying when he said there were no 15 Ngok to the west of his settlement in Burakol. 16 What we suggest is you look at the other evidence on 17 that particular point. To take one example, what is the 18 other evidence? The other evidence is the route report 19 which someone walks from Gerinti, which is not a Ngok 20 settlement and certainly was not a Ngok settlement in 21 1905, to the new village, to Burakol, and finds no 22 treks, and then says that on the Ragaba there are only 23 Arabs travelling south to go to the village to buy 24 grain. 25 There is a concordance of evidence conforming with</p> <p style="text-align: center;">Page 191</p>
<p>16:22 1 clear is that the coming of the Condominium was 2 an unqualified blessing for the people of the Sudan, 3 including both the peoples primarily involved in this 4 case. 5 Professor Daly fully accepted my view that the 6 population estimate given by the SPLM/A of 50,000 was 7 wrong. He wasn't prepared to put his own estimate on 8 it. We've given an estimate based upon his methodology 9 of 5,000-10,000. Counsel distorted my statement, which 10 was a slight modification of our earlier position, by 11 giving the number of 15,000, but didn't explain where 12 that came from. 13 The consequence was that it's obvious from the 14 evidence that there was significant interest by the 15 Government in clarifying the river situation at 16 precisely the time when the transfer occurred, and that 17 incidentally in the course of those programmes there was 18 something which is indistinguishable from 19 administration. 20 Can you imagine, if you were counsel in my 21 hypothetical case between the British Government and the 22 French Government for the delimitation of the boundary 23 between a French Bahr el Ghazal and an English Kordofan, 24 how much you would leap on these documents with joy as 25 evidence of administration? But you know that for</p> <p style="text-align: center;">Page 190</p>	<p>16:25 1 Sultan Rob, who may have lied on occasions but doesn't 2 seem to have been lying on this occasion, and there is 3 much other evidence of the non-involvement of the Ngok 4 on the Darfur boundary, north of the Bahr el Arab. 5 But the principal new element about the oral history 6 is the community mapping report. Now, one cannot deny 7 the value of community mapping in certain contexts, but 8 frankly it's the case that the information gathered may 9 be gathered in a more systematic way, but it can only be 10 checked in a very careful manner. We simply don't have 11 the data, the data produced by the community mapping 12 project that was conducted in a hurry. 13 You heard the circumstances in which it was 14 conducted, but in particular you heard the concession by 15 Dr Poole when I asked him whether he accepted the 16 SPLM/A's representation of what he had established. 17 I will quote it again from paragraph 51 of the 18 rejoinder: 19 "The community mapping project shows permanent 20 Ngok Dinka villages were located throughout the Bahr 21 region, extending north to latitude 10°35' north, both 22 in 1905 and for decades thereafter." 23 He obviously accepted under some pressure that that 24 was not the case. It is a clear misrepresentation. The 25 community mapping project can establish nothing except</p> <p style="text-align: center;">Page 192</p>

<p>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</p> <p style="text-align: center;">Page 193</p>	<p>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.</p> <p style="text-align: center;">Page 195</p>
<p>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 Ngol 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</p> <p style="text-align: center;">Page 194</p>	<p>16:31 1 THE CHAIRMAN: I thank you very much, Professor Crawford. 2 Are there any questions on the part of the Tribunal? 3 No. Then we'll break until 5 o'clock. 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 chiefdoms. 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</p> <p style="text-align: center;">Page 196</p>

<p>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.</p> <p>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.</p> <p>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.</p> <p>25 Preliminarily, though, as we've seen -- and this</p> <p style="text-align: center;">Page 197</p>	<p>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.</p> <p>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 10 to Wingate's memorandum and by reference to what they 11 call 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.</p> <p>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.</p> <p>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.</p> <p>24 I discussed at some length on Sunday that in the 25 English language the plain meaning of Article 1.1.2</p> <p style="text-align: center;">Page 199</p>
<p>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.</p> <p>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.</p> <p>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.</p> <p>25 In any event, even if that were the basis for some</p> <p style="text-align: center;">Page 198</p>	<p>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.</p> <p>6 We also saw how that interpretation was confirmed by 7 the expert report of Professor Crystal OBE.</p> <p>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.</p> <p>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.</p> <p style="text-align: center;">Page 200</p>

<p>17:07 1 Let's take a step away from just the language of 2 Article 1.1.2 and look at the entire provision in 3 a little broader context before sort of taking 4 successive steps back, further away, and looking at the 5 language in a broader context as well. 6 That conclusion -- Professor Crystal's conclusion, 7 our conclusion -- is confirmed by the fact that 8 Article 1.1.2 included the phrase "the area of the nine 9 Ngok Dinka chiefdoms"; not seven, not three, not however 10 many may have been beneath the Kiir, but instead all 11 nine. It referred to all nine because it wanted to 12 include all of the Ngok Dinka chiefdoms. It didn't want 13 to include some of them or some indeterminate number, 14 but the parties wanted specifically to capture all of 15 the Ngok Dinka chiefdoms. 16 As we've seen, they did that because those were the 17 Ngok Dinka people. That's how you defined the Ngok 18 Dinka tribe: all nine Ngok Dinka chiefdoms under 19 a single paramount chief, whose witness statement you 20 have. The parties sought specifically in doing that to 21 ensure that they caught the territory of all of the 22 Ngok Dinka chiefdoms, not just some of them. I would 23 suggest that that's a very powerful and important aspect 24 in giving meaning to Article 1.1.2. 25 We also saw how it is important to not just look at</p> <p style="text-align: center;">Page 201</p>	<p>17:10 1 that they wanted to choose, to vote freely and 2 democratically on whether to be included in the south or 3 in the north. 4 That's why Article 1.1.2 referred to the Ngok Dinka 5 and referred to the nine Ngok Dinka chiefdoms. In those 6 circumstances, it would make no sense -- it would be 7 absurd -- to say that the referendum should include some 8 of the chiefdoms or some of the Ngok Dinka people. That 9 would be completely contrary to the basic purpose of the 10 referendum. 11 I note that the Government has not once said the 12 word "referendum". They haven't referred to the 13 purposes of the Abyei Protocol in 2005. They haven't 14 confronted the reason it was that these parties, the 15 Government across the table from us, the SPLM/A on this 16 side, sat down and agreed to that language. They agreed 17 to that language basically for the purpose of how to 18 decide who would get to vote freely and democratically 19 in the Abyei referendum. 20 In those circumstances I would submit the reason 21 that Professor Crawford and Mr Bundy haven't addressed 22 this issue is because they don't have anything to say. 23 When you think about what the purpose of the Abyei 24 referendum was, and put it together with the language of 25 Article 1.1.2, there is no answer but that which I have</p> <p style="text-align: center;">Page 203</p>
<p>17:08 1 the words of Article 1.1.2. Those words are clear. 2 Those words are very clear. You can apply English rules 3 of grammar; that confirms what the words mean. But it's 4 also, I would suggest, important to look at what the 5 parties meant in 2005, because that confirms -- confirms 6 powerfully -- what the words that they used mean. 7 This is a subject where again, just as they didn't 8 answer Professor Crystal, they have not answered me; and 9 more importantly, I'd say, they haven't answered the 10 language that they agreed to in the Abyei Protocol. 11 Those purposes recorded in the Abyei Protocol are 12 clear. The basic purpose for defining the Abyei Area in 13 the Abyei Protocol was to specify that region whose 14 residents would be entitled to participate in the Abyei 15 referendum which is provided for in Article 8 of the 16 Abyei Protocol. Only residents of the Abyei Area will 17 be entitled to participate in the free democratic 18 elections, in the referendum, conducted simultaneously 19 with the main southern referendum in 2011, on the 20 question of whether they will go south or whether they 21 will go north. 22 It's undisputed that the entire reason for the Abyei 23 referendum was to permit the people of the Ngok Dinka 24 chiefdoms, all nine chiefdoms, who had consistently said 25 over the past decades that they belonged to the south or</p> <p style="text-align: center;">Page 202</p>	<p>17:11 1 given. 2 Let's look now at how some other people have 3 interpreted the Abyei Protocol, and in particular the 4 definition of the Abyei Area. This is the ABC experts' 5 transcripts. It's how they, time and again, in their 6 meetings with the parties, with the Government's 7 delegation and with the SPLM/A, as they were expected to 8 do under the procedural framework set out for them, how 9 they referred to what the Abyei Area was. 10 Ambassador Petterson said: 11 "Our job is to define and demarcate the area of the 12 nine Ngok Dinka chiefdoms that were [not 'which was', 13 'that were'] transferred to Kordofan from Bahr el Ghazal 14 province in 1905." 15 Precisely consistent with what Professor Crystal 16 said, precisely consistent with what I have been saying, 17 precisely contrary to what the Government now says, but 18 the Government didn't say anything then in objection. 19 Let's look at the meeting in Agok on 20 18th April 2005. Ambassador Petterson said there that 21 the mandate of the ABC was: 22 "... to define and demarcate the area of the nine 23 Ngok Dinka chiefdoms which were transferred to 24 Kordofan." 25 Again, precisely the same language. In the meeting</p> <p style="text-align: center;">Page 204</p>

17:13 1 on April 16th in Dembloya, he said again that what they
2 were setting out to do was:
3 "... determine the boundaries of the nine Ngok Dinka
4 chiefdoms as they existed 100 years ago."
5 A different formulation, but every single time it
6 had the same essential meaning. It referred to the nine
7 Ngok Dinka chiefdoms which were transferred; not to some
8 specific territory that was transferred. Each time the
9 Government sat there, the Government didn't object,
10 didn't protest, didn't say, "That's wrong". The reason,
11 I would suggest -- and we are going to come on to it --
12 is because the Government knew perfectly well, and
13 didn't disagree that that's what the language meant.
14 That is one of the reasons that they picked the ABC
15 experts. They didn't pick people that might adopt
16 a sort of abstract, cold, arbitrary provincial boundary
17 definition that the Government urges; they picked
18 experts that would evaluate historical evidence and they
19 put in -- with the greatest of respect to our mountains
20 of evidence -- their own mountains of evidence.
21 They put in 100 witnesses to talk not about
22 provincial boundaries, not to read on what Governor
23 Wingate said or didn't say, but to talk about the land,
24 to talk about the people, to talk about the history, to
25 talk about the traditional areas of both people, because

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17:15 1 chiefdoms at the time they the chiefdoms were
2 transferred to Kordofan in 1905. That is the definition
3 of the Abyei Area.
4 With that we arrive at where Mr Bundy began
5 yesterday, when he addressed the issue of the definition
6 of the Abyei Area.
7 You will recall that Mr Bundy began his presentation
8 by addressing the reference to what he described as the
9 Condominium orders of the 1905 transfer, which he said
10 were before the Government and the SPLM/A when they
11 negotiated the Abyei Protocol, and you can see --
12 I don't want to be accused of misstating what someone
13 said -- you can see here that he said:
14 "Yes, the negotiators of the Abyei Protocol were
15 aware of the 1905 transfer documents."
16 Preliminarily. Mr Bundy's reliance on the supposed
17 negotiating history of the Abyei Protocol, on what was
18 before the negotiators of the Abyei Protocol, is a bit
19 of an about-face about the Government.
20 The Government's initial position was that the
21 Tribunal did not need to pay attention to these
22 so-called supplementary means of interpretation. You
23 will recall that our memorial put in a substantial
24 discussion of the drafting history, while the Government
25 devoted essentially no attention to it because, pursuant

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17:14 1 that's what they had in mind.
2 They didn't object when Ambassador Petterson
3 provided these comments, and he didn't adopt any
4 peculiar interpretation here; this is just what
5 Article 1.1.2 says in the English language.
6 Even the Government's counter-memorial, when you
7 look at it, does not disagree that what
8 Ambassador Petterson said at these meetings was
9 an acceptable interpretation of the mandate.
10 Flipping back, even if Professor Pellet had answered
11 Professor Reisman's question differently and had said:
12 yes, if they made a serious error in misinterpreting
13 Article 1.1.2 that would be an excess of mandate, the
14 Government conceives here that these were acceptable
15 interpretations. That is a concession we don't need to
16 rely on. It's because Article 1.1.2 is as plain as day
17 when you read it.
18 So, if we can stop here for just a moment, what we
19 see from the language of Article 1.1.2, what we see from
20 the grammatical rules of the English language applied to
21 Article 1.1.2 and what we see from the purposes of
22 Article 1.1.2, and indeed of the whole
23 Comprehensive Peace Agreement, is a single, clear,
24 inescapable conclusion, and that is that Article 1.1.2
25 referred to the entire area of the nine Ngok Dinka

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17:17 1 to this paragraph from their memorial, they didn't think
2 it was appropriate, didn't think it was necessary.
3 In any case, about-face or not, Mr Bundy's
4 discussion of the drafting history of the Abyei Protocol
5 is wrong. In fact, when you go and look at that
6 drafting history, it confirms -- it confirms
7 powerfully -- what the language said, what English
8 grammar rules say, and what the purposes mean. It may
9 be a secondary means of interpretation, but it's still
10 one that supports the primary means.
11 What we will see when we look at this drafting
12 history is the opposite of what Mr Bundy told you.
13 Mr Bundy would have you think that the negotiators of
14 the Abyei Protocol focused on Wingate's memorandum.
15 There's no evidence at all -- none -- that they even
16 knew about it. There's no evidence that they even
17 referred to it.
18 Instead, as one would think, and as we will see the
19 record clearly shows -- and as the Government has
20 conceded repeatedly, even under Professor Crawford's
21 standards for concessions -- what the parties focused on
22 was Sudan Intelligence Report No. 128, and we will look
23 at that too. What we will see is the Sudan Intelligence
24 Report No. 128 talks about a tribal transfer of people,
25 the Ngok Dinka people.

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<p>17:18 1 You will recall on the first day of this hearing, in 2 a bit of a shift from the Government's memorial, 3 Professor Crawford told us -- and you can see his 4 comments here on the screen -- that: 5 "... the travaux of the Abyei Protocol ... can be 6 referred to in order to confirm the meaning arrived at 7 on an analysis of the text ..." 8 He then went on to say, as part of the travaux of 9 the Abyei Protocol, that: 10 "Reference was specifically made to the Sudan 11 Intelligence Report of March 1905, one of the transfer 12 documents." 13 Let me repeat that so that we don't miss it: 14 "... specifically made to the Sudan Intelligence 15 Report [No. 128] of March 1905." 16 Professor Crawford didn't make that up. You can 17 look at the Government's memorial, which is exactly 18 consistent with it. It's on the screen for you. This 19 is the Government's memorial, and it said: 20 "It was precisely this passage ..." 21 The passage there just above the quote, the passage 22 which quotes Sudan Intelligence Report No. 128: 23 "It was precisely this passage which led to the 24 formulation of the ABC's mandate and that of this 25 Tribunal."</p> <p style="text-align: center;">Page 209</p>	<p>17:21 1 about a slave raid by Homr Arabs which had carried off 2 some 30 Dinka and 1,000 of their cattle." 3 It's only a small fraction of the 60,000 or so that 4 we heard about. Then the record says: 5 "Two runners who arrived at Fashoda on 6 13th September from the Dinka district reported on the 7 cattle and slave raid." 8 I would like to move on from that for just a second. 9 There was then, in January 1905, a similar report from 10 the Twic Dinka, who complained, as Sultan Rob had, to 11 the Condominium authorities about a similar kind of 12 raid. Sheikh Rihan made the complaints, and you can see 13 them on the screen there. I won't read it out because 14 it's just the point of the complaints. 15 As we know, it was these complaints and the raids 16 that they referred to that resulted in a decision by the 17 Sudan Government to ensure that both the victims, the 18 Ngok and the Twic, and the perpetrators, the Homr, were 19 placed together under a single administrative authority. 20 The rationale was that if you had the same governor 21 looking after both peoples, then it would be less likely 22 that the two peoples, and in particular the northern 23 Arabs, would do bad things to each other. The idea was 24 to place the tribes together under a single authority. 25 We heard Professor Daly, the world's leading authority</p> <p style="text-align: center;">Page 211</p>
<p>17:20 1 You can see the Government's memorial on the screen: 2 precisely this passage which led to the formulation of 3 the disputed text. The precise passage that we are 4 talking about is the definition of the transfer in 5 Sudan Intelligence Report No. 128. 6 I would note that there is no suggestion in the 7 Government's memorial, there's no suggestion in 8 Professor Crawford's comments, there's no suggestion 9 anywhere else in the record that anything but Sudan 10 Intelligence Report No. 128 is what the parties had in 11 front of them when they thought about the language in 12 Article 1.1.2 of the Abyei Protocol. 13 That is what the travaux refers to; that is what the 14 Government said, it didn't say anything different; and 15 that is what, if we are going to look at travaux, we 16 have to look at. So let's go look at it. 17 Before we look at it, though, let's put it in a bit 18 of context. First, you will recall -- and we have had 19 expert testimony about this from Professor Daly, but we 20 can look at the record for ourselves too -- Condominium 21 records reported that: 22 "In September of 1903 residents of the village of 23 Sheikh Rob [he had either been demoted or promoted, I've 24 never figured out quite which, from Sultan Rob] in the 25 Dinka district of Gnok [presumably Ngok] had complained</p> <p style="text-align: center;">Page 210</p>	<p>17:23 1 on this subject-matter, describe that purpose very 2 clearly this morning. 3 So, with that background, let's look now at what the 4 Government has said is the text that the parties -- 5 these parties, the SPLM/A and the Government -- had in 6 front of them when they negotiated Article 1.1.2. 7 We can see it on the screen there, and we look at 8 the passage which the Government has said was precisely 9 the passage that led to the formulation of the ABC's 10 mandate. It makes it unmistakably clear that the 11 transfer in question was not a transfer of territory, 12 not a transfer of an area, but the transfer of a tribe, 13 the transfer of a people. 14 Look at the slide, look at what it says: 15 "It has been decided that Sultan Rob, whose country 16 [yes, he had a country] is on the Kiir River, and 17 Sheikh Rihan of Toj are to belong to the Kordofan 18 people." 19 "Are", those: Sultan Rob and Sheikh Rihan: 20 "These people have on certain occasions complained 21 of raids made on them by southern Kordofan Arabs, and it 22 has therefore been considered advisable to place them 23 under the same governor as the Arabs of whose conduct 24 they complain." 25 It's perfectly clear that the object of this</p> <p style="text-align: center;">Page 212</p>

<p>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 Sheikh Riham 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 Sheikh Riham. 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 Sheikh Riham, is 19 hopeless, it's desperate. 20 Sudan Intelligence Report No. 128 did not transfer 21 just Sultan Rob and Sheikh Riham. 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</p> <p style="text-align: center;">Page 213</p>	<p>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 Sheikh Riham 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 Sheikh Riham 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 21 Kordofan." 22 The Government didn't say to transfer Sultan Rob and 23 Sheikh Riham; 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</p> <p style="text-align: center;">Page 215</p>
<p>17:26 1 we look at why the transfer was done, we will see that 2 that is inescapably true. 3 First, it doesn't make much sense in the English 4 language -- and perhaps that's why Mr Bundy said he 5 wasn't a grammarian -- to refer to just two individuals 6 as people in this context. People is a broader concept 7 in the English language. 8 More fundamentally, though, the Condominium 9 officials weren't referring to just Sultan Rob and 10 Sheikh Riham; indeed, it's literally absurd to suggest 11 that just those two individuals were transferred. 12 It wasn't they, those two individuals, who had 13 personally been the targets of the Arab raids which are 14 referred to in the transfer decision; it was their 15 people. Sultan Rob wasn't carried off, he wasn't one of 16 the 30 Ngok boys who was carried off as reported; it was 17 his people. 18 It wasn't Sultan Rob who went and complained to the 19 Condominium officials; that's why I showed you the slide 20 that said two runners did, two Ngok Dinka runners went 21 and did. Those people complained, the Ngok Dinka 22 complained. 23 It wasn't Sultan Rob and Sheikh Riham who by 24 themselves were placed under the Kordofan government; of 25 course not. It was the Ngok Dinka people and the</p> <p style="text-align: center;">Page 214</p>	<p>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</p> <p style="text-align: center;">Page 216</p>

<p>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 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 the reason for 13 protecting the people of the tribes. 14 Let's look at the next slide, and here it's a little 15 bit obscured: 16 "The decision to transfer." 17 The decision to transfer the Ngok and the Twic to 18 Kordofan. And guess what you see underneath that: you 19 see Sudan Intelligence Report No. 128, which says what 20 we've already seen, and which, just as I said, just as 21 the Government's memorial said, just as the previous two 22 slides said, just as the ABC experts said, that it was 23 a decision to transfer the Ngok and the Twic to 24 Kordofan. 25 It did not, as Mr Bundy sought to do, describe this</p> <p style="text-align: center;">Page 217</p>	<p>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</p> <p style="text-align: center;">Page 219</p>
<p>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.</p> <p style="text-align: center;">Page 218</p>	<p>17:34 1 attention to. When you look at what the experts did, 2 they did just what everybody else who's ever looked at 3 this document concluded: they said that it was the 4 principal reasons for the transfer of the nine 5 Ngok Dinka chiefdoms to Kordofan, again a tribal 6 transfer. 7 If you don't read the experts' report with any care, 8 maybe then you say it's a scientific shambles, maybe 9 then you say they didn't even bother to refer to the 10 transfer documents. But if you do read it what you see 11 is the same thing that the SPLM/A has said, the same 12 thing that I have said, the same thing the Government's 13 memorial has said, the same thing the Government's 14 presentation to the experts said. 15 In addition, if you go and look at proposition 7 in 16 the experts' report, they described the full context of 17 the Sudan Intelligence Report. They ended with another 18 conclusion that this was a tribal transfer, not 19 a territorial one. They said that the Ngok people were 20 regarded as part of the Bahr el Ghazal province until 21 their transfer -- "their transfer" -- in 1905. 22 So I don't think there really can be any doubt about 23 it. It's completely clear that the transfer decision in 24 1905, which is recorded in Sudan Intelligence Report 25 No. 128, which is precisely the passage that the parties</p> <p style="text-align: center;">Page 220</p>

<p>17:36 1 had before them when they negotiated the Abyei Protocol, 2 and as to which that's no evidence that they had any 3 other passage, any other document in front of them, that 4 this passage, precisely the passage which formulated 5 their views, shaped their views, was a transfer of the 6 tribes. 7 That's what Sudan Intelligence Report No. 128 said. 8 That's, when you go and look at the ABC report, what the 9 ABC experts said. That's what Professor Daly said. 10 That's what Mr Schofield said. That's what the 11 Government's presentations to the ABC experts said. 12 That's what the Government's memorial said. The only 13 person who has said something different is Mr Bundy, and 14 he is just plain wrong on this issue. 15 Mr Bundy then went on and addressed the question of 16 the provincial boundaries. He treated the references to 17 the provincial boundaries in the annual reports as some 18 sort of extraordinary revelation. He emphasised how 19 there was a reference to changes in the provincial 20 boundaries. 21 That's hardly surprising; it's not surprising in the 22 at least. It's obvious that if you transfer a people, 23 especially if you transfer a large and widely dispersed 24 people like the Ngok Dinka, there will be territorial 25 consequences. A transfer of people will at some point</p> <p style="text-align: center;">Page 221</p>	<p>17:39 1 the provincial boundary in the next years. Contrary to 2 the Government's claims, Kordofan's boundaries were not 3 extended to encompass any particular area, any specific 4 area in 1905; again, because it was only the 5 administration of the Ngok people, and not a defined 6 territory, that had been transferred. 7 In 1905, as we've seen, the Condominium officials 8 had no idea about what territory the Ngok Dinka 9 inhabited. Mr Bundy said this, and I will, with all 10 respect, stick to my interpretation of what he said. 11 In 1905, as we've seen, the Condominium officials 12 had no idea about what territory the Ngok Dinka 13 inhabited. Mr Bundy said this -- and I will, with all 14 respect, stick to my interpretation of what he said -- 15 very clearly when he made the statement in his opening 16 comments that: 17 "It is self-evident that as of 1905 Government 18 officials would have had no knowledge of tribal 19 locations ..." 20 The qualification that he added [earlier] didn't 21 change the substance of it, but if it did, it doesn't 22 matter. You saw from the evidence, you heard from the 23 evidence, you heard from Professor Daly that the 24 Condominium couldn't have begun to define the territory 25 of the Ngok Dinka in 1905; they had no clue, quite</p> <p style="text-align: center;">Page 223</p>
<p>17:37 1 entail -- or at least potentially entail, depending on 2 where they are -- territorial consequences. That's what 3 happened here: after the transfer decision there were 4 territorial consequences. 5 But critically, the critical passage before the 6 parties when they negotiated the Abyei Protocol was 7 a tribal transfer that only subsequently had territorial 8 consequences. It was the tribal transfer of the 9 Ngok Dinka people that defined subsequently the area. 10 That is not a case of the Condominium officials, as 11 Mr Bundy has said and as the Government has argued, 12 defining some area beneath the Kiir or somewhere else. 13 They had no idea of what sort of area they might be 14 transferring; they didn't think about it. What they 15 transferred, as everybody said, including the 16 Government, was a people: the Ngok Dinka people. 17 Mr Bundy relied in particular on the annual reports. 18 We can see references in the annual reports to the 19 changes to the boundaries, but it's useful to look at 20 them as well. They refer in both cases to the 21 Ngok Dinka people, the Dinka Sheikhs: Sultan Rob and 22 Sultan Rihan Gorkwei are now included in Kordofan. 23 Again, this is the territorial consequence of the 24 previous tribal transfer. 25 That's exactly how the Condominium officials treated</p> <p style="text-align: center;">Page 222</p>	<p>17:40 1 literally, about where the Ngok Dinka's territory might 2 start and where it might stop. Professor Daly confirmed 3 that. What they did was wherever the Ngok were, they 4 put administration of the Ngok in the hands of the 5 Governor of Kordofan, and they did it for a very simple 6 and logical practical reason. 7 When you look at what actually happened in the next 8 years, the Condominium took no steps to delimit the 9 territory because they didn't know what the territory 10 might be. The Government concedes: 11 "The southern limit of the transferred area remained 12 to be delimited in 1905." 13 Likewise the Government says that it was only in 14 1912, seven years after the transfer, that a provincial 15 boundary line was established between Kordofan and 16 Bahr el Ghazal and then, AS we've seen, never more than 17 25 kilometres from the Bahr el Arab. 18 Mr Bundy also acknowledged this point clearly in his 19 oral submissions on Monday, when he said -- and you can 20 see it on the slide: 21 "The southern limits of the transferred area, and 22 hence the new post-transfer Kordofan/Bahr el Ghazal 23 boundary, were not precisely established in 1905." 24 That's a bit of an understatement. Far from 25 precisely established, they weren't established at all.</p> <p style="text-align: center;">Page 224</p>

<p>17:41 1 It makes perfect sense for the reasons that we've 2 discussed that they couldn't have. They didn't have any 3 idea about the territory of the Ngok Dinka, who -- not 4 what, who -- they had transferred. 5 Even after 1912, the southern boundary of Kordofan 6 remained indeterminate and ill-defined because the 7 Government didn't even at that stage know where the Ngok 8 really were, and you can see what Mr MacDonald called 9 the spaghetti bowl of different boundaries that were 10 there. 11 It's also instructive to consider how the 12 Twic Dinka, who we haven't heard that much about and who 13 were transferred along with the Ngok, were treated by 14 the Government. 15 In 1929 the Twic Dinka, who had been tribally 16 transferred as a people in 1905, were retransferred back 17 to Bahr el Ghazal. That's undisputed between the 18 parties. Again, everybody treated the Twic's retransfer 19 just the way they had treated their transfer: namely, as 20 a tribal transfer of people, not of areas. 21 We can see -- and this is the best version of the 22 document that's in the record; it comes from the 23 Government's presentation to the ABC experts. It's the 24 published gazette notice of the alteration of the 25 boundaries of Kordofan and Upper Nile provinces. Just</p> <p style="text-align: center;">Page 225</p>	<p>17:44 1 Ngok don't really live anywhere: they're not north, 2 they're not south of the Kiir. But people do live 3 somewhere, and if you transfer a people there will be 4 territorial consequences. 5 But the essential question that the Government tries 6 to confuse is that what Article 1.1.2 refers to is 7 a transfer of people. That's what Sudan Intelligence 8 Report No. 128, which was precisely the passage that was 9 used to formulate Article 1.1.2, said. There were 10 subsequent territorial consequences, but the essential 11 guiding point is that there was a transfer of a people, 12 which is just the way the English language of the 13 Abyei Protocol reads. 14 Again, as the Government describes it here, it's 15 a transfer of people, the Twic, not of a territory. If 16 that's not clear enough, we can also look at how the 17 Government has described this retransfer. 18 Let's look at their memorial. They talk there about 19 the retransfer of the Twic Dinka to Bahr el Ghazal. 20 They don't talk about a territory. They use that phrase 21 multiple times in their memorial and you can see it in 22 the slide. 23 Professor Crawford said the same thing when he 24 talked about this part of the case in his submissions. 25 He said: a retransfer of the Twic. Again, just</p> <p style="text-align: center;">Page 227</p>
<p>17:43 1 parenthetically I note that this is how boundary changes 2 and boundary creations were noticed in the Sudan. If 3 there was a boundary, it was noticed in the gazette, the 4 way this is done. 5 It is important to look at this report, and look at 6 it closely. It refers as you can see to the transfer of 7 the Ruweng Ajubba, the Ruweng Await and the Ruweng Alorr 8 sections of Dinka from Kordofan to Upper Nile province. 9 Those are transfers of people. What follows from that 10 transfer of people? As a result then there are certain 11 territorial consequences which if you look at the 12 gazette notice are described. 13 Note down at the bottom of the page the Government's 14 comment on this: 15 "By then the Twic were already returned to 16 Bahr el Ghazal, probably in 1929." 17 It's a sequence. You can look at it up there. 18 There's a transfer of people, a tribe, the Ruweng, which 19 has a consequence of result as a consequence of 20 transferring people which is to alter the boundaries. 21 It's no revelation that after you transfer a people 22 there will then subsequently be a boundary adjustment or 23 a territorial consequence; of course. People have to 24 live somewhere. 25 The Government I think seems to believe that the</p> <p style="text-align: center;">Page 226</p>	<p>17:45 1 inevitably lapsing in his case into the plain English 2 language of what the transfer was: it was a transfer of 3 people and tribes. The retransfer of the Twic was 4 exactly on the model of the original transfer of the 5 Twic, and the original transfer of the Ngok Dinka, not 6 of abstract pieces of territory. 7 The simple point is that the description was 8 precisely parallel to the earlier transfer decision that 9 we saw in the Sudan Intelligence Report. 10 Finally Mr Bundy took us to what he would have 11 defined -- the ABC defined -- the Abyei Area. He took 12 us to Governor-General Wingate's memorandum, and in 13 particular to the statement that: 14 "The districts of Sultan Rob and Okwai, to the south 15 of Bahr el Arab, and formerly a portion of the 16 Bahr el Ghazal province, have been incorporated into 17 Kordofan." 18 This is treated as some extraordinary revelation 19 also. That frankly has no more weight than the province 20 boundary references previously discussed. 21 Of course there would be consequences from the 22 transfer of the people. Those consequences would be the 23 incorporation of an as yet unspecified area of the Ngok 24 and Twic territories into Kordofan. That in no way 25 changed of course the fact that the 1905 transfer was</p> <p style="text-align: center;">Page 228</p>

<p>17:47 1 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 clear 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</p> <p style="text-align: center;">Page 229</p>	<p>17:50 1 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.</p> <p style="text-align: center;">Page 231</p>
<p>17:48 1 had been transferred. No. He was simply referring back 2 to what the territorial consequence would be of the 3 tribal transfer. Of course there was a territorial 4 consequence, but nobody would know what that would be 5 until 1911. 6 Of course Wingate's memorandum played no role at all 7 in the 2005 negotiations of the Abyei Protocol. We've 8 seen what did play a role in those negotiations. What 9 did play a role was Sudan Intelligence Report No. 128. 10 That is what reference was specifically made to, that 11 was the passage that was precisely relied on by the 12 parties. There was no hint of Wingate's memorandum in 13 those discussions. 14 There was frankly virtually no hint of Wingate's 15 memorandum in the Government's memorial. When you go 16 back and look at that memorial, and you can see on the 17 screen the references to it, there was no argument of 18 the sort that Mr Bundy has made. It was the same as in 19 the previous presentations to the ABC experts: the focus 20 was on the transfer decision, the transfer of the 21 people, not on some supposed territorial transfer. 22 In sum, where all that takes us is back to where we 23 started. If we're going to interpret Article 1.1.2 of 24 the Abyei Protocol, we start with the language. We've 25 seen what that language means. We pay attention to the</p> <p style="text-align: center;">Page 230</p>	<p>17:51 1 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.</p> <p style="text-align: center;">Page 232</p>

<p>17:52 1 There wasn't in 1905 any determinate or defined 2 Kordofan/Bahr el Ghazal boundary. That's because no 3 such boundary had been established; and because, even if 4 there had been some reference to the Bahr el Ghazal as 5 a real boundary, that wouldn't have meant anything. 6 I'll briefly look at both points. Again, we've 7 heard testimony on this from Professor Daly and from 8 Mr Schofield, who have addressed it specifically. I'll 9 try to summarise as best I can what's in the evidence. 10 Their expert testimony on it I would suggest is much 11 more to the point, much more decisive. 12 Preliminarily, it's clear that in 1905 any 13 provincial boundary in Sudan was approximate and 14 uncertain. Professor Daly explained it. You'd just had 15 17 years of civil war, and Sudan was just coming to 16 grips with peace. Nobody was paying attention to trying 17 to establish boundaries. There were no constitutional, 18 there were no legislative, there were no executive 19 pronouncements. There was no gazette that announced the 20 existence of a boundary. 21 There are a couple of references in annual reports 22 to how governors approached their particular 23 territories. But I would suggest that's not enough to 24 create a real provincial boundary of the sort that the 25 Government has relied on.</p> <p style="text-align: center;">Page 233</p>	<p>17:56 1 two." 2 You can see the rest of his answer there on the 3 slide. 4 We also heard how Bahr el Ghazal had only been 5 established as a province in 1902, less than three years 6 before the tribal transfer. No boundary between 7 Kordofan and Bahr el Ghazal was included on any 8 Government map before 1914, nine years after the 9 transfer. Even when that happened -- and there's the 10 cartographic evidence in the record, referred to in our 11 memorials -- it was only referred to as an approximate 12 provincial boundary. 13 The Government claimed that there's not a single 14 mention in the record of any boundary, other than the 15 Bahr el Arab, between the two provinces before the 1905 16 transfer; you can see the cite to that in the previous 17 slide. 18 In fact there were multiple references, that 19 Mr Schofield referred to, to other boundaries that had 20 been -- albeit in a very indeterminate and uncertain 21 way -- referred to in the preceding years. I won't 22 bother to take you to each of them, but Kordofan was 23 described during the Turkiyya as: 24 "... towards the south. No definite confines can be 25 described, as the extent of these dominions increases or</p> <p style="text-align: center;">Page 235</p>
<p>17:54 1 You can tell that in part from the cartographic 2 evidence. I'm challenged on it, no doubt, but I'm 3 comforted because Mr MacDonald agreed with me. The only 4 Sudan Government cartographic evidence in the record of 5 any provincial boundaries is after 1905. If you look in 6 the transcript Day 3, page 166, Mr MacDonald 7 acknowledges under cross-examination that there wasn't 8 any Sudan Government map that identified a provincial 9 boundary at that time. 10 We can see how there wasn't a provincial boundary in 11 the Gleichen map. This, as he discussed, was a set of 12 chapter headings; it was not a provincial boundary. It 13 wasn't even until 1907 that the Sudan Intelligence 14 Office even began the process of trying to establish 15 provincial boundaries in Sudan. 16 You can see a lengthy quote. I'm not going to try 17 to read it, because I'd probably get it wrong. But 18 you'll keep it, and it draws attention to it. This is 19 how Mr Schofield explained the provincial boundary issue 20 before you this morning, and he did it very well. 21 Professor Daly said the same thing. He said: 22 "It should come as no surprise to the Tribunal that 23 with no administration in Kordofan in 1905, and no 24 administration in the northern Bahr el Ghazal, there was 25 simply no need for a provincial boundary between the</p> <p style="text-align: center;">Page 234</p>	<p>17:57 1 decreases." 2 The same kinds of references were made in the 1877 3 general report; and, if we go on to the next slide, in 4 similar discussions in 1884; and in Gleichen's handbook, 5 where it's said that the mudiria was vaguely described, 6 but may be described as enclosing the entire district 7 watered by the southern tributaries of the Bahr el Arab 8 and the Bahr el Ghazal regions. 9 The truth of the matter is there was historically 10 a huge degree of uncertainty, not surprisingly, about 11 where the boundaries might be between whatever the 12 political entities in this area was. The suggestion by 13 the Government that the three or four, two or three -- 14 however many there were -- references in annual reports 15 by the governors created a boundary is simply untenable. 16 There was a process by which boundaries could be 17 established. That was a process that hadn't begun, much 18 less ended, by 1905. 19 Beyond that, even if one took those references that 20 the Government seizes on so assiduously to the 21 Bahr el Arab as a boundary, that itself doesn't work, 22 because the Bahr el Arab, that reference, those three 23 words didn't convey a meaning that was definite or 24 determinate to the Condominium officials. They didn't 25 have the same understandings of what those words meant.</p> <p style="text-align: center;">Page 236</p>

<p>17:58 1 We've seen numerous references from Professor Daly 2 and Mr Schofield to the different meanings. I went 3 through some of the different meanings from Wilkinson 4 and Percival and Lloyd and others. 5 The Government has suggested that this was 6 an isolated error by Wilkinson; that was its first 7 characterisation. It's since become somewhat less 8 isolated: it's in Wilkinson and Percival, and now Mahon 9 and Lloyd and O'Connell and others. But it wasn't 10 an error that had been rectified, as the Government puts 11 it, by 1905. On the contrary, nobody knew what the 12 situation was, nobody knew what the Bahr el Arab was in 13 1905 in the Condominium Administration. 14 Preliminarily -- and moving on to the next slide -- 15 it was the ABC experts who identified this confusion. 16 We've heard a lot of criticism of their work, but the 17 experts said: 18 "Wilkinson was not alone in erroneously demarcating 19 geographic features in the Sudan ... other reports make 20 it clear that administrative officials mistook the 21 Ragaba ez Zarga/Ngol for the Bahr el Arab and thought 22 the Kiir was a different river." 23 This is the report that has been castigated in such 24 harsh terms, but this was something that the experts 25 themselves identified in their archival research. They</p> <p style="text-align: center;">Page 237</p>	<p>18:01 1 that was identified by 1905, and that's contradicted by 2 essentially all the evidence in the record. The experts 3 correctly concluded that the confusion lasted until at 4 least 1907. If I can quote: 5 "1905 and [1906] surveys correctly identified the 6 Kiir as the Bahr el Arab and the Ragaba ez Zarga/Ngol 7 for what it actually was (and labelled it the 8 Bahr el Homr). It was not until 1908, however, that the 9 local administrators in Kordofan consistent described 10 the Ragaba ez Zarga as Bahr el Homr in their official 11 reports." 12 The historical record, if we go through it 13 briefly -- Mr Schofield did this and I hesitate to 14 repeat it too much, but Mr Schofield did it. If we go 15 through the historical record, we will see that was 16 precisely confirmed. It wasn't just Wilkinson and it 17 wasn't just Percival who made the mistake; everybody was 18 confused. 19 You can see how Percival referred to the Ngol in 20 May 1905, two months after the transfer of the 21 Ngok Dinka people. He said that the wildlife was thick: 22 "... between the Lol, Kiir and Bahr el Arab." 23 He thought still in May 1905 that they were two 24 separate rivers. 25 That's the same reference that Percival had used</p> <p style="text-align: center;">Page 239</p>
<p>18:00 1 identified not just a single error by Wilkinson, as the 2 Government would have had us believe, but a widespread 3 error and a widespread confusion. 4 The experts were right in reaching this conclusion. 5 As you've seen from our reply memorial, it was 6 a confusion that was shared by Percival, Mahon, 7 Boulnois, Gleichen, Lloyd, O'Connell and Wingate 8 himself, whose reports between 1903 and 1907 all 9 proceeded on the premise that the Ngol was described as, 10 referred to as, the Bahr el Arab. 11 That's not surprising when you think about it. The 12 MENAS report explains why that would be the case. 13 Professor Crawford referred to a "featureless plain" on 14 the first day of the proceedings. That in some sense 15 was right. It's completely understandable, given the 16 nature of the watercourses, that the Condominium 17 officials wouldn't know where the rivers were, wouldn't 18 know which river they had reached. 19 Indeed, Mr MacDonald acknowledged the same thing. 20 You can see the language that was used in his 21 cross-examination on the current slide: that it would be 22 very difficult to identify the course of any particular 23 river. 24 The Government tries to pretend that this confusion 25 over what the Bahr el Arab was was a short lived mistake</p> <p style="text-align: center;">Page 238</p>	<p>18:03 1 earlier in his reports in 1905, when he referred to the 2 Ngol as what he took to be the Bahr el Arab. The 3 Government essentially concedes that not just Wilkinson 4 but Percival made that same mistake. 5 Then the Governor of Kordofan, O'Connell, in the 6 1906 annual report for Kordofan located Hasoba, which 7 everybody agrees is on the Ngol, on what he called the 8 Bahr el Arab. Again, that reference to the Bahr el Arab 9 plainly meant the Ngol, that reference in 1906 by the 10 Governor of Kordofan. 11 The Government put Governor-General Wingate's 12 memorandum front and centre in its case. Mr Schofield 13 walked you through what was in that memorandum and 14 explained how Wingate himself in that memorandum 15 continued to be confused about what the Bahr el Arab 16 was. That confusion was reflected and explained well by 17 Mr Schofield. 18 I am not going to take you through those particular 19 provisions because I'm worrying about my time, but you 20 can see the references there that Mr Schofield took you 21 to. He talked about the much-vexed question of the 22 Bahr el Arab and the Bahr el Homr. Much of the course 23 of these rivers is still unknown. Doubt still exists, 24 he said. 25 Then, moving on, he also talked about the "various</p> <p style="text-align: center;">Page 240</p>

<p>18:04 1 waterways, known locally as the Arab [the Bahr el Arab], 2 the Lol, the Kiir"; treating the Kiir and the 3 Bahr el Arab as separate rivers. 4 Again, if you look at the map that accompanied the 5 Gleichen text -- we can see this is the map that Wingate 6 would have had in front of him, this was the map that 7 was created in 1904, this was the map that Mr MacDonald 8 was questioned about -- when you look at the map and how 9 it labels the rivers, you will see how the Ngol is 10 referred to as the Bahr el Arab, the Ngol, the 11 Ragaba ez Zarga. 12 It's hard to read on this -- I guess we don't have 13 a blowup -- but the Ngol Ragaba ez Zarga continues on 14 the 1904 map, which wasn't replaced until well past 15 1907, as the Bahr el Arab. 16 Actually here we have the blowup and it's a little 17 easier for all of us to see. You can see there how the 18 Bahr el Arab is clearly referred to as the Ngol. 19 So the only official map that the Government had at 20 its disposal at the time when the 1905 transfer occurred 21 left undecided and indeterminate, because of the 22 confusion that Wingate referred to, what the 23 Bahr el Arab really meant. We've also seen the 24 statements by Boulnois and O'Connell and Wingate. 25 I'd like to move quickly on to what all this</p> <p style="text-align: center;">Page 241</p>	<p>18:08 1 I'd like to finally turn to two points about the 2 witness testimony. 3 I made reference this morning to Whittingham's 4 sketch map which we put in. I was searching desperately 5 for the Ngok Dinka dugdug and couldn't find it on my 6 slide. I've now found it. Here you can see on the map, 7 just to the south of the Ngol, a reference to 8 a Ngok Dinka dugdug. You can just see it in the second 9 white box there. 10 There's no question but that this was the Ngol 11 river. Obviously this is one dugdug; one dugdug does 12 not a kingdom make. On the other hand, given the 13 extraordinarily sparse and fragmentary nature of the 14 record, this provides yet another piece of the puzzle, 15 another piece of the evidence that contradicts 16 Professor Crawford's repeated assertion that there's not 17 any documentary evidence that shows Ngok Dinka on the 18 Ngol or north of the Ngol. Here you have a Ngok Dinka 19 dugdug exactly on the Ngol. 20 I would remind you that this is the map that the 21 Government didn't produce. They produced other parts of 22 this map; this is the piece they didn't produce. This 23 is the piece that we had to go to the Survey Department 24 and copy on the world's worst copying machine and try 25 and put in front of you. I apologise for the quality,</p> <p style="text-align: center;">Page 243</p>
<p>18:06 1 geographical confusion meant, and then to end. 2 This geographic confusion on this relatively small 3 part of the case, I would suggest, meant that the 4 references by the Government to the provincial boundary 5 didn't have any force, they didn't have any impact. 6 Even if there had been a provincial boundary that had 7 been established, which there wasn't, the references to 8 the Bahr el Arab were confused; they didn't have any 9 determinate or definite meaning in 1905. 10 The Government's effort, therefore, to found its 11 case on the notion that something was taken from beneath 12 the boundary and put above the boundary, and that that 13 is decisive, simply doesn't hold up. 14 Article 1.1.2 does not require us to do that. 15 Article 1.1.2 looks to the error of the nine Ngok Dinka 16 chiefdoms, so we don't need to do this. Even if we had 17 to approach this from the perspective of the 18 Government -- which we do not and if we pay attention to 19 the language of Article 1.1.2 would not do -- then the 20 Government's case nonetheless falls apart because there 21 wasn't a boundary in 1905 that had the significance that 22 the Government attaches to it; there was simply 23 confusion. No boundary had been established, nothing 24 had been gazetted. The only references were to the 25 Bahr el Arab, and that didn't, as we saw, mean anything.</p> <p style="text-align: center;">Page 242</p>	<p>18:09 1 but it's the best that they would give us. 2 Finally turning, as I promised, just briefly to the 3 witness evidence. We heard a question to Dr Poole this 4 morning, Professor Crawford put to Dr Poole the 5 following question: 6 "Question: '... the community mapping project, 7 shows permanent Ngok Dinka villages were located 8 throughout the Bahr region extending north to ... 9 latitude 10°35' north, both in 1905 and for decades 10 thereafter.' 11 "There are two different issues here. One is the 12 Bahr region. But I'm am interested in the aspect of 13 that statement that says 'extending north to ... 14 latitude 10°35''. Do you accept the accuracy of the 15 statement that you showed that the Ngok Dinka villages 16 extended to 10°35' north in 1905?" 17 Then we heard in his submissions just a few moments 18 ago how Professor Crawford said: and look, 19 Professor Poole admitted on cross-examination that the 20 community mapping report didn't get you up to 10°35'. 21 The truth of the matter was: Dr Poole was dead 22 straight honest. He got asked that question, 23 Professor Crawford read it out to him from our 24 rejoinder, he answered honestly and transparently. 25 You heard, he said: no, my report didn't go up to</p> <p style="text-align: center;">Page 244</p>

<p>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</p> <p style="text-align: center;">Page 245</p>	<p>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. 8 MR BORN: Thank you very much, Professor Hafner. I'm 9 trying to look at the transcript as we speak to make 10 sure that I had the question properly understood. 11 I think, though, that the answer is best understood 12 in the context of the Condominium administration. What 13 was transferred was the administration of the people. 14 That's what you see when you look at the purposes of the 15 transfer: it was how the Condominium authorities would 16 supervise, would oversee the respective people, the Homr 17 and the Ngok Dinka. What was transferred was the Ngok 18 from the administration of one place, one governor, to 19 the administration of another governor. Therefore the 20 transfer referred to the oversight and administration of 21 the Ngok Dinka tribe. Thank you. 22 THE CHAIRMAN: Thank you very much. No other questions. 23 So this closes the reply phase on the delimitation 24 issue. Tomorrow, Thursday, will be our very last day. 25 We start again at 9 o'clock, and we finish the hearings</p> <p style="text-align: center;">Page 247</p>
<p>18:12 1 region extending north to the goz and ... latitude 2 10°35' north, both in 1905 and for decades thereafter." 3 I would suggest that you have to read that 4 sentence -- just like you have to read the record as 5 a whole -- completely, carefully and fully. When you do 6 it you see we put the evidence together. We don't pluck 7 out soundbites and snippets; we put it together. 8 When Professor Crawford put to Dr Poole that that 9 was what his report said, that wasn't right. Dr Poole 10 put it right: that's not what he said. It's not what we 11 said either. You have to look at the whole record. 12 When you do look at the whole record I would suggest it 13 says exactly what we said there. 14 With that, I'll stop. Thank you. 15 THE CHAIRMAN: I thank you very much, Mr Born. 16 There is one question on the part of 17 Professor Hafner. 18 (6.14 pm) 19 Questions from THE TRIBUNAL 20 PROFESSOR HAFNER: Counsel, you've put quite a lot of 21 emphasis on the expression of "transfer". In 22 particular you say that there was a transfer of 23 peoples and not of territory. This is only a point of 24 clarification which I want to raise. 25 I would like to know how this transfer was</p> <p style="text-align: center;">Page 246</p>	<p>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. 4 MR BORN: Thank you, Mr President. 5 (6.16 pm) 6 (The hearing adjourned until 9.00 am the following day) 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 248</p>

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