

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

Tuesday, 21st 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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<p>09:33 1 Tuesday, 21st April 2009 2 (9.30 am) 3 THE CHAIRMAN: Mr Bundy, you can go on. 4 Submissions by MR BUNDY (continued) 5 MR BUNDY: Thank you very much, Mr President, members of 6 the Tribunal. Yesterday I had started to address one 7 of the core issues in the case, which is: what is the 8 area of the nine Ngok Dinka chiefdoms transferred to 9 Kordofan in 1905? I had been looking at it from the 10 point of view of the contemporaneous documentation 11 referring to that transfer. 12 I started by going through the four documents from 13 the relevant period that specifically refer to the 14 transfer: the March 1905 intelligence report, the annual 15 reports for Kordofan and Bahr el Ghazal in 1905 and 16 Governor-General Wingate's memorandum in which he 17 described the transferred area in 1905. 18 I mentioned that the only genuine question that 19 Wingate's memorandum could give rise to was what river 20 he was referring to when he said that the districts of 21 the two Sultans, Sultan Rob and Sultan Okwai, to the 22 south of the Bahr el Arab and formerly a portion of the 23 Bahr el Ghazal province, had been incorporated into 24 Kordofan. What river was he referring to when he 25 mentioned the Bahr el Arab? It's to that subject that</p> <p style="text-align: center;">Page 1</p>	<p>09:33 1 marches from north to south, covering large expanses of 2 territory. 3 Others, such as Lieutenant Bayldon and 4 Lieutenant Walsh, were sent to the region with 5 specification instructions to explore the rivers, 6 including the Ragaba ez Zarga, the Lol, the Bahr el Arab 7 and the Kiir. It wasn't referred to as the 8 Ragaba ez Zarga at that time. 9 It is submitted that the accounts of this latter 10 group of individuals, that ones that were sent there 11 with specific instructions to explore the relevant 12 rivers, is entitled to greater probative value as 13 a result of the much more detailed surveys they 14 undertook of the relevant features and the fact that 15 these surveys and explorations were being undertaken at 16 the time of the transfer and were specifically referred 17 to by Governor-General Wingate in his memorandum in 18 which he described the transferred area. 19 Now, on some of the basic facts the parties do not 20 have major differences, and this results from the fact 21 that for the most part the parties have been referring 22 to the same documents recording the trips of the various 23 individuals to the rivers in question. Where the 24 parties differ is in their appreciation of these facts 25 for purposes of determining the area transferred to</p> <p style="text-align: center;">Page 3</p>
<p>09:31 1 I would like to turn now. 2 As Sudan pointed out in its rejoinder, in our 3 submission in assessing the evidence relating to the 4 Bahr el Arab there are two general conditions that 5 should first be borne in mind. 6 The first is to appreciate the evidence on record in 7 the order in which it was documented. It appears to be 8 common ground between the parties that the knowledge of 9 Condominium officials of the rivers of the region was 10 evolving over the first few years after 1900. By taking 11 a chronological approach to the evidence it's possible 12 to ascertain what was known to Sudanese Government 13 officials, including to Governor-General Wingate, at the 14 time the transfer was referred to in the documents that 15 I addressed yesterday. 16 The second general consideration is to assess the 17 evidence qualitatively in terms and in the light of the 18 amount of time that the relevant officials who visited 19 the area during the first five years of the 20th century 20 actually spent crossing or exploring the relevant 21 rivers. 22 Certain individuals, such as Wilkinson and Percival, 23 on whom the SPLM/A's pleadings rely quite heavily, 24 crossed the Ragaba ez Zarga and the Bahr el Arab in 25 a day or two, in the course of rather long general</p> <p style="text-align: center;">Page 2</p>	<p>09:34 1 Kordofan in 1905. 2 The SPLM/A's main thesis is that there was confusion 3 over the identity and location of the Bahr el Arab 4 before the 1905 transfer, and that this confusion 5 persisted up until 1907 or 1908, after the transfer had 6 occurred. 7 The Government, on the other hand, submits that the 8 Bahr el Arab had been correctly identified by 9 March 1905; and that Wingate's memorandum, in which he 10 described the transferred area in relation to that 11 river, and in which he also referred to the exploration 12 activities that had been carried out on that river, 13 shows that Wingate knew what he was writing about; and 14 that when he authored his 1905 memorandum reporting on 15 the events of that year in the annual report, he was 16 referring to the correctly identified Bahr El Arab 17 River. 18 Because the material on the record has been 19 extensively canvassed by the parties in the written 20 pleadings, I do not intend to repeat obviously all 21 that's been said, but I do wish to focus on a number of 22 essential facts. 23 It's not disputed that in 1900 Saunders travelled to 24 the junction of the Bahr el Arab and the Bahr el Ghazal 25 rivers in the east. The MENAS report accepts that</p> <p style="text-align: center;">Page 4</p>

<p>09:36 1 Saunders correctly identified the eastern reaches of the 2 Bahr el Arab at that time, and I believe this also came 3 out in Mr MacDonald's testimony yesterday. 4 Nor does the SPLM/A challenge the fact that 5 Major Peake, in the same year, trekked up the 6 Bahr el Arab -- the real Bahr el Arab -- for a distance 7 of about 9 miles from its junction with the 8 Bahr El Ghazal River. 9 We next come to Wilkinson's trek through the region 10 in January and February 1902, as to which the parties 11 have devoted considerable attention, and which formed 12 one element in the ABC experts' report. It's curious 13 that, unlike Bayldon's subsequent explorations, 14 Wilkinson's journey is not actually referred to in any 15 of the intelligence reports on file for 1902, or in the 16 annual reports submitted by the parties for that year or 17 subsequent years. It's unclear, therefore, how widely 18 circulated Wilkinson's report actually was amongst 19 Government officials at the time. 20 The only record we have is a route report included 21 in Gleichen's 1905 compendium, and Wilkinson's sketch 22 maps. I think the route report can be found in the 23 arbitrators' folders at tab 14 and the common bundle at 24 tab 20, for reference. 25 That route report does not provide daily entries of</p> <p style="text-align: center;">Page 5</p>	<p>09:40 1 There is also no dispute that two years later 2 Percival misidentified the Bahr el Arab when he marched 3 from Lake Keilak in the north to Wau further south in 4 Bahr el Ghazal province. He made this march over 5 a six-week period from about mid-November to 21st or 6 22nd December 1904. As was the case with Wilkinson, the 7 purpose of Percival's trek was not to engage in 8 a detailed survey and exploration of the rivers; it was 9 a rapid trek from north to south in which he crossed 10 a number of rivers, such as the Ragaba ez Zarga, the 11 Kiir and the Lol. 12 Now, the daily entries from Percival's route report 13 may be found in the common bundle. They're both at 14 tabs 31 and 32. They are probably clearer in 32, where 15 they are reprinted in Gleichen's compendium for 16 reference, and they're also in the folders that we had 17 distributed yesterday at tab 15. 18 Those route reports indicate that on 19 19th November 1904 Percival came to a feature which he 20 took to be the Bahr el Arab. He crossed that river the 21 following day -- we know it was actually the 22 Ragaba ez Zarga, but he says he takes it to be the 23 Bahr el Arab -- and he crossed the river the following 24 day, on the 20th, and proceeded southwards, after first 25 ascertaining that the area, to the extent he was able to</p> <p style="text-align: center;">Page 7</p>
<p>09:38 1 where Wilkinson was on each day. Percival's later route 2 report does, but Wilkinson's doesn't. But it seems 3 clear from the fact that Wilkinson covered a great deal 4 of ground in less than two months that it means that at 5 most he could have only spent a couple of days on the 6 relevant rivers. 7 A map of his itinerary outlining where he went is 8 being placed on the screen for ease of reference. It's 9 a map you've seen before; it's been in the parties' 10 pleadings. 11 Professor Crawford will be discussing Wilkinson's 12 route report in greater detail later this morning. For 13 present purposes, I would simply recall that the parties 14 agree that Wilkinson correctly identified the 15 Kiir River, south of which lay Sultan Rob's village and 16 district, but that he misidentified the Ragaba ez Zarga 17 as the Bahr el Arab at the two points where he crossed 18 it. 19 Nonetheless, although he misidentified the 20 Ragaba ez Zarga as the Bahr el Arab, he did note in his 21 route report another matter that Professor Crawford will 22 deal with: that he only saw Arab settlements, to the 23 extent he saw any, on that river, on the Ragaba ez 24 Zarga. He didn't find any Dinka settlements there; he 25 found Arab settlements.</p> <p style="text-align: center;">Page 6</p>	<p>09:41 1 go a few miles up it, on the Ragaba ez Zarga -- what he 2 called the Bahr el Arab -- was uninhabited, or appeared 3 to be uninhabited. 4 The parties agree that the river that Percival said 5 he took to be the Bahr el Arab was actually, as I noted, 6 the Ragaba ez Zarga. 7 Percival's route report indicates that he had seen 8 Wilkinson's sketch map. Thus Percival misidentified the 9 Bahr el Arab, as Wilkinson had done, at the points where 10 he crossed it, although his report was not entirely 11 unequivocal because he simply stated that he came to 12 what he took to be the Bahr el Arab, probably based on 13 Wilkinson's sketch map. 14 His mistake was repeated by Boulnois on, I think, 15 23rd December. Percival had arrived in Wau in 16 Bahr el Ghazal on the 21st or 22nd, and Boulnois 17 reported Percival's principal findings to Wingate on 18 that date. Boulnois himself did not visit any of the 19 rivers in question and had no firsthand knowledge of 20 them; he was simply forwarding on Percival's remarks 21 when he arrived at Wau. 22 Now, further south, after Percival had crossed the 23 Ragaba ez Zarga, which he took to be the Bahr el Arab, 24 Percival correctly identified the Kiir River, just as 25 Wilkinson had correctly identified the Kiir River.</p> <p style="text-align: center;">Page 8</p>

<p>09:43 1 There was no dispute on the Kiir. 2 He reached the Kiir on 23rd November, and he also 3 noted -- and this appears in the route report -- that, 4 according to Sultan Rob himself, the Ragaba ez Zarga, 5 which was Percival's Bahr el Arab, was uninhabited 6 except for occasional wandered parties of Arabs. 7 Now, Sultan Rob's own account, told to a Condominium 8 official, rebuts the SPLM/A's thesis that the Dinka 9 lived as far north as the Ragaba ez Zarga, much less to 10 the 10°22'30" north parallel or the 10°35' north 11 parallel. 12 By November 1904, therefore, while individuals such 13 as Wilkinson and Percival had crossed the rivers in 14 question, the Government had not sent any party 15 specifically to explore the relevant rivers, with the 16 exception of the early 1900 trips of Saunders and Peake 17 which had been limited to the very eastern reaches of 18 the Bahr el Arab, in the region where it met up with the 19 Bahr el Ghazal River. 20 But that situation changed at the end of 1904, when 21 Lieutenant Bayldon was sent to the region with the 22 express task of exploring the relevant rivers. In his 23 memorandum included with the 1904 annual report for 24 Sudan -- I'm not in 1905, the 1904 annual report for 25 Sudan -- Governor-General Wingate referred to this</p> <p style="text-align: center;">Page 9</p>	<p>09:46 1 report it is stated: 2 "Sub-Lieutenant Bayldon HN left Khartoum on the 3 18th instant [18th December] by steamer with 4 instructions to explore the Bahr el Arab from its mouth 5 and if possible the other little-known rivers in the 6 northwest of the Bahr el Ghazal." 7 Bayldon wasn't coming from Khartoum; at that time he 8 had been in Bahr el Ghazal at Wau exploring rivers 9 further south, and he was now sent with explicit 10 instructions to explore rivers such as the Bahr el Arab 11 and other features in the area. 12 The March 1905 intelligence report, which 13 I mentioned yesterday in connection with the transfer, 14 contains a detailed summary prepared by Bayldon dated 15 20th March 1905 on the status of the Bahr el Arab and on 16 the Ragaba ez Zarga, which he called the Bahr el Homr. 17 It was in this report dated 20th March 1905 that Bayldon 18 recorded his conclusion that the river usually spoken of 19 as the Bahr el Arab -- ie spoken of as the Bahr el Arab 20 by people such as Percival and Wilkinson -- is really 21 the Bahr el Homr, or as we now know it, the 22 Ragaba ez Zarga or the Ngol. So he cleared up that what 23 Wilkinson and Percival had called the Bahr el Arab was 24 not the Bahr el Arab; it was what Bayldon said was the 25 Bahr el Homr, which is the Ragaba ez Zarga.</p> <p style="text-align: center;">Page 11</p>
<p>09:45 1 initiative. It is at tab 34 of the common bundle and 2 tab 16 of the arbitrators' folders. This is what 3 Wingate wrote: 4 "Exploration of the Bahr el Arab by 5 Lieutenant Bayldon HN: meanwhile I am endeavouring by 6 further explorations of little-known rivers, such as the 7 Bahr el Arab, the Kiir, the Lol and other streams, to 8 obtain information which may be of use in solving this 9 interesting problem." 10 Now, the SPLM/A's distinguished expert 11 Professor Daly has asserted that the complexity 12 hydrology of southern Kordofan was of little or no 13 concern to Condominium officials in 1905; that's at 14 page 3 of Professor Daly's second report. But I would 15 suggest that this is not borne out by Governor-General 16 Wingate's memorandum in which he expressed a clear 17 interest in solving the problem of what had hitherto 18 been the little-known rivers such as the Bahr el Arab, 19 the Kiir and the Lol by sending Lieutenant Bayldon 20 specifically to obtain information. 21 Now, Lieutenant Bayldon's expedition is also 22 referred to in the December 1904 Sudan Intelligence 23 Report. I will put the cite up on the screen. It's in 24 the common bundle, tab 33, and your folders of 25 yesterday, tab 17. In the December 1904 intelligence</p> <p style="text-align: center;">Page 10</p>	<p>09:48 1 Now, it's important to appreciate the fact that 2 Bayldon did not base this conclusion merely on crossing 3 the relevant river in a day or two, as had Wilkinson and 4 Percival. His report, again in the March 1905 5 intelligence report, indicates that he traced what he 6 called the Bahr el Homr for a distance of over 40 miles. 7 Although he found it to be a clearly defined 8 channel, he noted that there was little or no water in 9 it and that from all accounts, including what he himself 10 saw: 11 "This river is much more in the nature of a khor 12 than a river." 13 As for the Kiir further south, which had been 14 crossed by Wilkinson and Percival, Bayldon concluded 15 very clearly in his report in March that, "It is the 16 real Bahr el Arab", and he then offered suggestions for 17 opening it up to navigation. 18 Thus in the very same edition of the intelligence 19 reports in which the transfer was first mentioned, the 20 Government of Sudan also had detailed information from 21 Lieutenant Bayldon that the Kiir River was the real 22 Bahr el Arab and that the so-called false Bahr el Arab, 23 previously misidentified by Wilkinson and Percival, was 24 the Bahr el Homr. 25 Bayldon knew what he was talking about because by</p> <p style="text-align: center;">Page 12</p>

<p>09:50 1 the time he filed his report he had spent almost three 2 months on the relevant rivers. 3 Bayldon's activities on the real Bahr el Arab, as 4 well as those of his successors, continued throughout 5 1905, during which time they became focused on clearing 6 sudd or amassed vegetation from the river in order to 7 open it up to navigation. 8 We have the following accounts reporting on this 9 work, as continuously documented during the course of 10 1905 in the Sudan Intelligence Reports, which you can 11 also find at your convenience under tab 18 of your 12 folders. 13 We have the June 1905 intelligence report; that 14 contained an actual marginal subsection in the report 15 entitled "Upper Nile, Bahr El Arab Sudd", and that was 16 a refer to the real Bahr el Arab, the river where 17 Bayldon was carrying out his operations. 18 Then we have the July 1905 intelligence report. It 19 continued to display the same marginal heading, 20 "Bahr el Arab Sudd", and it noted that out of 18 miles 21 along the river where sudd was present, only 6 miles 22 remained to be cut. 23 By August, Bayldon unfortunately had fallen ill; 24 eventually he was repatriated from the country. 25 Nonetheless the work continued under his engineer,</p> <p style="text-align: center;">Page 13</p>	<p>09:53 1 "Sudd Cutting on the Bahr El Arab" -- in which he spoke 2 highly of the work of Bayldon, Sciplini and Walsh on 3 that river. He actually even quoted a passage from 4 a report that he had received from Walsh about this 5 work. You'll find, at your convenience, the relevant 6 entry under tab 8 of your folders. This section of 7 Wingate's memorandum speaking specifically about the 8 operations on the Bahr el Arab, where Bayldon, Walsh and 9 Sciplini were operating, is at page 11 of his 10 memorandum. 11 Taking into consideration Wingate's account of the 12 operations that were being carried out on the 13 Bahr el Arab, the real Bahr el Arab, throughout 1905, it 14 stands to reason that when Wingate, 12 or 13 pages later 15 in that same memorandum, referred to the transferred 16 districts of Sultan Rob and Sultan Okwai to the south of 17 the Bahr el Arab, and formerly a portion of the 18 Bahr el Ghazal province, he could only have been 19 referring to the same Bahr el Arab that he mentioned 20 earlier in his memorandum: the real Bahr el Arab, the 21 Bahr el Arab that Bayldon and Walsh had been exploring 22 and clearing. That was the real Bahr el Arab. 23 Wingate devotes a page to it at page 11 of his 24 memorandum. Then at page 24, when he's talking about 25 the transfer, he says "the districts to the south of the</p> <p style="text-align: center;">Page 15</p>
<p>09:51 1 a Mr Sciplini, of whom subsequently Mr Walsh was to say, 2 "He knew everything about the rivers". 3 By October 1905 the intelligence reports noted that 4 Bayldon's replacement, who was Lieutenant Huntley-Walsh, 5 was expected soon and stated that work on widening the 6 passage of the Bahr el Arab was nearly complete. 7 The November 1905 intelligence report also contained 8 another marginal heading called "Bahr el Arab Sudd" in 9 which it was reported that the sudd had been cleared up 10 to open water, which according to all reports existed up 11 to Sultan Rob's. From this report it's clear that 12 Sultan Rob was still regarded by Condominium officials 13 as living on the Bahr el Arab, the real Bahr el Arab. 14 It's in the light of these accounts throughout 1905 15 that it's useful to come back to Governor-General 16 Wingate's memorandum included in the annual report for 17 Sudan at the end of 1905. In that memorandum, which 18 I discussed yesterday, Wingate noted that, as a result 19 of the march of Captain Percival and the reconnaissance 20 of Lieutenant Bayldon, light had been thrown on the 21 question of the Bahr el Arab and the Bahr el Homr, even 22 though he said that much of the courses of those rivers 23 was still unknown. 24 He then went on to devote a specific section of his 25 memorandum -- it's almost a page long, and it's entitled</p> <p style="text-align: center;">Page 14</p>	<p>09:55 1 Bahr el Arab". I think it strains credibility to 2 suggest that when he made the reference to "the 3 districts to the south of the Bahr el Arab" he was 4 referring to a different Bahr el Arab than he had 5 mentioned a few pages earlier in his memorandum. That 6 is a further reason why the Government of Sudan says 7 that it's clear from the contemporary records that the 8 transferred areas lay to the south of that river. 9 Because the crucial date in this case is to 10 determine the area that was transferred in 1905, 11 post-1905 events are of marginal relevance unless they 12 shed further light on the limits of the area that was 13 transferred in that year. In this connection there's 14 nothing in the record covering the post-1905 period that 15 contradicts Wingate's description of the area that was 16 transferred that he referred to in his memorandum. 17 Notwithstanding this, the SPLM/A argues that 18 confusion over the identity of the Bahr el Arab 19 persisted after 1905. And it points to references made 20 by Lloyd and O'Connell to support this thesis. 21 With respect to Lloyd, the SPLM/A refers to 22 an article that he authored, or some notes he published 23 in the June 1907 edition of the Geographical Journal. 24 He wasn't speaking of provincial boundaries here; he was 25 addressing the question of the Dar Homr Arabs. In that</p> <p style="text-align: center;">Page 16</p>

<p>09:57 1 account Lloyd wrote that the southern boundary of the 2 Dar Homr Arabs: 3 "... is between the Bahr el Arab and the River Kiir, 4 the latter [ie the River Kiir] being occupied by the 5 Dinkas under Sultan Rob." 6 That passage is relied on by our colleagues on the 7 other side to show that, as of 1907, Lloyd was 8 distinguishing between the Bahr el Arab and the Kiir, 9 and still treating them as two separate rivers. 10 Let me clarify a number of points that the SPLM/A 11 has chosen not to discuss in its pleadings. First, 12 Lloyd made only one trip to the region, and that was not 13 until February 1906. It's reported in Annex E to the 14 March 1906 intelligence report. 15 That 1906 intelligence report referring to Lloyd's 16 one trip to the region at the time makes no reference to 17 the Bahr el Arab or the Kiir. In fact Lloyd at that 18 time only travelled as far south as Hasoba. He didn't 19 visit the Kiir or the real Bahr el Arab at the time, as 20 had been previously identified by Bayldon. That same 21 intelligence report from March 1906 also discussed the 22 further operations of Walsh on the real Bahr el Arab. 23 Second, Lloyd's implicit reference in 1907 to the 24 Bahr el Arab and the Kiir as two different rivers was 25 immediately corrected; immediately corrected by none</p> <p style="text-align: center;">Page 17</p>	<p>10:01 1 2007, immediately corrected by Percival, had absolutely 2 no bearing on Governor-General Wingate's memorandum and 3 his description in his 1905 annual report. Wingate 4 makes no reference to Lloyd in his memorandum, and Lloyd 5 had neither visited the rivers in question at that time 6 nor written his article at the point when Wingate 7 described the transferred area. 8 The same comments can be made about the very brief 9 reference by O'Connell in the 1906 annual report, where 10 he states that he had visited -- and it's a very short 11 passage -- Hasoba "on the Bahr el Arab"; you'll find 12 that in the common bundle, tab 52. 13 Now, O'Connell was mistaken in referring to Hasoba 14 as being on the Bahr el Arab, but O'Connell had never 15 travelled down to the read Bahr el Arab or Kiir. But 16 that account also, written at the end of 1906 or early 17 1907, had no influence on Wingate's prior description of 18 the transferred area for 1905 in his 1905 memorandum, 19 and in fact O'Connell himself did not purport to 20 describe the transferred area; that was described by 21 Wingate a year earlier. 22 Once again, as the SPLM/A emphasises, it is 23 important to focus on what Government administrators 24 said they transferred in 1905, and not to rewrite or 25 second-guess those accounts. What they said -- and it</p> <p style="text-align: center;">Page 19</p>
<p>09:59 1 other than Percival. Lloyd's account had been published 2 in the June 1907 Geographical Journal. On 2nd July 3 Percival wrote that the June 1907 journal had just 4 reached him, and he offered the following corrections on 5 Lloyd's notes, and I'll put the relevant passage on the 6 screen. I'll just read it, it's just as easy. This is 7 what Percival said: 8 "The Bahr el Arab is the River Kiir, and takes this 9 name Kiir when it enters the Dinka country either before 10 or after joining the rivers that join the River Lol 11 below Sultan Rob's." 12 In any event, of course, Lloyd had indicated that 13 Sultan Rob was on the Kiir still, not way up north 14 somewhere. So that's an immediate correction to Lloyd 15 by Percival. 16 Lloyd thereafter himself corrected his own mistakes 17 in notes he wrote in 1910 in which he described the 18 Bahr el Arab as the separate river, the real 19 Bahr el Arab flowing 30 miles south and nearly parallel 20 to the Bahr el Homr, which was the Ragaba ez Zarga; and 21 he referred to Lieutenant Huntley-Walsh's explorations 22 on the Bahr el Arab that I discussed earlier and which 23 were taking place on the real Bahr el Arab. 24 Fourth, any assessment that Lloyd reached in these 25 notes on a separate subject in a geographical journal in</p> <p style="text-align: center;">Page 18</p>	<p>10:02 1 was said by the seniormost official in the colony -- was 2 that the districts of the two Sultans, Sultan Rob and 3 Sultan Okwai, Rob on the Kiir, Sheihk Rihan Okwai 4 between the Lol and the Kiir, those districts to the 5 south of the Bahr el Arab were transferred to Kordofan. 6 In 1905, when they said this, the Bahr el Arab had been 7 correctly identified as the same river as the Kiir. 8 I now turn to the third factor that supports the 9 Government's position on the area that was transferred 10 in 1905, and that's the understanding of Condominium 11 officials at that time of where Sultan Rob's territory 12 or district lay. Now, on this issue I can be quite 13 brief because it's a subject that Professor Crawford 14 will be coming back to in more detail later this 15 morning. 16 The key point here, we would submit, is to focus on 17 where the Sudanese administrators themselves considered 18 Sultan Rob's territory to be situated based on their 19 knowledge as of 1905. It's self-evident that as of 1905 20 Government officials would have no knowledge of tribal 21 locations or other factors that only emerged after that 22 date. The transfer decision was based on the facts as 23 they were known at the time. 24 Now, the key information available to Government 25 officials as of 1905 includes the following.</p> <p style="text-align: center;">Page 20</p>

<p>10:04 1 In 1902 we have Wilkinson's trek report and his 2 sketch map indicating where Sultan Rob's village and 3 where his district was. As I noted earlier, Wilkinson's 4 route report stated the following when he arrived at the 5 Kiir River: 6 "The district on the north bank of the Kiir is 7 called Mareig, the district on the south bank is called 8 Massian, and Sultan Rob lives in the latter. Much dura 9 is cultivated." 10 I think this is a quote that Mr MacDonald was 11 referred to yesterday as well. "The district on the 12 south bank is called Massian", and Sultan Rob lives in 13 that district. 14 Now, the relevant portion of Wilkinson's sketch map 15 is now being displayed on the screen. Sultan Rob's 16 village is identified on the sketch as lying just south 17 of the Kiir River, down at the bottom. You can see that 18 Wilkinson labelled the Ragaba ez Zarga further north 19 wrongly as the Bahr el Arab, but that's where he found 20 only Arab settlements, to the extent he found anything 21 at all. 22 Just below Sultan Rob's village on the sketch map 23 are the words "Mathiang district" and this district, 24 Sultan Rob's district, identified by Wilkinson, lies to 25 the south of the river, the river that Bayldon</p> <p style="text-align: center;">Page 21</p>	<p>10:07 1 engaged in his sudd-cutting operations on the real 2 Bahr el Arab, up to Sultan Rob's, there was open water. 3 Thus, as of that time, Sultan Rob was viewed by 4 Condominium officials as still living on the Kiir or 5 Bahr el Arab. And of course Lloyd said the same thing 6 in his 1907 article. 7 All of these accounts are consistent with Wingate's 8 description of the transferred area and they're equally 9 consistent with the Government's position in this case 10 that such areas, the transferred areas, lay on or to the 11 south of the Bahr El Arab River. 12 We would respectfully suggest that in contrast these 13 accounts cannot possibly be reconciled with the SPLM/A's 14 position that the transferred area was considered by 15 Government officials at the time to extend up to the 16 10°35' latitude or the 10°22'30" latitude decided by the 17 experts. 18 The final issue I'd like to address concerns the 19 relevance of the provincial boundary between Kordofan 20 and Bahr el Ghazal for purposes of determining and 21 assisting to determine the area that was transferred in 22 1905. 23 The SPLM has argued that this matter is irrelevant, 24 but that cannot be right. The contemporary transfer 25 documents, as I mentioned yesterday, record the fact</p> <p style="text-align: center;">Page 23</p>
<p>10:06 1 subsequently correctly identified as the Bahr el Arab. 2 Next we have Percival's account and sketch map 3 recording his march to the area in 1904 that I mentioned 4 earlier. While Percival noted that Sultan Rob was 5 living at Burakol at the time, his sketch map is really 6 quite revealing. It shows, as you can see on the screen 7 in large letters, Sultan Rob's territory to the south of 8 the Kiir. 9 As I also mentioned, Percival reported that 10 Sultan Rob told him at that time that there were only 11 Arabs to the west of him and that the so-called 12 Bahr el Arab -- Percival's Bahr el Arab, which was the 13 Ragaba ez Zarga -- was uninhabited except for wandered 14 Arabs; not Dinka, Arabs. 15 Then we have the references in the February and 16 March 1905 intelligence reports placing 17 Sheihk Rihan Gorkwei's district or territory between the 18 Lol and the Kiir Rivers, and Sultan Rob's country, which 19 presumably included his people, on the Kiir; not at 20 10°35' or 10°22', on the Kiir. 21 And we have the account of Lieutenant Walsh, who, 22 as I said, had replaced Bayldon in connection with the 23 operations ongoing on the Bahr el Arab recorded in the 24 November 1905 intelligence report, which had indicated 25 that from the point that Walsh had reached when he was</p> <p style="text-align: center;">Page 22</p>	<p>10:09 1 that an area, described as the districts of Sultan Rob 2 and Sultan Okwai, was transferred from one province to 3 another in 1905. It was under the rubric "principal 4 alterations to the provincial boundaries" that Wingate's 5 memorandum stated that these districts, formerly 6 a portion of the Bahr el Ghazal province, had been 7 incorporated now into Kordofan. 8 Obviously this entailed a change to the provincial 9 boundary. It must therefore be pertinent to compare the 10 way in which the provincial boundary was described 11 before the transfer with the way it was described and 12 depicted afterwards, in order to assess and to help in 13 determining the location of the areas that Government 14 officials considered were subject to the transfer. 15 Let me start with the pre-transfer boundary. 16 Bahr el Ghazal became a province in 1902, and it's from 17 that date up to 1905 that it's appropriate to examine 18 how its boundary with Kordofan was described. But 19 before doing so, let me make just a quick preliminary 20 comment. 21 Had the Government's intention at the time been to 22 fix the boundary between Bahr el Ghazal and Kordofan 23 along a parallel of latitude, such as the 10°35' or the 24 10°22'30", it would have been perfectly possible for 25 Condominium officials to say so. The fixing of just</p> <p style="text-align: center;">Page 24</p>

<p>10:11 1 a straight parallel line required no survey of the line; 2 the latitude could simply have been adopted as the 3 provincial boundary; as occurred, for example, with 4 respect to the southern boundary of the Mongalla 5 province that was recorded at the beginning of 1906. 6 You'll find that in your folders at tab 22. 7 In that document, Government administrators, for 8 part of the boundary of that new province, fixed the 9 5° north latitude. So Condominium officials knew how to 10 use latitudes as provincial boundaries when they wanted 11 to. 12 They didn't do this with Kordofan/Bahr el Ghazal. 13 Instead the annual reports for Bahr el Ghazal and 14 Kordofan both started to refer after 1902 to the 15 provincial boundary as being the Bahr el Arab. It 16 wasn't described as a putative boundary, it wasn't 17 described as indeterminate, uncertain, vague; it was 18 described in the documents as the Bahr el Arab. 19 The 1902 Bahr el Ghazal annual reports, under 20 a heading "Mudiria Boundary", states that the 21 Bahr el Arab was the province's northern boundary, as 22 far as the Hofra en Nahas. The 1903 annual report for 23 Kordofan states that the southern boundary of that 24 province was the Bahr el Arab and the Bahr el Ghazal 25 River up to Lake No. Those descriptions did not change</p> <p style="text-align: center;">Page 25</p>	<p>10:14 1 the Baggara Arabs of the north and the Dinka tribes in 2 the south. We cited a number of these references in our 3 counter-memorial, paragraphs 400-403. Let me just put 4 one description on the screen that comes from 5 Professor Daly's writings himself. He states: 6 "The northern districts of this region ..." 7 He's talking about the region that we're interested 8 in in this case: 9 "... roughly speaking along the line of the 10 Bahr el Arab, had for centuries been the border between 11 the Baggara Arabs and the Dinka and other non-Arab 12 tribes." 13 I sincerely doubt that Professor Daly, when he 14 mentioned the Bahr el Arab here, was referring to the 15 Ragaba ez Zarga. 16 In 1903 Government officials knew the location of 17 the Bahr el Arab where it joined the Bahr el Ghazal in 18 the east; and in the west the Bahr el Arab was the only 19 river that could have constituted the 20 Darfur/Bahr el Ghazal boundary. 21 I'll take one of the SPLM/A's own maps, which is 22 probably clearer on the smaller screens than the big 23 screen, to illustrate this. As you can see, the 24 Bahr el Arab is the only river that fits the 25 description. The Ragaba ez Zarga, which is actually</p> <p style="text-align: center;">Page 27</p>
<p>10:12 1 until after the transfer in 1905 occurred. 2 At the same time I think it's important to recall 3 that the Bahr el Arab was also the boundary between 4 Darfur and Bahr el Ghazal, a situation that lasted up 5 until 1924, when it was moved southwards pursuant to the 6 Munroe-Wheatley Agreement. That was confirmed by 7 Slatin's very detailed account prepared at the end of 8 1903, and that account in turn was confirmed by Wingate 9 in his memorandum attached to the 1903 annual reports. 10 You'll find Slatin's account in the common bundle at 11 tab 29 and you'll find Wingate's 1903 confirmation of 12 that in the common bundle at tab 27. 13 In the light of those accounts I do not think it can 14 reasonably be disputed that the intention of Condominium 15 officials was that the provincial boundary between 16 Kordofan and Bahr el Ghazal, after Bahr el Ghazal had 17 become a province in 1902, the intention was that the 18 provincial boundary followed a major river referred to 19 as the Bahr el Arab, not a line of latitude. That's 20 hardly surprising given that rivers often form internal 21 administrative boundaries, and obviously also 22 international boundaries. 23 It's also not surprising, I would suggest, in view 24 of the fact that the Bahr el Arab has been recognised by 25 a number of authors as the traditional border between</p> <p style="text-align: center;">Page 26</p>	<p>10:16 1 more in the nature of a seasonal stream, peters out 2 before it even reaches the Kordofan/Darfur boundary. 3 That's what the British had in mind: a major river 4 across this area. 5 I should not in passing that the SPLM/A objects to 6 us calling the Ragaba ez Zarga a "seasonal stream". Of 7 course we know that Bayldon had said it was more in the 8 nature of a khor than a river. But let me simply recall 9 how the SPLM/A itself described this feature, the 10 Ragaba ez Zarga, in its submissions to the ABC. This is 11 what the SPLM/A said in discussing the geography of the 12 area: 13 "There are no mountains or hills except high and 14 open ground in the northern part of the area. River 15 Kiir runs west-east through the area. There are also 16 some seasonal streams, such as the Ngol and the 17 Nyamora." 18 The Ngol is the Ragaba ez Zarga. These were the 19 SPLM/A's own words to describe the feature, which they 20 now seek in a sense to disown. 21 While the central portions of the Bahr el Arab 22 remained largely unexplored prior to Bayldon's 23 explorations in early 1905, this did not detract from 24 the fact that the Bahr el Arab as a whole was understood 25 by Condominium officials to be the pre-transfer</p> <p style="text-align: center;">Page 28</p>

<p>10:17 1 provincial boundary, wherever it lay. And again 2 I suggest that it's worth recalling what the Chamber of 3 the International Court said in the El Salvador v 4 Honduras case, a reference which we've made before in 5 our written pleadings, but which the SPLM/A has not 6 commented on: 7 "The Chamber considers, particularly in the light of 8 the materials before it, that it is entitled to start 9 from a presumption that an inter-provincial boundary 10 which follows a river is likely to continue to follow it 11 as long as its course runs in the same general 12 direction." 13 That's from paragraph 244 of the 1992 judgment. 14 The SPLM/A's position is that none of this is 15 relevant. They first point out that no provincial 16 boundaries at the time were prescribed in any 17 constitutional, legislative or executive decree or 18 proclamation, and no official maps were issued showing 19 boundaries until well after the transfer. 20 They then contend -- and I think this is probably 21 the main argument -- that provincial boundaries were 22 approximate, vague and frequently modified. They point 23 to the fact that because Wilkinson and Percival had 24 misidentified the Bahr el Arab, references to the 25 Bahr el Arab as the provincial boundary in the pre-1905</p> <p style="text-align: center;">Page 29</p>	<p>10:20 1 same 1905 compendium edited by Gleichen, and prefaced by 2 Governor-General Wingate, in which Wilkinson's and 3 Percival's route reports appear, as well as the 1904 map 4 that Mr MacDonald was asked about yesterday. I would 5 suggest that although it may not have been produced by 6 Government officials, there was no question that 7 Government officials ever challenged or thought the map 8 was wrong. 9 Moreover, Mardon's description of the Bahr el Arab 10 is virtually identical with an official British 11 War Office map also produced in October 1903 which was 12 put on the screen yesterday and which Mr MacDonald was 13 asked about. I am not relying on this map to show 14 provincial boundaries; the point I want to make is that 15 on the War Office map, an official map, the course of 16 the Bahr el Arab is virtually identical to the course on 17 Mardon's map. As I said, there's no record that 18 Mardon's map was ever criticised or stated to be 19 inaccurate by Condominium officials. 20 Now, with respect to the confusion over the identity 21 and course of the Bahr el Arab before the transfer, it's 22 obviously true that both Wilkinson and Percival mistook 23 the Ragaba ez Zarga for the Bahr el Arab at the places 24 where they crossed it. But it was recognised by Wingate 25 in his 1904 memorandum that further information was</p> <p style="text-align: center;">Page 31</p>
<p>10:19 1 annual reports were necessarily indeterminate. At best, 2 according to the SPLM/A rejoinder, the Bahr el Arab may 3 have been treated as a working administrative boundary, 4 but not a definite or permanent boundary. 5 As to the lack of any legislative or executive 6 decree establishing provincial boundaries, the 7 Government's written pleadings have already explained 8 that this was not a legal requirement. Certainly the 9 transfer wasn't referred to in a proclamation or decree 10 either, but nobody questions the validity of the 11 transfer. 12 Nonetheless, there were definite and repeated 13 references to the Bahr el Arab as the provincial 14 boundary in official documents, official annual reports 15 that were sent to Cairo and to London, and no one ever 16 questioned the description of the boundary contained in 17 those reports in London or in Cairo. 18 We also had a map that was discussed yesterday, 19 Mardon's revised map of 1903. It does depict Mudiria 20 boundaries with a red dotted line and it does show the 21 Kordofan/Bahr el Ghazal boundary following the 22 Bahr el Arab. 23 Our colleagues on the other contend that this map 24 cannot be considered to be an official map. I would 25 point out, however, that this map was contained in the</p> <p style="text-align: center;">Page 30</p>	<p>10:22 1 needed to solve the issue of the course of the rivers 2 such as the Bahr el Arab, the Kiir and the Lol, and 3 that's why Bayldon was sent on this exploration at the 4 end of 1904. Of course, by March 1905 Bayldon had 5 cleared up much of this confusion and had correctly 6 identified the Bahr el Arab as the same river as the 7 Kiir. 8 That did not cause Condominium officials to question 9 or reassess in any way their earlier references to the 10 Bahr el Arab as the provincial boundary; it was simply 11 that the actual course of the Bahr el Arab in its 12 central section was now better understood. 13 Wingate's 1905 memorandum illustrates the point. As 14 I discussed earlier, Wingate addressed the transfer in 15 connection with a change to the provincial boundary it 16 gave rise to. He noted that the transferred districts 17 that were situated to the south of the Bahr el Arab were 18 formerly part of the Bahr el Ghazal province, and that 19 Bahr el Arab he's talking about could only be the same 20 Bahr el Arab he was mentioning earlier in his report, 21 which was the real Bahr el Arab correctly identified by 22 Bayldon. 23 This shows that Wingate considered the actual 24 Bahr el Arab to have been the pre-transfer provincial 25 boundary. Areas to the south of it formerly were in</p> <p style="text-align: center;">Page 32</p>

<p>10:23 1 Bahr el Ghazal province; as a result of the transfer, 2 now they weren't. As a result of the transfer the 3 districts of the two Sultans to the south of that river, 4 formerly part of the Bahr el Ghazal province, were 5 incorporated into Kordofan, thus changing the provincial 6 boundary. 7 It was for this reason that the 1905 annual reports 8 for Kordofan and Bahr el Ghazal no longer stated that 9 the boundary was the Bahr el Arab, as they had done in 10 earlier editions; instead they referred to the transfer. 11 Now, the parties agree that the southern limits of 12 the transferred areas were not defined in 1905, either 13 in Wingate's memorandum or elsewhere. It's for this 14 reason that the Watkiss Lloyd map of 1910 and the whole 15 series of sheet 65 maps that have been produced by the 16 parties that began to be published afterwards in some 17 instance labelled the new boundary as "approximate". 18 This has been highlighted by the SPLM/A, for example, on 19 the Lloyd map. This is a 1910 map. 20 Now, the Tribunal will observe that, even if 21 approximate, the provincial boundary no longer tracks 22 the Bahr el Arab; it lies south of it. 23 Because the southern limits of the transferred area 24 had not been delimited at that time -- they didn't 25 necessarily follow any river, like the Bahr el Arab --</p> <p style="text-align: center;">Page 33</p>	<p>10:27 1 documentary record as a whole is examined, the record 2 fits together with really quite remarkable clarity, and 3 it supports the Government's position that the area 4 transferred in 1905 lay to the south of the 5 Bahr el Arab. 6 That's precisely where the Governor-General of the 7 Sudan said the transferred area lay. It's consistent 8 with the March 1905 intelligence report, and with the 9 annual reports for Kordofan and Bahr el Ghazal of that 10 year; it's consistent with the Government's knowledge of 11 the correct identity of the Bahr el Arab by the time 12 that the transfer was made and was referred to; it's 13 consistent with where Condominium officials considered 14 the districts of Sultan Rob and Sheikh Rihan Gorkwei 15 were situated; and it's consistent with the fact that 16 the pre-transfer provincial boundary was recorded as 17 being the Bahr el Arab, while the post-transfer boundary 18 lay to the south of that river. 19 In contrast, we would suggest that the SPLM/A's 20 position cannot be reconciled with any of these facts. 21 There is not a single mention anywhere in the record 22 that the pre-transfer boundary was located along the 23 10°35' latitude or halfway between that latitude and 24 10°10'. None of those latitudes are ever mentioned in 25 any of the contemporary documents. You can't find them.</p> <p style="text-align: center;">Page 35</p>
<p>10:25 1 and because the Twic, formerly under Sheikh Rihan, were 2 re-transferred back to Kordofan in the 1920s, post-1905 3 maps of the area do not show the boundary in exactly the 4 same place. Both parties have illustrated this fact on 5 illustrative maps: ours is at page 146 of our memorial; 6 the SPLM/A's is at map 60. I will use the SPLM/A's map 7 to illustrate the position. 8 The Tribunal will note that these are all post-1905, 9 post-transfer, post-change in the provincial boundary 10 maps. The various depictions of the post-1905 boundary 11 do not match but they all show in the relevant area the 12 boundary lying to the south of the Bahr el Arab in the 13 same general place. 14 Now, ultimately the Kordofan/Bahr el Ghazal boundary 15 became fixed upon independence in 1956 -- that's the red 16 line being highlighted -- and both parties accept that 17 line as the southern limits of the transferred area. 18 But for the transfer, however, the boundary would have 19 remained the Bahr el Arab, as referred before the 20 transfer. It's thus the area between the Bahr el Arab 21 and the post-1905 provincial boundary that was the area 22 of the Ngok Dinka chiefdoms transferred to Kordofan in 23 1905. 24 Mr President, members of the Tribunal, the 25 Government of Sudan submits that when the contemporary</p> <p style="text-align: center;">Page 34</p>	<p>10:28 1 They didn't exist. They simply weren't in the 2 Condominium official' minds. 3 Nor is there any suggestion from contemporary 4 reports that Sultan Rob's territory was viewed as 5 somehow extending up to 10°35'. Even Sultan Rob had 6 told Percival that the Ragaba ez Zarga was uninhabited 7 except for wandered parties of Arabs. 8 Nothing suggests that the Government at the time had 9 the slightest intention to transfer or did transfer 10 areas stretching up to the SPLM/A's claim line from 11 Bahr el Ghazal to Kordofan at that time. Areas north of 12 the Bahr el Arab were already part of Kordofan before 13 the transfer. They were not and they could not have 14 been transferred to that province in that year. 15 That is why the Government submits that the area of 16 the nine Ngok Dinka chiefdoms transferred to Kordofan in 17 1905 is the area lying between the Bahr el Arab river 18 and the southern limits of the 1956 provincial boundary. 19 Thank you for your patience and attention, 20 Mr President. I think at this point we were going to 21 move to the witness phase. 22 My understanding -- but it perhaps can be confirmed 23 by colleagues on the other side -- is we were originally 24 going to present two witnesses that the SPLM/A wanted to 25 cross-examine; I understand they may only want to</p> <p style="text-align: center;">Page 36</p>

<p>10:30 1 cross-examine one of those witnesses now. If that is 2 the case, we propose to call that witness. 3 THE CHAIRMAN: Mr Born, can you confirm? 4 MR BORN: Yes, Mr Chairman. We will be cross-examining 5 Zakaria Atem, the only Ngok Dinka witness tendered by 6 the Government. 7 MR BUNDY: Right, thank you. So if somebody can get 8 Mr Zakaria and bring him in, I will relinquish the 9 floor. (Pause) 10 (10.31 am) 11 MR ZAKARIA ATEM DIYIN THIBEK DENG KIIR (called) 12 (Evidence interpreted) 13 THE CHAIRMAN: I welcome Mr Zakaria Atem Diyin Thibek Deng 14 Kiir. Please be kind enough to read the affirmation 15 which is in front of you in Arabic. 16 THE WITNESS: I solemnly declare upon my honour and 17 conscience that I will have to say the truth, the 18 whole truth, and nothing but the truth. 19 THE CHAIRMAN: I invite questions from the part of the 20 SPLM. 21 (10.34 am) 22 Cross-examination by MS MILES 23 Q. Atem-dit, choibak. I have a few questions for you 24 today. You are from the Anyiel section of the 25 Ngok Dinka; yes?</p> <p style="text-align: center;">Page 37</p>	<p>10:38 1 (11.03 am) 2 MS MILES: Atem-dit, you are from the Anyiel section of 3 the nine Ngok Dinka; right? 4 A. Yes. 5 Q. And the Jong yom subsection is your subsection? 6 A. Yes, Anyiel is the main section I belong to. 7 Q. In your witness statement you say you were born in 8 Huk Lonlual; correct? 9 THE INTERPRETER: Repeat again, please. 10 MS MILES: In your witness statement you say you were born 11 in Huk Lonlual? 12 A. Actually I was born in Noong Lual to the north of Abyei. 13 Q. Noong Lual? 14 A. Noong Lonlual. 15 Q. And "Lonlual" means "monkey"; correct? 16 A. Yes, it is true. At the time when I was not born yet 17 there were so many monkeys, that's why the area is 18 called after the monkeys. 19 Q. And Noong Lonlual is on the eastern bank of the Nyamora? 20 THE INTERPRETER: Repeat again, please; to the west bank 21 of what? 22 MS MILES: Eastern bank of the Nyamora. 23 THE INTERPRETER: Of what? Can I ask again, please? 24 MS MILES: Umm Biero. 25 A. If you are going to Abyei, towards Na'am, it is</p> <p style="text-align: center;">Page 39</p>
<p>10:35 1 (Pause to resolve a technical problem) 2 We will start again. Atem-dit, choibak. I have 3 a few questions for you today. You are from the Anyiel 4 section of the Ngok Dinka? You are from the Anyiel 5 section of the nine Ngok Dinka; is that correct? 6 I don't think the witness can hear the headphones. 7 MR BORN: Perhaps, Mr Chairman, just as a practical 8 solution and in light of the time, would it be 9 possible for an interpreter to just come and sit next 10 to the witness and speak into the microphone? 11 I recognise that other arrangements have been made, 12 but in light of how they are progressing and in light 13 of the time schedule, I wonder if the old solution 14 of -- 15 THE CHAIRMAN: Mr Bundy? 16 MR BUNDY: Thank you. Maybe it would be appropriate, with 17 your leave, to take an early break to try and sort -- 18 THE CHAIRMAN: Exactly, I was thinking of that. 19 MR BORN: We are fully agreed. 20 THE CHAIRMAN: We will take a break now for half an hour. 21 MR BORN: Perhaps the parties will endeavour to find 22 a solution even if it doesn't use the full 23 technological sophistication. 24 (10.38 am) 25 (A short break)</p> <p style="text-align: center;">Page 38</p>	<p>11:07 1 located ... It is located to the west if you are going 2 towards Na'am. 3 Q. Towards Na'am? 4 A. Yes. 5 Q. In Dinka, Noong? 6 A. Na'am. 7 Q. And in Dinka, Noong? 8 A. Noong. 9 Q. Thank you. Could we get a map up, please. 10 So your birthplace is near Na'am, or Noong in Dinka, 11 and you were born there in 1938 or 1939? 12 A. Yes. The date of birth on the birth certificate was 13 always approximate and not exact, according to the exact 14 date of birth. 15 Q. That's something I'm learning, thank you. 16 If you look at the above map, this is a map dated 17 from 1936, so it is dated around your approximate birth 18 date. Do you see the red box pointing to Abyei Town, 19 and the box pointing to Noong, or Na'am as it is on the 20 map? 21 A. Yes, I have seen them. 22 Q. And Noong Lual is, did I hear you correctly, immediately 23 south of Noong? 24 A. Repeat again, please. 25 Q. On the map, could you please show me -- just point on</p> <p style="text-align: center;">Page 40</p>

11:09 1 the screen, I can see -- where your birthplace of
2 Noong Lonlual is on that map.
3 A. Noong Lonlual is the birthplace of my mother, and not my
4 birthplace ...
5 THE INTERPRETER: Repeat again.
6 A. I went to Noong Lonlual because my maternal uncle asked
7 that my mother come to give birth to me in Noong
8 Lonlual.
9 Q. You said in your witness statement that you were born in
10 Huk Lonlual. Is that where you were born?
11 A. Yes.
12 Q. Can you tell me where you were initiated? Sorry,
13 initiated: where he entered his age set.
14 A. Malual Ador.
15 Q. Malual Ador. If it is okay, I'm going to move to
16 a different map. This one is not terribly clear. To be
17 fair to you, the map I'm putting up is a map submitted
18 by the SPLM called the "Ngok presence map".
19 It is still not clear, and I apologise. I thought
20 we had it bigger. I am going to go through some of the
21 places mentioned in your witness statement, and plot
22 them very approximately on this map.
23 I said "very approximately"; that was wrong. I am
24 going to take you to places in your statement that the
25 community members of the nine Ngok Dinka have GPSed, or

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11:17 1 defer to him.
2 PROFESSOR CRAWFORD: No, sir, I indicated no desire
3 whatever to ask a question.
4 JUDGE AL-KHASAWNEH: I speak first in Arabic, and say ...
5 (Addresses the witness in Arabic)
6 (Interpreted) I would like to thank you very much
7 for accepting to come before this court to answer our
8 questions. I will ask these questions in English.
9 (In English) First, there have been allegations that
10 you had been intimidated and threatened. Those
11 allegations have been denied. Could you briefly tell us
12 the truth or otherwise of those allegations?
13 A. When I came here I was pretty sure for the fact that
14 anyone who is not giving testimony in favour of the
15 SPLM, that person is not a good one.
16 JUDGE AL-KHASAWNEH: Please translate correctly. What he
17 said was, "I'm threatened with [my] life". This is
18 very important. Can you ask him again to repeat. The
19 translation has to be correct and precise.
20 THE INTERPRETER: Repeat the question, please.
21 JUDGE AL-KHASAWNEH: It's not my question. I asked
22 a question. You did not translate the answer as fully
23 as you should have.
24 Could you translate it as he said: a person who does
25 not give evidence in support of the SPLM/A is thought of

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11:14 1 places we have obtained from other maps that are all
2 together on this map, and just point to the places that
3 you've named so we know where they are.
4 A. What you said is not clear to me. All my statement
5 pertinent to this point, I have stated them in a written
6 statement, and you have to refer to it.
7 Q. And I'm just asking you, please, Atem-dit, to help me,
8 because I am not familiar with these lands, to find
9 where the places you refer to are.
10 A. Name the places you want me to locate.
11 Q. Abin Anguui.
12 A. This is not a language I understand, the way you
13 pronounce the terms, or the names.
14 MS MILES: Yin shileich, Atem-dit. I have no further
15 questions.
16 A. I have answered all these questions in a written paper,
17 and I am an old man, I'm always telling the truth.
18 THE CHAIRMAN: I thank you. I understand that
19 Judge Al-Khasawneh wants to ask a question to the
20 witness.
21 (11.17 am)
22 Questions from THE TRIBUNAL
23 JUDGE AL-KHASAWNEH: Before that, Mr President, I notice
24 that counsel for the Government of the Sudan had
25 indicated that he wished to ask a question. I would

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11:19 1 as a bad person, and would be threatened in his life.
2 That is literally the translation. So, please, be
3 careful with the next.
4 THE INTERPRETER: Okay.
5 JUDGE AL-KHASAWNEH: Thank you very much.
6 The second question, and this is about a different
7 matter. In your written testimony, and I refer in
8 particular to paragraph 28 of that testimony, you said
9 that as a member of the ABC nominated by the Government
10 of Sudan you attended all meetings of the Commission and
11 participated in all field visits. And I am now quoting:
12 "The leaders of the two parties and the experts made
13 it clear in all public meetings that the ABC task is to
14 define and demarcate the area [I repeat, 'the area'] of
15 the nine Ngok Dinka chiefdoms transferred to Kordofan
16 from Bahr el Ghazal ..."
17 And you also said --
18 A. The question is so long, please just ask -- make the
19 question shorter, be shorter.
20 JUDGE AL-KHASAWNEH: Okay, now I put the question. This
21 was an introduction to the question. Now I will ask
22 the question.
23 Did the experts make it clear, and say so in
24 an express way, that the ABC task is to define the area
25 of those nine chiefdoms transferred in 1905?

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<p>11:24 1 A. Actually I'm the president of the -- or I'm representing 2 the NCP in Abyei, and I am the political supervisor in 3 Abyei. I was part of the five representatives of the 4 Government in the ABC. 5 We went to Mathiang Diil, we travelled by car. Yes, 6 went to the house of the Sheikh, of Arop Biong, we went 7 to visit his house. This was his old house, and all of 8 us, the representatives of the SPLM, the representatives 9 of the Government and the experts, all of us paid money. 10 And the area so-called Mathiang Kiir is located to 11 the southern part of -- to the south of Abyei. So 12 because there are some troubles the sheikh goes there 13 and the Dinka are living to the north of Abyei, and to 14 the south with the Nazir as well. 15 So this is the truth, we went there and we have 16 found Mathiang Diil. Then we went back. 17 Any further questions, please don't hesitate. 18 JUDGE AL-KHASAWNEH: (Addresses the witness in Arabic) 19 (Interpreted) Explaining their mission, the experts, 20 were they clear in stating that their mission is to 21 define and demarcate the area transferred to Kordofan, 22 the area of the nine chiefdoms of the Dinka Ngok 23 transferred to Kordofan in 1905? 24 A. Danforth in the agreement referred to the Mathiang Diil 25 agreement, and he said that this is the place where the</p> <p style="text-align: center;">Page 45</p>	<p>11:31 1 in clear in all public meetings that the ABC task", 2 et cetera. 3 THE INTERPRETER: He said that there is no conformity 4 between ... 5 MR BORN: Can you perhaps translate the paragraph 28 you 6 have in Arabic there in front of you? 7 (Paragraph translated) 8 A. That is the mandate of the experts, but they have not 9 adhered to the area according to 1905. We went to the 10 same area but they have not focused on the area in 11 question which is referred to in their mandate. 12 PROFESSOR REISMAN: Excuse me, interpreter, I had posed 13 a simple question to the witness and I just wanted 14 an answer: had he read the second sentence of 15 paragraph 28, and is it an accurate translation? 16 That's all I want to know from the witness. 17 THE INTERPRETER: But the witness elaborated. 18 PROFESSOR REISMAN: No, I don't want an elaboration, 19 I didn't want an elaboration; I am asking the witness 20 a factual question. 21 The second sentence of paragraph 28, is that 22 a correct statement of what happened? 23 THE INTERPRETER: Yes. 24 PROFESSOR REISMAN: Could you please confirm with the 25 witness?</p> <p style="text-align: center;">Page 47</p>
<p>11:28 1 Dinka have been transferred, but this is a small 2 triangle, so it is not enough to accommodate even the 3 owners of the area. So as a Dinka tribe member I think 4 that this is unfair, because Dinka used to extend from 5 the south -- from the north and to the south as well. 6 JUDGE AL-KHASAWNEH: Shukran jazeelan, thank you very 7 much. 8 THE CHAIRMAN: There is a question from the part of 9 Professor Reisman. 10 PROFESSOR REISMAN: I have a simple question for the 11 witness, please translate. 12 Could you be kind enough to look at the second 13 sentence of paragraph 28. Could I ask the interpreter 14 to read that sentence to the witness in Arabic. 15 THE INTERPRETER: The whole paragraph? 16 PROFESSOR REISMAN: Just the second sentence. 17 (Sentence translated) 18 A. So it is not a grave, it is a house of the -- which 19 locates 2.5 kilometres to the south of the -- 20 PROFESSOR REISMAN: I beg your pardon, interpreter, 21 I don't mean to be rude to interrupt. Are we talking 22 about paragraph 28? 23 THE INTERPRETER: Yes. 24 PROFESSOR REISMAN: I read the second sentence as saying: 25 "The leaders of the two parties and the experts made</p> <p style="text-align: center;">Page 46</p>	<p>11:35 1 A. Yes, the answer I have given you is the answer. 2 PROFESSOR REISMAN: I'm sorry, I don't mean to belabour 3 it, and I will relieve the witness if he can't answer 4 the question. But the question solicits either 5 a "yes" answer or a "no" answer. "n'am" or "laa"? 6 A. No. No. The answer is: no. 7 PROFESSOR REISMAN: That what he gave in that statement is 8 not correct? 9 THE INTERPRETER: He has elaborated. You said you just 10 want a yes or no [answer], and he said: no. Is that 11 the task -- 12 PROFESSOR REISMAN: Thank you. I have no other questions. 13 MR BORN: Mr Chairman, can I raise a small point of 14 housekeeping. I haven't checked personally myself, 15 but I'm told that we have not received a copy of the 16 Arabic version of the witness statement which the 17 witness has in front of him. We would be grateful if 18 we could be given that copy. 19 THE CHAIRMAN: I'm sure that the Government will provide 20 you with a copy. 21 PROFESSOR CRAWFORD: Of course you can have it. I'm 22 sorry, I have to make sure that he has the right 23 version, but we'll fix that as soon as there's 24 a break. 25 MR BORN: Wouldn't it be easier if I just took what's in</p> <p style="text-align: center;">Page 48</p>

11:38 1 front of him? That's what he was referring to.
 2 PROFESSOR CRAWFORD: Yes, you can have it. I'm sorry,
 3 I don't know the provenance of it, but you're welcome
 4 to the piece of paper.
 5 MR BORN: I guarantee you that I will make a copy
 6 immediately and hand it to you. He has looked at it
 7 during the testimony, he said it's his statement.
 8 I suggest that you just ask him to hand it to me now,
 9 please. The PCA will copy it.
 10 THE CHAIRMAN: Thank you. No other questions?
 11 JUDGE AL-KHASAWNEH: Mr President, I think there was
 12 a misunderstanding. The answer was literally lost in
 13 translation.
 14 I think what was meant by Professor Reisman is
 15 whether the experts were clear in saying that their
 16 mandate is confined to delimiting the area of the nine
 17 Ngok Dinka chiefdoms that were transferred to Kordofan
 18 in 1905. The witness in his earlier elaboration said
 19 that they did not follow that task, and when you asked,
 20 "Can you answer me by saying 'yes' or 'no'", he was
 21 thinking of that, that they did not follow their task,
 22 and that is what he meant by "no".
 23 That is my understanding, but this is a very
 24 important point, and I think there should be a way of
 25 verifying this.

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11:47 1 (11.47 am)
 2 MR AYOM MATIT AYOM (affirmed)
 3 (Evidence interpreted)
 4 JUDGE AL-KHASAWNEH: Mr Ayom Matit Ayom, thank you very
 5 much for agreeing to testify before us. Thank you for
 6 testifying before us.
 7 I would be grateful if you could answer only one
 8 question that I would like to put to you, and that
 9 question is: have you been intimidated with regard to
 10 your testimony or asked not to appear before us or to
 11 modify it? Thank you.
 12 A. Actually it is not me who has been actually threatened,
 13 but my brother who is coming after me. He was told: if
 14 you go to The Hague you will do one of the two things,
 15 either change your statements or refuse to go; otherwise
 16 you will bear the consequences. And don't ask us, you
 17 will be responsible for that.
 18 JUDGE AL-KHASAWNEH: If that's all, that's the only thing
 19 that I wanted to ask about.
 20 THE CHAIRMAN: So I thank you, and I call now
 21 Mr Majak Matet Ayom.
 22 (11.52 am)
 23 MR MAJAK MATET AYOM (affirmed)
 24 (Evidence interpreted)
 25 JUDGE AL-KHASAWNEH: Mr Majak Matet Ayom, I would like to

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11:40 1 I'm sorry, I understand that the witness has come
 2 from a long way, and he might be tired, and I've no wish
 3 whatever to detain him, but I think this is something
 4 that we should think about.
 5 PROFESSOR REISMAN: I had simply wished to confirm that
 6 the second sentence of paragraph 28 of the English
 7 translation of the witness's statement says that "the
 8 leaders of the two parties and the experts said", and
 9 not simply that "the experts said", and I simply
 10 wanted a confirmation that that was correct.
 11 A. So the experts have neglected the area. We have visited
 12 Mathiang Diil, they have neglected it and they have not
 13 reported it in their final report to the presidency. It
 14 was not clear in their report. They left aside the
 15 issue of Mathiang Diil according to 1905 and they
 16 started doing other work which is not clear in the
 17 mandate. So they made a new map of their own creation.
 18 So they put in the map areas which belonged to the
 19 Arabs, and not belonged to the Dinka.
 20 THE CHAIRMAN: Okay, I thank you very much. I think we
 21 should stop here and have a possibility for
 22 Judge Al-Khasawneh to ask questions to other
 23 witnesses. (Pause)
 24 So Judge Al-Khasawneh would like to ask questions to
 25 Mr Ayom Matit Ayom.

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11:53 1 thank you for agreeing to answer my questions.
 2 I would like first to ask you whether you were in
 3 any way intimidated or threatened in an attempt to cause
 4 you not to testify before us, or to change your
 5 testimony. We heard something to this effect from your
 6 brother, but I would like to hear it from you.
 7 A. For me, I don't find myself subject to threat by any
 8 person. I only can feel threatened by God. But any
 9 person, I don't see that there is room for any person to
 10 threaten me.
 11 Please go ahead. If you have anything to ask me,
 12 ask me.
 13 JUDGE AL-KHASAWNEH: My second question is as follows: you
 14 mentioned in paragraph 4 of your written testimony
 15 that the Ngok migrated in two stages, first composed
 16 of six chiefdoms, and the second of three, and that:
 17 "By the end of the Turkish rule both groups were
 18 residing in Baralil, next to the Twij."
 19 I take it this is south of the River Kiir, or
 20 Bahr el Arab.
 21 You also mention in the next paragraph of your
 22 testimony, that is in paragraph 5, that the Alei
 23 subsection of the Ngok is known as the chiefdom that:
 24 "... went far to the north and east but returned
 25 south of the River Kiir by the end of Turkish rule."

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11:55 1 Are you saying that the nine Ngok chiefdoms were
2 situated south of the Kiir by the end of Turkish rule?
3 That is my question.
4 A. Well, it could all be true except for one point I beg to
5 refute. That is related to Baralil. I think it is
6 a misconception and a miswriting. I didn't say Baralil,
7 but I said Baar, and this Baar is a point which is
8 located at Ngol area, where my grandfather Biar was
9 born; Baar in Ngol, where my grandfather was born.
10 About the nine chiefdoms of Ngok, three of them are
11 located around Ngol area, and some around Abyei, and
12 others in the area of Kiir. But regarding Alei tribe,
13 Alei tribe is centred in Ngol area. They have been well
14 in that until 1964, when the war broke out.
15 JUDGE AL-KHASAWNEH: Thank you. I think my question is
16 not where are they situated now or in 1965; my
17 question is whether the nine chiefdoms -- and this is
18 what is found in your statement -- were all situated
19 south of the river at the end of Turkish rule. That
20 is what you say in your statement.
21 So the question is not where --
22 A. I thought I have just told you that six tribes of the
23 Ngok Dinka are in different areas. But particularly
24 there are three tribes by name Bongo, Alei, Achak are in
25 the Ngol area.

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12:06 1 Deng Monyluak, and they came to me as representatives of
2 SPLA, and they came and told me, "Majid, your statement
3 is a clear manifest of a sellout of Dinka land to
4 Government of Sudan. We are coming here for two main
5 purposes: one, either you change the course of your
6 statements and testimony, or create, by a way or
7 another, some means to disable you not to go The Hague.
8 Otherwise you will face consequences.
9 JUDGE AL-KHASAWNEH: Thank you very much. I would like
10 now to put a question relating to a different matter
11 to you.
12 In your written testimony you describe your people,
13 the Ngok Dinka, as "warrior cattle herders". This is in
14 paragraph 3 of your testimony.
15 THE INTERPRETER: I beg your pardon, can you repeat that
16 again?
17 JUDGE AL-KHASAWNEH: Yes. In Mr Kur's testimony, in
18 paragraph 3 of that testimony, he describes his
19 people, the Ngok Dinka as "warrior cattle herders".
20 The Messiriya, like the Ngok Dinka, are also warrior
21 cattle herders. Both are pastoralist nomadic people,
22 who practice sometimes seasonal agriculture.
23 Is there any basis for a distinction in their
24 relationship to the land, given that this is the
25 characteristic of both people?

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12:00 1 JUDGE AL-KHASAWNEH: Thank you.
2 THE CHAIRMAN: I thank you very much.
3 I call now Mr Majid Yak Kur, whom Judge Al-Khasawneh
4 would like also to ask some questions to.
5 (12.01 pm)
6 (12.02 pm)
7 MR MAJID YAK KUR (affirmed)
8 (Evidence interpreted)
9 THE CHAIRMAN: Are you able to translate from Arabic into
10 English?
11 THE INTERPRETER: Yes, sir.
12 THE CHAIRMAN: You are. Okay, thank you.
13 JUDGE AL-KHASAWNEH: (Addresses the witness in Arabic)
14 (Interpreted) Majid Yak Kur, thank you for accepting
15 to answer our questions. But please, I beg your pardon,
16 I am going to ask you in English.
17 First of all I should like to ask you, as I asked
18 other witnesses before you, whether you have been
19 intimidated in any way or put under pressure not to
20 testify before us, or to modify your testimony?
21 A. Yes, I've been threatened.
22 JUDGE AL-KHASAWNEH: Would you kindly elaborate a little
23 bit on it?
24 A. Well, after this change of the testimony records, two
25 came to me in my house, namely Nyol Pagout and

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12:10 1 A. In fact, there has never been any conflict of any kind
2 until 1965. Earlier to that they were living as true
3 brothers, and there was no point of Dinka saying that,
4 yes, sell a piece of land to an Arab, or an Arab saying
5 that they had sold a piece of land to a Dinka. They
6 were just living as true brothers.
7 JUDGE AL-KHASAWNEH: Thank you. This was not my question,
8 I will pose it again.
9 My question is whether they -- it has been argued
10 that the one people have different rights in the land
11 than the other because one people, the Ngok, are less
12 nomadic or less pastoralist than the Messiriya.
13 In practice in southern Kordofan was there
14 a distinction in relation to the land based on the two
15 groups, based on the fact that one was more nomadic and
16 the other one was more agriculturalist?
17 I'm very sorry, thank you very much for the
18 interpretation. I wonder if I may put this in Arabic,
19 maybe it will be clearer for the witness.
20 (Addresses the witness in Arabic)
21 A. We in southern Kordofan, we have procedures and rules to
22 govern the procedures of these nomads, but the land
23 belongs to the state. And this makes that the local
24 traditional laws to come up with some rules and
25 regulations to govern the movements. And still we stand

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<p>12:14 1 believing that the land belongs to the Government, and 2 in this context it's Kordofan. 3 JUDGE AL-KHASAWNEH: Shukran jazeelan. 4 THE CHAIRMAN: So I thank very much the witness and also 5 the interpreter. There is a question from the part of 6 Judge Schwebel to Rodman Bundy. 7 JUDGE SCHWEBEL: Mr Chairman, I think I shall ask my 8 question subsequently as things develop. Thank you. 9 THE CHAIRMAN: Alright, thank you. 10 Then I think it is for Professor Crawford now to 11 conclude. 12 (12.15 pm) 13 Submissions by MR CRAWFORD 14 PROFESSOR CRAWFORD: Sir, to conclude in the sense that 15 I come next. I'm afraid it will be some little time 16 before I conclude. 17 The slides for this presentation are in your folder, 18 but I apologise that because of the pressures of time 19 they're not necessarily in the order in which we will be 20 showing them. I hope they're all there, but I'll do my 21 best to be coherent, if not as coherent as one might 22 have been. 23 Mr President, members of the Tribunal, this 24 presentation will run into the afternoon to some degree, 25 I'm afraid, because of the amount of time that's been</p> <p style="text-align: center;">Page 57</p>	<p>12:18 1 the questions of excess of mandate. It's also relevant 2 to your interpretation of the formula, to which I will 3 revert in due course, but not in this presentation. 4 When it comes to delimitation, however, the extent 5 of the transfer is a question of fact and not of law, 6 whether you accept the territorial interpretation or the 7 tribal interpretation. Identifying the transferred area 8 or the area of the transferred people, whichever of the 9 two interpretations you adopt, is certainly not 10 a question of international law. International law did 11 not speak about the modalities of inter-provincial 12 transfer within the Condominium in 1905. 13 Nor is it a question of Ngok or Messiriya customary 14 law, which were not part of the land law of Sudan at 15 relevant times, and are not part today, as you can see 16 from the provisions of the Comprehensive Peace Agreement 17 providing for the future recognition of customary law. 18 Nor is there any basis for an alleged system of 19 inter-tribal law, even though the ABC experts tried to 20 construct a spurious principle of preference for Ngok 21 housing over Homr or Messiriya tents. "tukuls trump 22 tents" is the three-word description of that particular 23 principle, and I will come back to it later on. It is 24 entirely illegitimate in the context of the Tribunal's 25 mandate, which is to determine a transferred area,</p> <p style="text-align: center;">Page 59</p>
<p>12:16 1 taken in cross-examination and Tribunal questions. 2 We'll do our best, but I believe we're still within 3 time. 4 As I explained on Saturday, the SPLM/A's definition 5 of the formula refers to an area occupied and used by 6 the nine Ngok Dinka chiefdoms in 1905. As I also 7 explained on Saturday, there are fundamental problems 8 with this definition. The words "inhabited and used by" 9 or "occupied and used" do not appear in the formula 10 agreed by the parties, but have been added. Similarly, 11 none of the transfer documents use that language. 12 It's undisputed that there was in 1905 an actual 13 transfer of territory. That strip was shown on maps 14 after 1905, and eventually, following the re-transfer of 15 the Twic to Bahr el Ghazal, became the straight-line 16 boundary of Kordofan below the Bahr el Arab. 17 So the dispute submitted to arbitration involves 18 a specific historical fact: a decision to transfer 19 an area attributed to the Ngok and Twic from one 20 province to another, and the consequence later on of the 21 re-transfer of the Twic back to the initial province; 22 the consequence being the boundary below Bahr el Ghazal, 23 which is not for the moment in dispute. 24 Unlike the ABC experts, this Tribunal has 25 an applicable law clause, and that's highly relevant to</p> <p style="text-align: center;">Page 58</p>	<p>12:20 1 a question of fact. 2 In terms of the law of Sudan at the time of the 3 transfer, the only proposition that matters is that the 4 Condominium authorities had the power to decide on 5 provincial boundaries. The Condominium administration, 6 led by the Governor-General, had general authority to 7 act, including the power to define provincial 8 boundaries. The fact is that that power was exercised 9 frequently and often informally; a matter which will 10 cause no surprise to a tribunal including members who 11 have had to deal with internal provincial boundaries in 12 other disputes. 13 The SPLM/A makes the point that the 1905 change was 14 never formally gazetted, unlike certain other changes to 15 provincial boundaries. That is true. The official 16 practice was inconsistent, especially but not only in 17 the early years of the Condominium. But nothing can 18 turn on this. 19 No one ever challenged a provincial boundary change 20 in the Sudan for want of form or publication. 21 Administration proceeded, as it had on the basis of the 22 Turkish-Egyptian administration in the 19th century, on 23 the basis that the provinces existed, and if boundary 24 changes or clarifications were necessary they were made. 25 Even the boundary of Darfur before 1916, a tributary</p> <p style="text-align: center;">Page 60</p>

12:22 1 state and not a province, was changed by rather informal
2 means. It was only in 1916 that Darfur became
3 a province. I have referred already to
4 Sir Rudolf Slatin laying down the boundary in 1903.
5 Overall, many provincial boundary changes occurred
6 by some combination of provincial action, endorsement in
7 Khartoum and depiction by the Sudan Survey Department or
8 the War Office in new maps. That's what happened in the
9 case of the provincial boundaries that concern us here.
10 But there are three points to be made about the
11 SPLM/A's complaint that this boundary change was not
12 gazetted.
13 The first point is that the SPLM/A itself relies on
14 boundaries that were determined in this markedly
15 informal way. As I pointed out, its Abyei Area is only
16 conceived of as tribal -- it's a very orderly tribe --
17 in the north. Perhaps the tribe had GPS indicators to
18 walk up and down their boundary.
19 It is only when they face north that their passion
20 for tribal boundaries strikes them. Facing east, south
21 or west, they have a pronounced affection for provincial
22 boundaries; the very boundaries that for the most part
23 have never been gazetted. The parties agree on the
24 southern boundary of the Abyei Area, yet that was never
25 gazetted.

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12:25 1 Mr President, members of the Tribunal, for all the
2 reasons we have given, the territorial interpretation of
3 the formula is the correct one. The corollary is that
4 the area transferred to Kordofan in 1905 is the area of
5 Kordofan that lies between the Bahr el Arab and the
6 southern boundary of Kordofan. That's the area
7 presently in Kordofan by reason of the transfer of
8 Sultan Rob's district to Kordofan.
9 But for the purpose of the argument -- counsel will
10 leap on me and say this is a concession; it is not
11 a concession -- I want to address you on the assumption
12 that the SPLM/A is right in its interpretation of the
13 formula. On that assumption, made solely for the
14 purposes of argument, the question is the following:
15 what was the area of the nine Ngok Dinka chiefdoms in
16 1905?
17 The SPLM/A accepts that the crucial date is 1905, as
18 I have said; they accept that the question is one of
19 identifying an area of occupation and use by the
20 chiefdoms in that year. That too is a question of fact.
21 It's a very complicated question of fact; I would call
22 it an anthropological fact, and I have to say that the
23 only anthropological witness that we have is on our
24 side.
25 Like many anthropological facts, it raises a host of

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12:23 1 The second point is that the whole premise of the
2 Abyei Protocol is that there was a transfer to Kordofan
3 in 1905. It happened, it was officially recorded, but
4 it was not gazetted. By the standards of African
5 boundary disputes, there was a decent amount of
6 information about it.
7 Assume hypothetically that instead of being
8 incorporated in the Sudan in 1902, Bahr el Ghazal had
9 become a separate territory -- perhaps a separate
10 territory of France, if Colonel Marchand had been more
11 successful -- and then later on a separate state. Can
12 anyone doubt that the 1902 boundary between
13 Bahr el Ghazal and Kordofan could have been determined
14 by an arbitral tribunal? Of course it could have been,
15 and it would have been held to lie along the
16 Bahr el Arab and not some unknown khor or ragaba 40 or
17 50 miles to the north.
18 The 1904 map deviation would have been dismissed, as
19 it was soon dismissed by the Condominium authorities, as
20 based on a misunderstanding as to the true course of the
21 Bahr el Arab, and not an error in the identification of
22 the relevant boundary river. It was not, after all,
23 that the river didn't exist, which would have raised
24 a different set of questions.
25 So the absence of a gazette notice is irrelevant.

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12:27 1 methodological issues, and is one to which no
2 comprehensive answer can be given. Contrary to what the
3 ABC experts seem to have assumed, it's a much more
4 difficult question of fact than the question of fact
5 "What were the boundaries of Kordofan between 1905?"
6 That question falls in the elementary category for
7 a tribunal of this standing.
8 In this presentation I want first to discuss briefly
9 the methodological issues, then to review the evidence
10 of the location of the Ngok Dinka in 1905. In doing
11 that I will start with the only Condominium depiction of
12 the Ngok area, the 1933 sketch map. I will then turn to
13 a chronological review of the evidence of where the Ngok
14 were before the transfer in 1905 as well as after. But
15 let me make two preliminary points.
16 The first preliminary point is that the question of
17 fact, the anthropological fact that I am now addressing,
18 what was the area of occupation and use by the nine
19 Ngok Dinka chiefdoms in 1905, is not the question the
20 ABC experts actually answered.
21 As I've said, however much they may have mentioned
22 1905, in truth they abandoned 1905 and looked
23 indifferently -- I do not say impartially -- at the
24 evidence of much later years. Their allocation of half
25 the shared rights area to the Ngok and half to the

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<p>12:28 1 Messiriya was on its face a new allocation of territory 2 which had nothing conceivable to do with 1905. 3 That makes it even more surprising -- and this is my 4 second preliminary point -- that the answers to the 5 anthropological question given by the ABC experts and by 6 the SPLM/A are now virtually the same. True, there is 7 a slight difference: the SPLM/A claims all the way north 8 to 10°35'; whereas the ABC experts split the difference 9 between 10°35' and 10°10' in order to arrive at their 10 compromise allocation line. But that's a rather minor 11 difference compared with the large areas at stake in 12 this case. 13 You can see this from the graphic which is now on 14 the screen. It will be modified from our memorial 15 figure 11. We can split the relevant area into five 16 segments, south to north, as follows. 17 First there is the area between the present southern 18 boundary of Kordofan and the Bahr el Arab. Let's call 19 this area 1. It's about 2,700 square kilometres in 20 extent, a non-trivial area about the size of Luxembourg. 21 The parties agree this is part of the Abyei Area, so 22 it's not actually in dispute. But it's worth observing 23 that the reasons for that conclusion, the reasons for 24 that agreement, must be different. 25 For the Government of Sudan it is the territory</p> <p style="text-align: center;">Page 65</p>	<p>12:31 1 What I am calling area 3 is the area between the 2 Ragaba Umm Biero and the Ragaba ez Zarga. This is 3 an even larger area; it's 3,500 kilometres in extent. 4 Again I will come back to the question of occupation and 5 use in relation to that in a while. You will be pleased 6 to [hear] that will be after lunch. 7 In this area 4, this is the area above the 8 Ragaba ez Zarga, up to the experts' boundary at 9 10°22'30" north. This is a huge area, 11,000 square 10 kilometres in extent. It's more than half the 11 "transferred area", according to the experts. 12 I say "transferred area" in inverted commas because 13 no one can seriously suggest that area 4 was transferred 14 in 1905, or that the Ngok Dinka made my use of it in 15 1905, indeed that they made any significant use of it at 16 a later time. They certainly never had primary rights 17 anywhere in area 4 in 1905, even if one accepts the 18 distinction between primary and secondary rights, which 19 we do not. Its inclusion in the Abyei Area is frankly 20 incredible. Act IV of Professor Pellet's tragedy, 21 spoken in the language of Shakespeare. 22 Finally there is area 5, which is the difference 23 between the ABC experts' line and the SPLM/A claim line 24 at 10°35'. It's outside the Abyei Area, even as the 25 experts saw it; though, acting manifestly outside their</p> <p style="text-align: center;">Page 67</p>
<p>12:30 1 which is part of Kordofan by virtue of the transfer of 2 1905, and it doesn't matter that it may well be the case 3 that the Messiriya claim use rights south of the 4 Bahr el Arab. That's irrelevant to the question of the 5 identification of the transferred area on the 6 territorial interpretation, but it's not irrelevant to 7 the identification of that area on the tribal 8 interpretation. 9 It must be for the SPLM/A to show which areas below 10 the Bahr el Arab were actually occupied and used by the 11 Ngok Dinka, by the nine tribes or some of them. They've 12 never made any attempt to do that. They tend to say, 13 "But it's rather unoccupied". If it's unoccupied, it's 14 part of Kordofan, and not part of the Ngok Dinka 15 transferred territories. 16 They can't have it both ways. They can't be 17 territorial below the river and tribal above it. But, 18 of course, we've already seen that their claim is 19 a complete hybrid. This is another example of it. 20 The second component of the area in dispute, which 21 we'll call area 2, is the area between the Bahr el Arab 22 and the Ragaba Umm Biero. This is 1,100 square 23 kilometres in extent. I will come back shortly to the 24 question of the extent of Ngok and use and occupation of 25 area 2.</p> <p style="text-align: center;">Page 66</p>	<p>12:33 1 mandate, they purported to recognise Ngok grazing rights 2 in that area. It's 5,000 square kilometres in extent, 3 again a non-trivial area. 4 To summarise, although the experts -- the ABC 5 experts; I should use the qualifier -- effectively 6 abandoned the crucial date of 1905, while the SPLM/A 7 maintain that date, the two produced much the same 8 claim, as you will see. The SPLM/A claim is somewhat 9 more extreme but, over these vast areas, that is 10 a detail. What is more significant is that on this part 11 of the case, the part I'm addressing now, the SPLM/A is 12 committed to proving that already in 1905 the Ngok Dinka 13 had rights of use and possession over all five areas, in 14 totality. 15 The implication of their claim is that, despite the 16 huge demographic, political and other changes that have 17 occurred in that period, even if one takes the critical 18 date as 1956, the area of Ngok occupation and use has 19 not expanded during that period. That suggestion is 20 contrary to all the evidence. 21 That finishes my introduction. I move to the 22 methodological issues which face you in determining, if 23 you have to determine, the anthropological fact of Ngok 24 use and occupation in 1905. 25 There are three main points: the relevance of</p> <p style="text-align: center;">Page 68</p>

<p>12:35 1 post-1905 developments in determining the 1905 2 anthropological fact; second, the SPLM/A's reliance on 3 oral evidence; and third, the relationship between the 4 difference kinds of evidence in the record: maps, 5 contemporary official and unofficial records, subsequent 6 expert opinion, et cetera.</p> <p>7 The first of these then is the relevance of 8 post-1905 developments. If the question, as we agree, 9 relates to the year 1905, then what weight is to be 10 given to evidence dating from later years?</p> <p>11 There are three possible solutions. One is to 12 reject such evidence entirely. But that would be 13 unreasonably strict, as well as making it practically 14 impossible to fulfil the mandate on the SPLM/A's 15 interpretation.</p> <p>16 A second crude solution is simply to assume that any 17 evidence of Ngok occupation and use from any date is 18 valid for 1905, and that is effectively what the ABC 19 experts did, as I have said. That is completely 20 untenable, and involves an excess of mandate because it 21 is not in dispute between the parties that the mandate 22 refers to the year 1905.</p> <p>23 A determination of the scope of territory -- whether 24 territory transferred or territory occupied -- by 25 reference to another date is simply not doing what</p> <p style="text-align: center;">Page 69</p>	<p>12:38 1 The 1949 Abyei local government area is relevant 2 a contrario. It shows you that the SPLM/A claim can't 3 possibly be right because that was the area of local 4 government of the Ngok at a later date. I'll come back 5 to that. It sheds light on the transfer, even though 6 the transferred area must be a different one.</p> <p>7 I move to my second methodological point concerning 8 modern oral tradition. And I do so, Mr President, 9 members of the Tribunal, after a pronounced example this 10 morning of the difficulties of translation, 11 inter-cultural, in three or four languages.</p> <p>12 I must first stress the extent to which the SPLM/A 13 relies on oral tradition. Having next to zero -- I will 14 establish this -- having next to zero documentary or 15 cartographic evidence of their claim, they are forced to 16 create some substitute, and they do so by wholesale and, 17 I have to say with great compliments, remarkably 18 imaginative reliance on oral tradition. Very good for 19 the makers of GPS systems, for example.</p> <p>20 You will no doubt hear songs of praise tomorrow, and 21 even later today, from counsel for SPLM/A of oral 22 tradition, and its creative power is indeed worth 23 singing about. Some of the great societies in the world 24 depend upon oral tradition. That's why we have Homer. 25 It was Rudyard Kipling, the great poet of the</p> <p style="text-align: center;">Page 71</p>
<p>12:37 1 you're required to do. And that issue of interpretation 2 involves un acte clair. There's no question of a margin 3 of manoeuvre or of deference in that situation. If what 4 the experts did was to determine Ngok occupation and use 5 at other dates, without considering the relationship 6 between those dates and the date of 1905, then they 7 committed an excess of mandate.</p> <p>8 The third solution is to treat later material as 9 relevant, if and to the extent that it can reasonably be 10 inferred that it would be or might be equally valid for 11 1905. For example, it may be that the evidence relates 12 to a period close in time, a few years earlier or later; 13 and there is quite a bit of evidence a few years earlier 14 or later. There's no reason to think that there was 15 a rapid change in Ngok occupation patterns in 1905.</p> <p>16 By contrast, any development which can be shown to 17 have dated exclusively to after 1905 is either in 18 principle irrelevant, or it's relevant only a contrario 19 as showing that the position was not what it might be 20 claimed to be. For example, the rest house at Tebediya 21 is irrelevant: it was only created after 1905. Nothing 22 could have been decided or determined as to the extent 23 of the area transferred on either criterion by reference 24 to something that did not exist in 1905 and that was not 25 thought of.</p> <p style="text-align: center;">Page 70</p>	<p>12:40 1 British Empire, who sang about it in his poem In the 2 Neolithic Age. Kipling wrote: 3 "But my Totem saw the same; from his ridgepole 4 shrine he came, 5 And he told me in a vision of the night:- 6 "There are nine and sixty ways of constructing 7 tribal lays, 8 'And every single one of them is right!'"</p> <p>9 His point was clear: the point of oral tradition, or 10 tribal lays if they're in verse, in Kipling's words, is 11 to construct a present tribal identity and to connect 12 that to an indefinite past. All 69 ways are right 13 because the process is one of accretion and creation and 14 self-validation.</p> <p>15 The point of tribal lays is not to tell, and it does 16 not tell a history of events, let alone one precise 17 enough to enable a boundary commission or a tribunal to 18 delimit a state's boundary.</p> <p>19 If the ancestral tribal servants came over the 20 Kakadu swamp in the Northern Territory and defined the 21 boundary between the Northern Territory and Western 22 Australia, everyone including the aboriginal people 23 would laugh. It turns out that the boundary between the 24 Northern Territory and Western Australia is an extension 25 of the Treaty of Tordesillas of 1492.</p> <p style="text-align: center;">Page 72</p>

<p>12:42 1 State boundaries are created by state means, not by 2 oral tradition. I don't say that oral tradition is 3 useless, I don't say that it may not be incorporated in 4 the process of drawing boundaries, but I do say that it 5 is not enough. 6 The SPLM/A quote at length from Vansina's book on 7 oral tradition regarding its value in historical 8 reconstruction, but there are huge dangers. Vansina 9 states: 10 "Selectivity and interpretation weigh more heavily 11 on oral tradition than on written sources. This is 12 because once a written source exists it becomes 13 permanent. It is subtracted from time. It is no longer 14 affected by selection or interpretation as long as it 15 survives." 16 In short, it is not subject to correction. That is 17 why, as Vansina says, historians appreciate contemporary 18 documents more than any other. 19 There are three specific reasons why oral history is 20 of extremely limited utility in answering your mandate. 21 The first is that there are written sources, 22 contemporary written sources, from the years immediately 23 before and after 1905. 24 The second is that, despite all the attempts, oral 25 traditions cannot be dated to refer to a specific year,</p> <p style="text-align: center;">Page 73</p>	<p>12:45 1 That's why again documentary sources are paramount: 2 they freeze in time the relevant human thought or 3 experience, the experience of Heinekey trekking towards 4 Abyei or of Henderson driving towards Abyei on the road. 5 If we can say that that source is reliable and impartial 6 and separate and distinct from the present dispute, then 7 it offers an insight into the question that you are 8 asked to answer which oral tradition can never match. 9 Finally, while much has been said in praise of oral 10 tradition and of tribal lays, very little has been said 11 about its methodology. 12 It is endemic throughout the SPLM/A treatment of all 13 the sources that they support a line of 10°35'. Any 14 sources that might support that argument -- they are 15 only oral and singularly Ngok -- are said to be 16 conclusive any sources that do not observe it are said 17 to raise no negative inference. Any sources that 18 dispute it are dismissed for whatever reason. 19 Vansina comments: 20 "One of the special difficulties with reconstruction 21 drawn from oral traditions may well be the value of the 22 interpretations of the historian. This should be all 23 the more reason to deposit one's raw materials." 24 And yet in a sense there are no raw materials of 25 oral tradition; they are always what has been recently</p> <p style="text-align: center;">Page 75</p>
<p>12:43 1 and that's what you have to do. 2 The third is that the SPLM/A's methodology in 3 relying on oral tradition completely distorts and taints 4 the whole corpus of evidence in support of the 1905 5 boundary at 10°35', rendering the final product 6 worthless. 7 The first consideration I have already addressed. 8 Written documentary evidence, particularly contemporary 9 evidence, must be preferred. Regarding the issue of 10 dating oral tradition, it should be observed. I quote 11 Vansina again: 12 "With oral traditions the process of mnemonic or 13 conscious selection and streamlining continue so that 14 they show the impact of x generations of past presents, 15 which are experienced as a whole and can no longer be 16 unravelled." 17 So what of the epic of 10°35'? Today the Ngok claim 18 their settlements extended far to the north of 19 Ragaba ez Zarga, yet when did this idea germinate? Was 20 it in 1805, 1905, or 2005, or any of the years 21 intervening? Their traditions cannot answer that 22 question; and even if we could, how reliable would the 23 answer be in the light of the overwhelming weight of 24 documentary evidence to the contrary of that 25 proposition?</p> <p style="text-align: center;">Page 74</p>	<p>12:47 1 said. 2 What has been stressed here is that the fluid and 3 self-validating character of oral tradition, of oral 4 history, lends itself to being twisted. It's vital that 5 the raw data be deposited alongside the interpretation 6 of it so that the two can be compared. This principle 7 has not been observed by the SPLM/A. 8 In an adversary system where each side is expected 9 to have an agenda, all oral information gathered by one 10 party is potentially tainted and must be treated with 11 great care; we say that about ourselves as much as the 12 other side. The final products of the information must 13 be placed alongside the raw data; the full story told by 14 the informant free from innuendo and leading questions. 15 Turning to the SPLM/A's methodology, because we do 16 not rely upon oral tradition except for the purpose of 17 displaying to you a competing oral tradition which shows 18 the unreliability of reliance on tradition in principle, 19 we know next to nothing about how the data was gathered 20 or in what manner it was given. I will come back to 21 this when I deal with the community mapping report after 22 the break. 23 How the questions that the community mapping report 24 deal with relate to a straight-line boundary in 1905 is 25 completely puzzling. It's even more puzzling when the</p> <p style="text-align: center;">Page 76</p>

12:48 1 answers turn out to be related to provincial boundaries
2 which were established by means which have nothing to do
3 with the traditions in question. Perhaps the boundaries
4 created the traditions rather than the other way round.
5 One can only wonder how the rest of the oral data
6 was compiled, since we don't have access to it.
7 I turn to my third point: the relationship between
8 different kinds of evidence and opinion, and here I can
9 be brief.
10 Given the obvious shortcomings of oral evidence, in
11 particular produced after the dispute has arisen, it
12 goes without saying that documentary evidence should be
13 given preference. In addition, contemporary evidence
14 should be given preference over later evidence.
15 Thirdly, as I've said, evidence created before the
16 dispute arose should be given strong preference over
17 evidence created later; a general principle well
18 recognised in international law in the notion of the
19 critical date in its proper sense.
20 We have sometimes referred in this case to 1905 as
21 being the critical date, but it's not the critical date
22 in the sense of international law. The critical date in
23 the sense of international law is the point at which
24 a dispute arose between the parties over the Abyei Area,
25 and all the collection of oral evidence that has gone on

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12:51 1 screen because it's difficult to read:
2 "Shaded areas shall approx grazing areas. Areas
3 left white are either waterless or grassless."
4 Then you have listed cattle and approximate area for
5 each of the Fayirim, the Matinin and the Awad Kamil.
6 The total number of cattle listed in aggregate for those
7 three groups is 18,500 head, and the approximate area is
8 370 square miles. Then the Ngok Dinka: listed cattle
9 50,000, approximate area 500 square miles. Then the
10 point:
11 "Ngok cattle figures are approximate only. Real
12 figures are somewhere between 50,000 and 60,000."
13 That's a lot of cows.
14 It's interesting to note that many of the areas
15 which the SPLM/A claims now are permanently -- and have
16 been permanently -- inhabited by the Ngok since 1905 are
17 marked as waterless. This is odd for a people whose
18 cattle are especially adapted for living in swampy
19 areas. Then again, it's no more peculiar than them
20 living in the goz, which is also dry, certainly dry for
21 large numbers of cattle, as Cunnison's book shows.
22 I'm sure the members of the Tribunal feel they have
23 enough to read, but if you're trying to get to sleep at
24 night I do recommend Cunnison. He's very interesting
25 about the people of that period.

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12:50 1 has been after that date.
2 1905 is a crucial date because it's the date by
3 reference to which the mandate must be fulfilled, but
4 it's not a critical date in the other sense. There was
5 no dispute in 1905; it was to resolve a potential
6 dispute that the area was transferred and peace brought,
7 with great success, for more than half a century to the
8 relations between the Homr and the Ngok.
9 I turn then to consider the documentary evidence.
10 There is one original document in the record from
11 the Condominium office depicting the nine Ngok Dinka
12 tribes. It's a 1933 document taken from the civil
13 secretary's files. You can see the original coloured
14 version on the screen. Let me describe it to you.
15 The sketch depicts the areas surrounding Abyei,
16 which of course is named; in 1933 it was the centre of
17 Ngok life. It divides the grazing area into coloured
18 zones. Red is the Fayirim. Orange is the Matinin and
19 what is described as the Aw Kamil; that's short for
20 Awad Kamil. Blue is the Ngok Dinka, although you might
21 think it was purple. Red and orange stand for Humr or
22 Messiriya tribal groups which are otherwise referred to
23 as omodiyas.
24 There's a caption in the top right-hand corner which
25 reads as follows -- we've transliterated it on the

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12:53 1 The SPLM/A wishes the Tribunal to ignore the "Civsec
2 sketch", as I will call it. They state that no
3 inference may be drawn from the map, as the official
4 meeting for which the map was prepared did not involve
5 either Ngok Dinka or Kordofan officials. Clearly the
6 ABC experts thought otherwise. The maps and minutes of
7 that meeting are cited in the ABC report without
8 criticism.
9 According to the ABC experts, the hand-drawn
10 sketch -- the Civsec sketch map -- was produced in the
11 civil secretary's office in Khartoum, based on
12 information provided by local officials, including from
13 both Bahr el Ghazal and Kordofan provinces. It was
14 created to help settle grazing disputes between the Homr
15 and the Ngok. It was created for an official purpose,
16 though we don't know who created it. Whoever prepared
17 it took some care.
18 The sketch provides detailed information about the
19 Homr and the Ngok. We may note the following six
20 features.
21 First, a significant fraction of the Ngok grazing
22 area is south of the Bahr el Arab; we make it
23 approximately one-third.
24 Second, the Ngok grazing area occupies some but by
25 means not all of what is called the "Bahr". There's

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<p>12:55 1 a lot of terminology in this case, and had we had more 2 time we would have spent more time explaining it 3 upfront; I suppose we should have done that. But the 4 Bahr is the region between the Bahr el Arab and the 5 Ragaba ez Zarga, especially in the area which is shown 6 on this map. It's a watered area; it's a riverine area. 7 The Ngok grazing area occupies some but by no means all 8 of the Bahr. There are yellow areas there as well as 9 purple areas.</p> <p>10 Thirdly, the Ngok are to be found in the wetter 11 areas, not the waterless areas. I note in particular 12 the caption "Homr waterless area" in the top left-hand 13 side of the map. That's below 10° north. Since the ABC 14 experts' decision, that area has been renamed; it's now 15 the "Ngok waterless area". Of critical importance for 16 this case is that the northern limit of the Ngok grazing 17 area is nowhere near the Ragaba ez Zarga.</p> <p>18 Fifth (sic), there is no relationship on this map 19 between the Ngok area and any provincial boundary, 20 except for the southern boundary, where there is 21 a relationship, and that relationship is not accidental, 22 as we will see. In every other respect the Ngok area is 23 miles away from any provincial boundary. It's many 24 miles away from both the eastern and western boundaries 25 of Kordofan.</p> <p style="text-align: center;">Page 81</p>	<p>12:58 1 there were 15,000 Ngok. All the accounts of the Ngok 2 would indicate that a significant fraction of that 3 15,000 people were children.</p> <p>4 How is it possible that perhaps 8,000 to 9,000 5 adults, who in 1933 grazed their cattle over 6 approximately 500 square miles, 1,300 square kilometres, 7 could conceivably in 1905 have used or occupied an area 8 of more than 23,300 square kilometres, nearly 18 times 9 as much? Yet that is the SPLM/A claim.</p> <p>10 Mr President, this would be a convenient moment to 11 break.</p> <p>12 THE CHAIRMAN: I thank you very much, Professor Crawford. 13 The hearings will be resumed at 3 o'clock in the 14 afternoon.</p> <p>15 (1.00 pm) 16 (Adjourned until 3.00 pm) 17 (3.00 pm)</p> <p>18 THE CHAIRMAN: Professor Crawford, you have the floor. 19 PROFESSOR CRAWFORD: Thank you, Mr President. 20 Mr President, members of the Tribunal, I was 21 discussing the 1933 civil secretary sketch map, the only 22 Condominium depiction of Ngok use and occupation which 23 is in the record. That's the original. Given the very 24 valuable information provided by the 1933 Civsec sketch, 25 a few words should be said about the ABC's use of it.</p> <p style="text-align: center;">Page 83</p>
<p>12:56 1 The SPLM/A highlights the fact that the Ngok are 2 reported to have had more cattle than the Homr, and 3 that's true: 60,000, let's say, as compared with less 4 than 30,000. They note that most of the Ngok cattle 5 would have been further south because of the Ngok's 6 transhumant pattern. While they continually insist that 7 no negative inference can be made from the absence of 8 the Ngok, they still manage to extrapolate from this map 9 that the absence of more Ngok cattle, a higher 10 number than 60,000, may lead:</p> <p>11 "... to the assumption that for all of the year save 12 for the several months of dry the Ngok cattle, all of 13 their cattle so many more than 50,000, would be spread 14 throughout the Abyei Area -- over an area at least equal 15 to (but certainly greater than) all of the coloured 16 areas ... through the goz and toward Keilak in the 17 rains."</p> <p>18 And at this rate they'll get to Muglad, and possibly 19 Khartoum.</p> <p>20 This desperate hypothesis I will call "the theory of 21 the invisible Ngok". I'll revert to it in our progress 22 through the sources.</p> <p>23 But the core question raised by the map is this: in 24 1934, the year after this sketch map was created, 25 Newbold, the then governor of Kordofan, estimated that</p> <p style="text-align: center;">Page 82</p>	<p>15:00 1 The Civsec sketch is actually shown in the ABC's 2 report together with some other information, and this is 3 the ABC experts' depiction of it. Despite the fact that 4 the Civsec sketch is the only map on record that depicts 5 the Ngok area during the Condominium period, the ABC 6 experts used the map exclusively for one purpose: that 7 is to refute the claim that the Messiriya territory 8 originally extended to the Bahr el Arab; that's their 9 proposition 2. That's the only reason they used it.</p> <p>10 An official sketch map produced by Condominium 11 officials and showing a limited area of Ngok grazing 12 rights in the Bahr, and below the Bahr el Arab, is only 13 relied on to dismiss the Messiriya claim. Nothing is 14 said about what the sketch so clearly reveals about the 15 Ngok in 1933.</p> <p>16 The truth is otherwise, and the ABC experts' use of 17 the 1933 Civsec map can, I'm afraid, only be described 18 as partisan. The information provided on that map 19 stands in stark contrast to the allocation line they 20 drew at 10°22'30".</p> <p>21 The folly of the matter becomes even more apparent 22 when we superimpose the Civsec map onto the ABC experts' 23 Abyei Area. You can see that a Ngok Dinka living at 24 about 10°10' north, still in the area where the Ngok are 25 alleged to have a dominant claim, would have to walk</p> <p style="text-align: center;">Page 84</p>

<p>15:01 1 40 kilometres south to reach the Ngok grazing area. In 2 other words, the Ngok living in the waterless area at 3 10°10' north would have to walk for nearly a day to get 4 a drink of milk. Milk was their primary source of 5 protein, so it would be a weary walk. 6 Any claim by the Ngok to the Ragaba ez Zarga is 7 likewise foolish when one considers where the Ngok are 8 said to be in 1933. It should be noted that the sketch 9 does not say that it depicts dry seasonal grazing, as 10 suggested by the SPLM/A; but even if it does, there's no 11 evidence of any significant Ngok movement to the north 12 in the wet season beyond the area depicted, as we will 13 see. 14 This brings us to the second question I identified 15 this morning. When we find relevant information after 16 1905, it is necessary to ask the next question: what's 17 the relationship between that information and what we 18 can reasonably say about 1905, given that 1905 is the 19 crucial date? There are two points here, population and 20 vastly improved administration, and they are related to 21 each other. 22 In our memorial we proposed by way of estimate that 23 the Ngok may have numbered of the order of 5,000 in 24 1905. The SPLM/A proposed a competing figure of 50,000. 25 The way they did that was to postulate without any</p> <p style="text-align: center;">Page 85</p>	<p>15:05 1 result that the population in 1905 was less, and 2 probably very considerably less, than in 1933, which 3 itself suggests that the Civsec area is a maximum and 4 not a reduction in what was occupied in 1905. 5 The second question involves the trend of movement 6 in terms of visits by administration officials before 7 and after 1905, and this is a chart taken from our 8 pleadings. 9 The red notations on the graphic demonstrate visits 10 before 1905, the black ones visits slightly afterwards. 11 We detect -- although I confess that it's perhaps not 12 a very strong indication -- a movement to some degree to 13 the north. 14 What is absolutely clear from this graphic, however, 15 is two things: first of all that the Ngok were on or 16 around the Bahr el Arab; and secondly that there was no 17 contraction to the south in the period after 1905. It 18 is fair to say -- and indeed it is fair to say that the 19 SPLM/A don't deny this -- that the area occupied by the 20 Ngok in 1905 cannot have been larger than that depicted 21 on the Civsec sketch. 22 Against this background I want to take you rather 23 rapidly on a -- considering the character of the roads, 24 a busman's tour would be the wrong words -- but a tour 25 of the evidence in the record on the extent of the Ngok</p> <p style="text-align: center;">Page 87</p>
<p>15:03 1 evidence that the Ngok constituted 10% of the population 2 of Kordofan in 1908, which Governor Lloyd had estimated 3 at roughly half a million. That gave them the 50,000. 4 By contrast, Professor Daly states: 5 "The Ngok population must have been quite small in 6 1905." 7 He notes -- and this methodology, though of course 8 it covers the later period, has something to be said for 9 it -- that in the 1955 census of the Sudan the Ngok 10 comprised 32,000 people or 1.8% of the population. 11 Applying 1.8% of the population to Governor Lloyd's 12 estimate, we get 9,000 Ngok in 1908. 13 The SPLM/A estimate of 50,000 ignores the population 14 estimates in the record: 15,000 in 1934 -- these are 15 estimates -- 20,000-25,000 in 1948, 30,000 in 1951 and 16 1952, and the census of just over 31,000. These numbers 17 are in line with our position that the population of the 18 Ngok in 1905 was of the order of 5,000-10,000; 5,000 may 19 be a slight underestimate, but the order of magnitude is 20 right. You can see the contrast in the table on the 21 screen. 22 Given the improvements that occurred in health, food 23 distribution, the definitive abolition of slaving and 24 raiding after the transfer, it is inconceivable that the 25 Ngok population declined after 1905. That produces the</p> <p style="text-align: center;">Page 86</p>	<p>15:07 1 area before and after 1905 in strictly chronological 2 order. 3 The contemporary sketches and reports which either 4 depict or describe where the Ngok lived in and after 5 1905 are essentially convergent. This is vital for two 6 reasons. 7 First, the ABC experts were supposed to base their 8 conclusions on scientific evidence and research, not on 9 mythology or on unfounded preference for transhumance 10 over a nomadic lifestyle. Secondly the question, as the 11 SPLM/A agrees, is the position in 1905 when the ABC 12 experts treated themselves as unconstrained by that 13 date. 14 Let's go to the indications before 1905, and we 15 start with Wilkinson in his 1902 journey. He provided 16 crucial data as to where the Ngok lived in 1902. He may 17 have got the name of the Ragaba ez Zarga wrong, or he 18 may have thought that the Bahr el Arab went up for 19 a short period to the Ragaba ez Zarga; but that's 20 independent of the point I'm making now. His 21 observations still allow us to say pretty much where the 22 Ngok actually lived at the time of his visit. 23 According to his travel itinerary from El Obeid to 24 Sultan Rob's, the first Dinka village he reached was the 25 village of Bombo; it's called "Bongo" on the map; 9°32'</p> <p style="text-align: center;">Page 88</p>

<p>15:08 1 north, 28°49' east. This village was, however, much to 2 the SPLM/A's disapproval, empty. The SPLM/A finds the 3 observation of emptiness specious, but it's a fact. 4 A fact is neither specious nor unspecious. 5 Repeatedly the SPLM/A claims that no negative 6 inference can be observed from the fact that Wilkinson 7 and others didn't observe any Ngok. They are said to 8 have been hiding, or the Condominium officials only 9 visited the relevant areas in the dry season when they 10 were further south. 11 It's fair to say that no negative inference can be 12 drawn from a single occasion of a visit from not seeing 13 someone; but the point is the comprehensive absence of 14 evidence. In this case the absence of evidence is the 15 evidence of absence: there is not a single sighting of 16 the Ngok in areas to north of where they were sighted by 17 Wilkinson at the relevant period. 18 In any case, the dry season claim is easily 19 rebutted. Wilkinson's sketch states that Bongo or Bombo 20 was "inhabited in the rains". He and other officials 21 such as Willis, to whom we will return, knew where the 22 Ngok lived during the rains. 23 Moreover, Wilkinson and others reported everything 24 from cattle tracks to abandoned villages. Wilkinson did 25 not encounter any Ngok before he got to Etai at 9°29'</p> <p style="text-align: center;">Page 89</p>	<p>15:12 1 Arabs west of him." 2 That's Sultan Rob. 3 The river that Percival tentatively took to be the 4 Bahr el Arab, but we know really was the 5 Ragaba ez Zarga, was, according to Sultan Rob -- and 6 I quote again words from him himself: 7 "... uninhabited ... except for occasional parties 8 of wandering Arabs." 9 The phrase "wandering Arabs" has a nice touch to it 10 in the context of the competition between a transhumant 11 and a nomadic society. But he thought there was no one 12 there except wandering Arabs. 13 There are only two rivers: one was the Kiir, the 14 real Bahr el Arab, and one was the Ragaba ez Zarga. The 15 Kiir was of course inhabited. Sultan Rob was talking 16 about the Ragaba ez Zarga when he said it was only 17 inhabited by wandering Arabs. 18 Instead of accepting the observation that the 19 Ragaba ez Zarga was uninhabited except by wandering 20 Arabs, the SPLM/A may suggest that the Ngok were hiding, 21 or that Percival was only referring to: 22 "... the immediate area on or around the southern 23 bank of the Ngol/Ragaba ez Zarga." 24 They also suggest as an alternative to their hiding 25 hypothesis that Sultan Rob might have been lying. It's</p> <p style="text-align: center;">Page 91</p>
<p>15:10 1 north, 28°44' east. Both places, Bombo and Etai, are 2 far south of the Ragaba ez Zarga. We won't talk about 3 10°35'. By comparison, all of the indications along the 4 Ragaba ez Zarga are of Arab -- that is Homr -- 5 settlement. Numbers of rivers were called Bahr el Homr, 6 but the Ragaba ez Zarga in this period dominantly was 7 called the Bahr el Homr. 8 Wilkinson notes: 9 "The positions of Arab settlements marked with 10 a query are from information supplied by 11 Sheikh Ali Gula Nazir of Homr Arabs." 12 There are several villages marked with a query. 13 There are other villages not marked with a query which 14 we know to have been Arab villages. There are no 15 villages on the Ragaba ez Zarga at this period which 16 have been identified as Ngok Dinka villages. 17 I turn to Percival's 1904 sketch map. As you can 18 see, he clearly has Sultan Rob south of the Kiir, not 19 far from the village of Bongo. The village of Burakol 20 is mentioned just north of the Kiir. He states that 21 Sultan Rob was "at present living in Burakol", which 22 implies that there was movement by Sultan Rob between 23 his various villages. He also noted: 24 "There are no Dinkas west of Burakol as far as 25 I could see, and Sultan Rob told me there are only Homr</p> <p style="text-align: center;">Page 90</p>	<p>15:13 1 revealing that the only Ngok in the record who the 2 SPLM/A suggested may have been lying on some point was 3 the transferred leader himself. 4 I turn to Comyn's sketch map. This is a sketch map 5 from Comyn, another official of 1906. It clearly 6 indicates the Homr on the Bahr el Arab. 7 The SPLM/A rejoinder states that this sketch and 8 report place both the Ngok Dinka and the Messeriya 9 almost entirely outside the Arab area, and are not 10 credible sources of information. They're contemporary 11 sources of information, and the SPLM/A don't have any 12 better contemporary sources. In any event it's the 13 cumulative effect of all of the sources. 14 We now turn to Hallam's route report of 1907. 15 Hallam was an inspector in the Condominium 16 Administration. In 1907 Sultan Rob's new village was 17 recorded on the Ragaba Umm Biero. His new village is 18 described as: 19 "... covering the country between the Umm Biero and 20 the Gurf near their junction." 21 "Gurf" is another name for the Bahr el Arab: 22 "Thence the country stretched southeast towards 23 Sultan Rob's old village." 24 The description given by Hallam does not include any 25 significant extent of territory north of the</p> <p style="text-align: center;">Page 92</p>

<p>15:15 1 Bahr el Arab; nor does this or the rest of the report 2 evidence Ngok occupation anywhere near the 3 Ragaba ez Zarga, let alone north of it. 4 On the contrary, Hallam provides evidence of Arab 5 camping grounds along the Umm Biero and Ngok villages 6 along the Bahr el Arab. You will, of course, read these 7 route reports for yourself. It's instructive to read 8 them in chronological order, and you will see for 9 yourself what they say. 10 Governor Lloyd of Kordofan province, O'Connell's 11 successor, marked Arab -- that is Homr -- dry season 12 camps along the Ragaba ez Zarga in 1908. They're 13 located in the graphic on the screen, taken from Lloyd's 14 extensive account of Kordofan province. There's no 15 mention in that account of Ngok residents on the 16 Ragaba ez Zarga. 17 The last contemporary or near contemporary map 18 I will take you to is that of Bimbashi Whittingham of 19 1910. This was the first map to depict something 20 resembling the name of Abyei, namely "Abyia". 21 Whittingham measured the position of Abyia precisely, 22 and noted: 23 "I have struck it three or four times. It is about 24 3.5 miles up a tributary which is shown on the Hasoba 25 sheet."</p> <p style="text-align: center;">Page 93</p>	<p>15:18 1 On our calculation -- and it will be a matter for 2 your experts to determine -- where Whittingham said the 3 probable Dinka/Homr boundary was is not far off where 4 the 1933 Civsec sketch puts it, in terms of Ngok grazing 5 areas on that map. 6 To summarise the story so far, all reports 7 contemporary with the transfer of 1905 confirm 8 unequivocally that the Ngok lived on and around the 9 Bahr el Arab in 1905. 10 The SPLM/A accuse us of changing our position. They 11 say that we were not clear in the memorial that there 12 were Ngok to the north of the Bahr el Arab. What we 13 said, and what the transfer document said, was that in 14 1905 the Ngok were on and to the south of the 15 Bahr el Arab. 16 I have to say that by the time of the 17 counter-memorial we had found more evidence, which we 18 produced, of Ngok location both to the north and to the 19 south, and our position is as stated in the 20 counter-memorial. It is a result of our engaging in the 21 scientific research, which I regret to say the experts 22 did not. 23 The documents unequivocally contradict the claim of 24 Ngok habitation on the Ragaba ez Zarga, which is 25 reported by Sultan Rob himself to be uninhabited, except</p> <p style="text-align: center;">Page 95</p>
<p>15:16 1 The tributary was the Umm Biero. Abyia is not in 2 the same position as Burakol, which was on the right 3 bank 2 miles north up the Ragaba. Nor is it 4 Sultan Rob's village, which was of course on the south 5 bank of the Kiir. 6 It's notable that these three travellers, Wilkinson, 7 Percival and Whittingham, over a period of eight years 8 discovered the paramount chief of the Ngok situated in 9 a different village. The previous paramount chief died 10 in his most southerly village in 1906. There was some 11 indication of movement around. 12 Burakol was 2 miles up the Ragaba Umm Biero in 1904; 13 Abyia, 3.5 miles up in 1910; Abyei Town, 4.7 miles up in 14 2005, and on the opposite bank. Obviously there was 15 movement within an area, but there was still movement. 16 This confirms that Abyei Town was not a centre for 17 anything in 1905. 18 The other point to note is this in Whittingham's 19 sketch: he has a crack at determining a Dinka/Homr 20 boundary, uniquely for documents of this period. He 21 states on the map -- and you can see it, I hope 22 highlighted ... It's not highlighted, but if you look 23 carefully you will be able to see it, and you will be 24 able to see it in the bigger versions in the pleadings. 25 Probable Dinka/Homr boundary well to the south.</p> <p style="text-align: center;">Page 94</p>	<p>15:19 1 for wandering parties of Arabs. That's the contemporary 2 documentation. What about later documentation? Let's 3 run through this relatively briefly. 4 First we have Heinekey's route reports of 1918. 5 Bimbashi Heinekey travelled from Muglad to Gerinti, 6 a town close to the Darfur boundary, north of the 7 Bahr el Arab. His route, which is on the screen now, 8 then took him south along the Bahr el Arab until he came 9 to Mek Kwal's village, where he turned north and 10 travelled towards the Ragaba Umm Biero, and from there 11 further north again. 12 We stated that Heinekey's route reports largely 13 speak for themselves in the memorial, and that is true. 14 The SPLM/A rejects the inferences of Heinekey's report 15 on the ground that it is: 16 "... directed almost exclusively to unelaborated 17 topographical observations, focusing on watering places 18 and similar features and providing almost no use in 19 identifying the occupants of the Abyei Area (i.e. the 20 Ngok)." 21 In fact, that's what they say about most of the 22 officials. But the fact is that there is no indication 23 that Heinekey and others did observe the Ngok on their 24 voyages. In particular the Ngok were not seen to 25 inhabit the Ragaba ez Zarga.</p> <p style="text-align: center;">Page 96</p>

<p>15:21 1 Heinekey noted Homr cattle and Homr camps on his way 2 to Gerinti, and again only Homr north of Mek Kwal's 3 village. He mentioned Ngok villages along the 4 Bahr el Arab. The villages are there for you to see. 5 For a man who only made topographical observations, 6 Heinekey noted quite a few. 7 For approximately 85% of his lengthy journey he was 8 travelling through what the SPLM/A memorial puts forward 9 was Ngok Dinka country, the vast area below 10°35'. Yet 10 for most of his trip the Ngok were notable only for 11 their absence. 12 Finally he says that from Gerinti, north of the 13 Bahr el Arab near the Darfur boundary, to Mek Kwal's 14 village: 15 "... there is no track of any sort." 16 So he confirms the view which you would get from the 17 Civsec map that this area was uninhabited. That's 18 consistent with what Sultan Rob himself said. 19 The SPLM/A finds the notion of an unpopulated 20 stretch of land here "entirely implausible", but of 21 course anything that conflicts with their claim is 22 implausible, irrespective of the fact of its multiple 23 confirmation in the written sources. 24 I turn now to Dupuis's sketch of Dar Homr of 1921. 25 This is what it's called, a wheel-and-compass sketch,</p> <p style="text-align: center;">Page 97</p>	<p>15:24 1 Ngok houses where the SPLM/A would like them to be. It 2 was not before Lukji, which is approximately 3 16 kilometres north of the Bahr el Arab, that he 4 reported the first Ngok houses, and these are 5 distinctive houses. 6 The SPLM/A states: 7 "Henderson's account of a single 200-kilometre truck 8 ride in a dry season did not even remotely purport to 9 survey the extent of Ngok Dinka territories and provided 10 only a limited glimpse through a very narrow keyhole." 11 Let's consider the facts. In 1933 he was travelling 12 on the motor road that passes through the famous 13 settlement of Tebeldiya. He travelled on the very road 14 that the Ngok were said to be responsible for, according 15 to SPLM/A witness statements. He reports that the first 16 Dinka houses were seen at Lukji. That is well south of 17 the Ragaba ez Zarga and much further south of Tebeldiya. 18 It would be a very long walk to work. 19 I now refer to the 1941 Kordofan Native 20 Administration Act. The 1941 Administration Act sets 21 out the native administrations in Kordofan at that time, 22 and you will see at the bottom, in the southeasterly 23 corner of Kordofan, an area which says "Dinka", which is 24 located where Abyei is located. That was the local 25 government area map of that time.</p> <p style="text-align: center;">Page 99</p>
<p>15:22 1 but I don't propose to recall Mr MacDonald to explain 2 what that is. His sketch shows no sign of Ngok presence 3 in the area claimed by the SPLM/A. The most northerly 4 indication of Ngok presence that we can find is the word 5 "dugdug", which is indicative of a Ngok cattle camp, 6 some miles north of Lukji on the Umm Biero. 7 Then we have Titherington's 1924 sketch map. I'll 8 come back to it later in the context of the southern 9 boundary. But it should be noted that there is 10 an adaption on the left bank of the Umm Biero, just 11 north of the Bahr el Arab, when it says: 12 "Abyei ..." 13 Spelt properly: 14 "... [Chief Kwal Arob's since 1918]." 15 This is the best evidence in the record of the date 16 from which Kwal Arob took up residence in Abyei -- the 17 modern Abyei -- in 1918. 18 The final route report I would like to address is 19 that of Henderson of 1933. Henderson was 20 a distinguished scholar as well as a long-time civil 21 servant in the Sudan. He was Governor of Darfur 22 province from 1949 to 1953. 23 In 1933 Henderson travelled from Muglad to Abyei on 24 the main road by way of Tebeldiya, Antila, Lukji and 25 Na'am. As various travellers, he did not notice any</p> <p style="text-align: center;">Page 98</p>	<p>15:26 1 The SPLM/A states that the map is unsophisticated, 2 and it's not very sophisticated, that's true, but 3 sophistication is not a criterion of evidence. Indeed, 4 some of the most sophisticated evidence one hears is 5 some of the most unreliable. 6 The SPLM/A further complains that: 7 "Whatever information it is based on is unknown, and 8 it almost certainly did not involve any consultation 9 with the Ngok." 10 Now, we don't suggest that the British set up 11 a local administration area in the furtherance of the 12 principle of self-determination. It was a local 13 government area for the Ngok; that was all it was. But 14 that's not the point. The point for present purposes is 15 the location of the Ngok in 1905. 16 In 1949, when there were possibly five times as many 17 Ngok as in 1905, the Condominium Government established 18 a local government area for them. No doubt some Ngok 19 would have been living outside that area but the 20 concentration of them must have been within it; that's 21 the point of having local government. The rest of the 22 local government area in that part of Kordofan was, 23 of course, for the Homr. 24 The map clearly indicates where the Ngok were 25 exercising local government or self-administration in</p> <p style="text-align: center;">Page 100</p>

<p>15:27 1 1941. It is inconceivable that that same community, 2 living in an area of roughly 3,000 square kilometres 3 could in 1905 have inhabited 23,300 square kilometres 4 which the SPLM/A claim. 5 You can see their claim line on the screen 6 superimposed on the local government area map. It bears 7 no relationship to the Abyei local government area. 8 That's what I meant when I referred earlier to 9 a contrario evidence. It's powerful a contrario 10 evidence. 11 Mr President, members of the Tribunal, all these 12 documents confirm the position of the Ngok on and around 13 the Bahr el Arab in 1905. These sketches and maps, 14 moreover, correspond to maps published by various 15 scholars. I will go through these even more quickly -- 16 they are, after all, only academics; academics and some 17 Government administrators perhaps -- but I invite you to 18 study the versions in your folders in more detail. 19 I refer first to Cunnison's 1954 map. 20 Professor Cunnison, the professionally trained 21 anthropologist in the great tradition of British field 22 anthropology in central and eastern Africa, as his 23 second major anthropological fieldwork conducted over 24 three years a detailed study of the Baggara Arabs. 25 Over two whole seasons he engaged in their migratory</p> <p style="text-align: center;">Page 101</p>	<p>15:30 1 Geoffrey Lienhardt is well known as the main 2 anthropologist of the Dinka, in particular of Dinka 3 religion. It's true, as our friends opposite point out, 4 that he was not an expert on the Ngok as such -- he 5 worked with another group of Dinka, the Dinka is a very 6 large population in Southern Sudan -- but he knew the 7 paramount chief, he visited Abyei. 8 He would not have published a map, as an expert on 9 the Dinka, which bore no relationship to where the Ngok 10 were. You can see where he shows the Ngok: jammed in 11 near the Bahr el Arab, way south of the shared rights 12 area. 13 These, of course, are very small-scale maps; they 14 are not definitive and they certainly don't help you to 15 show the Abyei Area in detail, like some of the other 16 information I've given you. But they're indicative of 17 a general picture, especially when they are all 18 consistent with each other. 19 Then we have Lebon's map of 1965, a similar picture, 20 and then Collins's map of 1971. 21 All these admittedly small-scale maps, the ones I've 22 shown you recently, show the Ngok more or less in the 23 same place. It's the same place where contemporary 24 travellers reported them to live: on and around the 25 Bahr el Arab, to some extent south of the river, to some</p> <p style="text-align: center;">Page 103</p>
<p>15:29 1 activity, which he records very clearly both in 2 contemporary publications at the time he was doing it, 3 in the early 1950s, and later in his classic book 4 Baggara Arabs of 1966. 5 You can see where he puts the Dinka on the map in 6 his 1954 sketch map of Dar Homr. Now you can see, taken 7 from the 1966 book his indication of where the Homr 8 omodiyas migrated to on their summer migration; well 9 south of the shared rights area. 10 You will of course have read what Professor Cunnison 11 says in his two witness statements on that subject, 12 which are merely -- "merely" is perhaps the wrong 13 word -- which are entirely consistent with his published 14 writings deriving from his fieldwork. 15 Then we have, slightly out of chronological order, 16 Mr Tibbs. Mr Tibbs was the last assistant district 17 administrator to Dar Messiriya. He published 18 a charming -- well, published, it was self-published -- 19 book published in 1999, but he was actually in the area 20 for a couple of years at the same time as Cunnison, who 21 he met with. Cunnison was there much more continually 22 than Tibbs, who was normally further north. But you can 23 see where Tibbs puts the Ngok, and it's well south of 24 the shared rights area. 25 Then we have Geoffrey Lienhardt's 1971 map.</p> <p style="text-align: center;">Page 102</p>	<p>15:32 1 extent north of the river, in particular in the area 2 between the river and the Umm Biero and just on the 3 other side of it; not -- I repeat not -- on the 4 Ragaba ez Zarga. 5 Let me consider then, after this chronological 6 review, the evidence for a Ngok boundary in 1905, which 7 is after all, if you accept the SPLM/A's interpretation 8 of the formula, what you have to decide in this part of 9 the case. 10 We don't suggest that there is enough information, 11 as it were, to draw the line for you. Some level of 12 assessment is required. But there is enough information 13 for you to establish in general terms where the Ngok 14 lived. 15 Let's recall the 1933 map. Consistently with the 16 Civsec map of 1933, we would expect a 1905 tribal 17 boundary to include not more than this area; we would 18 expect it not to have contact with the Darfur boundary; 19 we would expect it to be limited to a line to the south; 20 we would expect it not to be on the Ragaba ez Zarga; we 21 would expect it not to go very far east. 22 Let me take each of those boundaries. First, and in 23 some respects easiest, is the southern boundary. 24 In 1905 the Twic Dinka were the southern neighbours 25 of the Ngok; this is undisputed. Contemporary records</p> <p style="text-align: center;">Page 104</p>

<p>15:33 1 are clear that the Twic lived between the Kiir and the 2 Lol. The Twic were transferred back to the Bahr el Arab 3 province. Precisely when this happened is uncertain, 4 except that we do know that it happened in the early 5 1920s. 6 In 1922 the district commissioner of western 7 Kordofan, Dupuis, referred to the Twic in his note on 8 the Dinka of western Kordofan, thus apparently placing 9 them within Kordofan at that time. 10 In 1924, however, a province boundary on 11 Titherington's sketch is very significant because it 12 establishes both the straight line boundary between 13 Bahr el Ghazal and Kordofan and exactly the same 14 boundary between the Ngok and the Twic; you see that to 15 the right-hand side of the map. The reference to Mareig 16 Dinkas is another name for Ngok; Mareig is another word 17 for Ngok. 18 By 1928 the monthly record of the Sudan referred to 19 the Twic area under the section on Bahr el Ghazal 20 province, showing that they had been transferred back to 21 Bahr el Ghazal by 1928, and nothing turns on the date. 22 The southern straight-line boundary is therefore the 23 boundary of the Ngok territory, at least in the section 24 shown on Titherington's map, though I've shown for you 25 that the area especially to the west seems to have been</p> <p style="text-align: center;">Page 105</p>	<p>15:36 1 simply giving you the indications where, consistently 2 with the body of the evidence, tribal boundaries would 3 be drawn if they had to be drawn. 4 The Ngok northern boundary, the most important 5 boundary. 6 Prior to 1905 the provincial boundary was the 7 Bahr el Arab, as the evidence of Alastair MacDonald 8 shows and as the argument of Mr Bundy shows. In 1905 9 the Ngok lived on and around the Bahr el Arab, not on 10 the Ragaba ez Zarga. 11 The first village encountered by Wilkinson in 1902 12 was Bongo, 24 kilometres after he crossed the 13 Ragaba ez Zarga. Mirroring Wilkinson's observation, 14 Willis notes Bongo as the furthest place north the Ngok 15 dare to go. He states: 16 "Just after the rains they go as far north as they 17 think safe from the Arabs (Bongo or El Myat)." 18 El Myat is apparently a swamp near Bongo. 19 This is in line with Percival's observations in 20 1904. Wilkinson's sketch map includes both Bongo and 21 El Myat, which were situated below 9°36'. Both 22 Wilkinson and Willis associated the village with Ngok 23 habitation during the rains. This confirms that the 24 Condominium officials knew where the Ngok were during 25 the rains.</p> <p style="text-align: center;">Page 107</p>
<p>15:35 1 uninhabited. 2 I referred to the Ngok western boundary. We 3 emphasise that Sultan Rob said that no one lived, except 4 for the Homr Arabs, to the west of Burakol. The area 5 was seen to have no tracks when it was travelled in 6 1910. Burakol was located between the Ragaba Umm Biero 7 and the Bahr el Arab roughly at 28°35' east. So the 8 boundary would have been slightly to the west of 9 Burakol. There's no evidence of Ngok presence further 10 to the west, for reasons I've stated. 11 Then we have the Ngok eastern boundary, Dupuis's 12 1921 wheel-and-compass sketch clearly depicts both the 13 Ngok and the Ruweng. The Ruweng were a different Dinka 14 group, not the Ngok. They must lie off the eastern 15 border of the Ngok. 16 In our counter-memorial we stated that the Ngok 17 territory did not extend east of Sultan Rob's village. 18 In their rejoinder, the SPLM/A insisted that Anyanga be 19 included in the area of the Ngok, and we accepted that 20 point. We think that's correct. Consequently the 21 eastern border of the Ngok must have been somewhere east 22 of Etai and Anyanga, somewhere near 28°50'. Etai is, of 23 course, where Wilkinson encountered his first Dinka in 24 1922. 25 I will try and put this all together later but I am</p> <p style="text-align: center;">Page 106</p>	<p>15:38 1 Thus from contemporary documents we may infer that 2 the Ngok in the early 20th century inhabited an area 3 north of the Lol but south of 9°36' north latitude. 4 We know from other indications, to which I will 5 return, that the area was approximately between 6 longitude 28°50' east and 28°05' east. That area, 7 roughly similar to the area shown on the Civsec map, is 8 dwarfed in comparison with the area allocated by the ABC 9 experts. 10 Two final points: the Ragaba ez Zarga and the area 11 to the north. 12 The SPLM/A claims that the Ngok lived on the 13 Ragaba ez Zarga, but that claim is not supported by any 14 contemporary evidence. Wilkinson in 1902 found only 15 Arab settlements on the Ragaba ez Zarga. Percival 16 reported that he found no trace of inhabitants, but 17 Sultan Rob told him that parties of wandering Arabs 18 frequented the area. 19 In 1907 Comyn depicts the Homr just north of the 20 Bahr el Arab. Hallam's route map of 1907 places the 21 Ngok on and around the Bahr el Arab, not on the 22 Ragaba ez Zarga. 23 In 1908 Watkiss Lloyd, Governor of Kordofan, 24 completed his detailed report of the province. He 25 records:</p> <p style="text-align: center;">Page 108</p>

<p>15:39 1 "The Homrs cultivate around Muglad and Baraka, but 2 as soon as the water dries up they migrate towards the 3 Bahr el Homr." 4 He was talking about the Ragaba ez Zarga. He 5 specifies the precise locations of the dry season camps 6 along the river; you've seen them in the graphic. There 7 is no mention of Ngok in this area in that report. 8 Thus the evidence is -- the evidence of contemporary 9 documents -- that there were no Ngok on the 10 Ragaba ez Zarga at the time of the transfer. On the 11 contrary, this river was inhabited in the dry season by 12 the Homr, as stated by Lloyd in his 1908 report. 13 I turn to the position north of the Ragaba ez Zarga. 14 In this regard it's relevant to quote Professor Daly, as 15 I do. He says: 16 "For the area north of the Ragaba ez Zarga, the goz 17 region of stabilised sand dunes growing scrub that 18 sustains seasonal grazing, we are left to consider 19 evidence from oral sources recorded during the 20 post-colonial disputation of Abyei boundaries; evidence 21 of archaeology and etymology." 22 That is a very polite way of saying that there is no 23 contemporary evidence of Ngok occupation north of the 24 Ragaba. In that respect Professor Daly gets it 25 absolutely right.</p> <p style="text-align: center;">Page 109</p>	<p>15:42 1 to the same conclusion: there were no Ngok on the 2 Ragaba ez Zarga; there were no Ngok permanent 3 inhabitants north of the Ragaba ez Zarga. Contemporary 4 and later evidence all confirm the conclusion that they 5 were on and around the Bahr el Arab, not further south 6 than the village of Bongo at 9°32'. 7 Where 10°35' gets you from there; well, you can set 8 aside that for yourself. 9 The SPLM/A, of course, do make an extraordinary 10 claim for Ngok habitation so far north. They've never 11 been observed living there, but that's because they 12 habitually disappear; a bit like the Scarlet Pimpernel 13 Mr President, "damned elusive". 14 Let's consider the facts under various headings; 15 first of all the SPLM/A argument based on toponymy, or 16 the naming of places. 17 The SPLM/A relies extensively on toponymy, the idea 18 that knowledge of Ngok place names attributed to modern 19 towns suggests that they were in 1905 Ngok places. Yet 20 many places throughout the Bahr el Ghazal have Arab 21 names. That doesn't mean that they were originally 22 Arab. In fact, it's a quite general pattern that places 23 in this region are named in both languages. 24 Ngok toponymy nonetheless appears to have struck 25 a chord with the experts, who emphasised in their</p> <p style="text-align: center;">Page 111</p>
<p>15:41 1 No documentary sources support the proposition of 2 Ngok habitation, permanent or transitory, to the north 3 of the Ragaba ez Zarga. Of course, individual Ngok 4 would have travelled across that area, as they did on 5 their way to the provincial capital, but that's 6 different. That's not the sort of occupation which 7 gives you the Abyei Area. The only sources on which 8 this claim relies is made up of witness statements, oral 9 traditions and Ngok toponymy. 10 Professor Daly goes on to say: 11 "Because our terms of reference specify the position 12 in 1905, we have no way precisely to delimit the 13 northern border of the Ngok territory in the goz." 14 Well, you can decode that sentence for yourself, 15 "Because our terms of reference specify the position of 16 1905"; it's not Professor Daly's terms of reference, 17 it's your mandate that specifies that definition. 18 According even to Professor Daly, there is no way 19 precisely to delimit the northern border of the Ngok 20 territory in the goz. Since the burden of proof at this 21 stage is on them in relation to this question, that is 22 an acceptance that they haven't demonstrated that 23 matter. Of course, Professor Daly's expertise is 24 geographical, not anthropological. 25 To conclude, all the evidence points overwhelmingly</p> <p style="text-align: center;">Page 110</p>	<p>15:44 1 summary that the Ngok gave a detailed account of place 2 names for permanent settlements and grazing grounds for 3 each of the nine Ngok Dinka chiefdoms and said that this 4 contrasted with the sparse details given by Messiriya 5 witnesses. 6 The fact that the places are named in a certain 7 language does not, however, mean that they were part of 8 a transferred area in 1905. A name does not connote 9 ownership, much less physical possession or usage in 10 1905. The name Khartoum, for example, is said to be 11 a Dinka name. Places such as El Oddaya and Muglad have 12 Dinka names as well, but not even the SPLM/A were 13 prepared to claim them. 14 Even the ABC experts had limits to their toponymic 15 tolerance. During the Khartoum interviews a member of 16 the Alei tribe listed 28 Ngok place names, including 17 El Oddaya and Muglad. The response, according to the 18 ABC experts' report, was as follows: 19 "We pointed out that the Ngok were not claiming to 20 return to Muglad and El Oddaya. What we needed was 21 evidence of Pawol, Nyama, et cetera." 22 That's the experts telling the Ngok which places 23 they want to name, and rejecting some names because 24 they're not in accordance with a preconceived idea of 25 what sort of claim might be made. And the response was</p> <p style="text-align: center;">Page 112</p>

<p>15:45 1 to refer to Tebeldiya. 2 We'll return in due course to the rest house at 3 Tebeldiya. Suffice it to say that toponymy proves far 4 too much, and therefore nothing at all. 5 I refer next to the oral evidence. I've already 6 made some remarks about oral evidence in general. It's 7 time to refer to some specific SPLM/A arguments in the 8 mode of tribal lays. 9 I'm going to take just one argument by way of 10 example: the repeated refrain in Ngok witness statements 11 that they never saw the Messiriya until the 12 mid-20th century, and that it was only after the middle 13 part of the 20th century that the Messiriya acquired 14 cattle. 15 The SPLM/A present 26 witness statements in their 16 original pleading. We obviously don't have time to go 17 through those 26 witness statements, and indeed you'll 18 only find in the text of my speech the references to 19 some of them. The SPLM/A advances the view that these 20 witness statements ought to be preferred over 21 documentary sources, which provide no support for the 22 propositions in the witness statements, because the 23 witness statements are highly detailed and consistent. 24 Indeed, they're suspiciously consistent. They tell 25 us the Messiriya did not start coming down to the Ngok</p> <p style="text-align: center;">Page 113</p>	<p>15:49 1 made towards the end of the dry season, mainly around 2 the largest water course, the Ragaba Umm Biero and the 3 Ragaba ez Zarga. Finally much of the Bahr ['much of the 4 Bahr'] has permanent Dinka settlements. Though during 5 most of the time the Homr occupy it, the Dinka are with 6 their cattle south of the Bahr el Arab." 7 That is an entirely independent study by the 8 anthropologist of the Baggara Arabs of the early 1950s. 9 It's totally inconsistent with the story that the 10 Baggara did not migrate south with cattle at that time. 11 Totally inconsistent. 12 Moreover, Professor Cunnison goes on to say that he 13 has no reason, based on his study of the subject and of 14 the literature and of the documentation, to believe that 15 this pattern was not of long-standing. 16 Of the 14 Ngok witnesses who give evidence about 17 contacts with the Messiriya, eight testify that the Homr 18 did not bring cattle into the region until after the 19 mid-20th century. Apparently Professor Cunnison was 20 imagining things on those long hot walks. The virtual 21 unanimity in the Ngok oral evidence in favour of 22 incredible propositions discredits the whole corpus. 23 Mr President, I was going to go on to say some words 24 about the community mapping project, but we'll leave 25 those comments for a brief cross-examination tomorrow.</p> <p style="text-align: center;">Page 115</p>
<p>15:47 1 lands until the mid-1950s. Moreover, the Ngok assert in 2 these witness statements that when the Messiriya did 3 eventually come down to the Ragaba and the Bahr el Arab 4 they were merely traders, not cattle herders. It 5 appeared that they subsequently diversified. 6 These assertions are extraordinary. As we've 7 already seen, there is a wealth of documentary evidence 8 showing the Homr grazing south of the Ragaba ez Zarga in 9 and after the period of the transfer. 10 Let me take the writings of the only professional 11 anthropologist to give evidence in this case, 12 Professor Ian Cunnison. He records his experiences 13 travelling with the Homr, with large herds of cattle -- 14 they left some behind, but they travelled with most of 15 them -- travelling through the goz down to the Bahr. He 16 is an impartial witness. He knew where he was. He 17 travelled with the tribes. He went as far south as the 18 Bahr el Arab. Describing the Homr migration, he says: 19 "The Bahr is the name which the Homr give to the 20 whole of the dry season watering country. Within it 21 they recognise different districts. The Ragaba is the 22 northern part of the Bahr, where the Homr make their 23 earliest dry season camps." 24 That's consistent with what Lloyd said in 1908. 25 "The Bahr proper is the region where the camps are</p> <p style="text-align: center;">Page 114</p>	<p>15:50 1 We've dealt with it in the pleadings, and we refer to 2 what we said on the community mapping project. 3 I refer now to Tebeldiya. Like many names in Sudan 4 this one derives from a tree. The 1931 gazetteer lists 5 18 towns called Tebeldiya. But there's not a shred of 6 documentary evidence that supports the assertion that in 7 1905 the boundaries of the Ngok extended to Tebeldiya. 8 It's a submission entirely reliant upon Ngok oral 9 tradition. 10 The rest house at Tebeldiya is the only evidentiary 11 basis on which the experts proposed the 10°35' claimed 12 border as entitled to any weight. And it was entitled 13 to weight, even though it was rejected: it is one half 14 of the reasoning which leads you to 10°23'30". 15 The SPLM/A witness statements regarding Tebeldiya 16 have been dealt with in our counter-memorial, and I will 17 not repeat them. I've already taken you to Vansina's 18 comments regarding methodology. It's illustrative to 19 note the way in which our colleagues opposite attempted 20 to gather witness testimony on Tebeldiya in the 21 following question: 22 "Did your grandfather and his father help to clear 23 the road to Tebeldiya that was constructed when the 24 British colonial administration began? When did your 25 chiefdom clear the road?"</p> <p style="text-align: center;">Page 116</p>

<p>15:52 1 That is a totally improper question, because it 2 contains first of all a statement which is very probably 3 false. There's no indication that the British colonial 4 administration constructed the road when the 5 administration began. The probability is that the road 6 was always there as a path, and that the improvement of 7 the road happened later on. 8 Secondly, it implies that the great-grandfather was 9 there when the British colonial administration began; 10 which, in terms of the chronology, is in many cases 11 unlikely. 12 "Where did your chiefdom clear the road?" implies 13 the answer that they did. 14 But the remarkable feature about this is: we didn't 15 even get the answers. The question having been asked in 16 a wholly improper way, the answers were not included in 17 the report. We can only infer that they would not have 18 assisted the SPLM/A case. 19 I turn to the ABC experts' argument based on 20 dominant and secondary rights. It's true that 21 an anthropologist would say that there was a distinction 22 in the lifestyle between the [Baggara] and the Ngok. 23 The Ngok are technically transhumant; the Baggara are 24 technically nomadic. 25 The beginning of my academic career and professional</p> <p style="text-align: center;">Page 117</p>	<p>15:55 1 terra nullius. They're not terra nullius in 2 international law, and they're not terra nullius on any 3 other basis. They're part of Kordofan. 4 I refer now very briefly to the SPLM/A's tribal 5 maps. The SPLM/A, as part of their argument, have tried 6 to, as it were, display oral evidence in all sorts of 7 forms as a method of making up for the absence of actual 8 documentary evidence. 9 Here they have a person in a rather unusual posture. 10 We speculated about what the posture was, whether it's 11 a posture of surrender, but we think not. Anyone who 12 gets that much territory has not surrendered. We think 13 it could be crossing the winning post and celebrating, 14 though we're not sure whether the celebration is in the 15 3.10 race to get to the north, or the 4.15 gallopers' 16 contest to grab the oilfields. At least there's some 17 prize at the end of it. 18 But it's instructive to look -- this is the 19 composite -- it's instructive to look at each of the 20 nine tribes. What we did was to take the specific 21 references to the nine tribes that we could find in maps 22 of the period up to 1936, and compare it with references 23 to that chiefdom that were made by the SPLM/A. 24 This is the Abyior chiefdom; I'm taking them in 25 alphabetical order. You can see where they're supposed</p> <p style="text-align: center;">Page 119</p>
<p>15:53 1 career as an international lawyer was marked by the 2 Western Sahara case, a great decision which got rid of 3 the inherent bias associated with colonial theories of 4 the acquisition of territory. It's somewhat remarkable 5 to find the social scientists who'd criticise the 6 international lawyers for their terra nullius theories 7 adopting it here. 8 On what basis can you say that one sort of lifestyle 9 trumps another? On what basis can you say that rights 10 of use of different sorts -- and they're functional 11 rights in all cases; none of them amount to ownership 12 under the applicable law -- trump another? That is 13 simply pulled out of a hat. It's part of an applicable 14 law by a body that did not have an applicable law 15 clause, and had no authority to decide a transferred 16 area as a matter of 1905 by reference to concoctions of 17 a post-colonial but still colonialist law. 18 As Ambassador Dirdeiry stressed in his opening, this 19 case, we hope, is not a confrontation between Ngok and 20 Messiriya. There are people on all sides of this 21 dispute. The position is much more complicated than 22 might be thought. 23 The region itself is populated by many different 24 groups. There are parts of it that remain, even today, 25 permanently uninhabited. That doesn't mean they're</p> <p style="text-align: center;">Page 118</p>	<p>15:57 1 to be. The actual map references to the Abyior are in 2 what might be described politely as the "underarm" of 3 the successful athlete; they're nowhere near the north. 4 Then we have the Achak chiefdom. Again you can see 5 where they're supposed to be in accordance with oral 6 tradition, and where the maps show them as being. The 7 colours represent different periods in relation to the 8 overall period from the early 20th century up to 1936. 9 Then we have the Acheung chiefdom; a vaster area in 10 a light grey, unexplained in the SPLM/A pleadings, 11 together with references further south, consistently 12 with the pattern of actual occupation that I've shown 13 you. 14 Then we have next the Alei. The Alei, I'm afraid, 15 miss out entirely. Perhaps they don't share in the 16 spoils. 17 The Anyiel, all to the south. 18 Quite a number of references to Bongo in the south; 19 absolutely nothing in the north. 20 The Diil. Quite lot of references to the Diil, and 21 this is perhaps the most accurate of the correspondences 22 between references in maps to reference to tribal areas. 23 But still it's the southern half of the imputed tribal 24 area, and not the northern half. 25 The Manyuar -- sorry, I'm trying to read at this</p> <p style="text-align: center;">Page 120</p>

<p>15:58 1 distance and my eyes are fading -- again, well in the 2 south. 3 The Mareng: lots of references in the south. 4 That's it, that's the nine. Well, I'm afraid the 5 winning post was a long way further away than the 6 athlete thought. 7 I now want to refer to the new maps which the SPLM/A 8 have put in as a result of the flurry of recent 9 activity, trying to discover what's in the archives. 10 I'm just going to take you through the maps and comment 11 on them in turn. 12 The first is Wilkinson 1902. The SPLM/A complained 13 that we only submitted part of the Wilkinson route 14 sketch from Debekir to the River Kiir in 1902, which is 15 on the screen. That's correct. We received two 16 extracts from the sketch from the Sudan Survey 17 Department, and submitted one of them, covering the 18 lower part of the area, in our counter-memorial atlas. 19 The second extract we received covers the more 20 northerly area which is highlighted. It's now displayed 21 in full. We had seen that before but we did not include 22 it in the counter-memorial atlas because it did not 23 strike us as containing any particularly relevant 24 information. All it shows that the El Debekir is 25 clearly labelled as Homr. That's highlighted now.</p> <p style="text-align: center;">Page 121</p>	<p>16:01 1 we had not seen this before at all. It's now on the 2 screen. Here it is in its geographical context. 3 Only a small section of this sketch lies within the 4 area claimed by the SPLM/A. Again, the only point of 5 relevance is that El Debekir is highlighted as a Homr 6 settlement. 7 That's really the only comments we have on the 8 Wilkinson material. 9 Then there was a new Whittingham map. On 3rd April 10 the SPLM/A produced a route sketch prepared by 11 Whittingham in 1910 which they titled "Turda to Koak & 12 Bara to Mellum", although the sketch itself is untitled. 13 The Government had already submitted a sketch by 14 Whittingham from 1910 in its counter-memorial covering 15 the route that you can see on the screen now, and I have 16 described what Whittingham saw on that particular 17 voyage. 18 The new sketch produced by the SPLM/A certainly 19 covers an area of relevance to this case, and we're 20 grateful to them for finding it. It fills one of the 21 gaps. 22 The first point is that its attempt to assemble the 23 sketch from its constituent parts went a little awry. 24 The southwest corner of the collage actually covers an 25 area further south, near Sultan Rob's old village. It</p> <p style="text-align: center;">Page 123</p>
<p>16:00 1 We submitted this section to the Tribunal and to the 2 SPLM/A when requested to do so. We have -- you may not 3 believe it -- tried rather hard to limit the burden of 4 paper on you, so we didn't show you everything we had. 5 We are certainly happy to respond to any requests, even 6 now. 7 The area of the sketch highlighted in yellow was 8 obtained from the Sudan Survey Department by the SPLM/A 9 and sent to us on 3rd April. We hadn't seen that 10 before; why I do not know. But I have to say, 11 Mr President, members of the tribunal, this has been 12 from a forensic point of view the case from hell. We 13 have had to plead three rounds in seven months, and 14 getting the documentary record together has been 15 difficult, as you can imagine. 16 We hadn't seen this. An examination of the little 17 bit that's shown reveals only one point of interest: 18 namely that Wilkinson understood Fauwel to be a Homr 19 settlement. We knew that already, of course. The ABC 20 experts treated it as falling well within the area of 21 Ngok primary rights. Fauwel is a Ngok settlement, 22 apparently. 23 On 3rd April the SPLM/A also submitted a sketch of 24 Wilkinson's journey from Debiri to Keilak and Debekir 25 before he travelled down to Sultan Rob on the Kiir, and</p> <p style="text-align: center;">Page 122</p>	<p>16:02 1 goes like that (indicates). 2 Sadly for the SPLM/A, Whittingham's sketch of the 3 area in question contains no information on the location 4 of Ngok Dinka tribes, or indeed anything of real 5 relevance to this case, though we may be told the 6 contrary when they speak. 7 Mr President, members of the Tribunal, the other day 8 we were told that further maps would be submitted; they 9 have not been submitted. I think I can stop on that 10 point here. 11 The new material submitted and not submitted shows 12 nothing of relevance to this case. 13 Mr President, members of the Tribunal, just as the 14 1933 Civsec map constitutes the best depiction of Ngok 15 territory for the Condominium period, so does the 16 following account by Inspector Willis provide the best 17 written description of it, and it has the advantage of 18 being much closer to the relevant date. The description 19 dates from 1909, "An Account of the Western Kordofan 20 Dinka". Let me read it to you: 21 "All along the Gurf [the Gurf is the Bahr el Arab] 22 are villages consisting of perhaps two or three houses 23 each." 24 Not indications of a very large population: 25 "The ones I saw at the ferry by Rob's old village</p> <p style="text-align: center;">Page 124</p>

<p>16:04 1 were about a mile apart, and I was told they continued 2 all along the Gurf both ways. Total distance from 3 end-to-end in which these Dinkas live (Lar and Rob) is 4 not more than two days (say 50 miles). They gather 5 together in the rains in order to combine to make their 6 houses, which are two sizes, one about 15-20 yards 7 diameter and 25 feet high for the men, and a very much 8 smaller one in which the door is a mere hole for the 9 women ..."</p> <p>10 I'm sure that doesn't happen now: 11 "Just after the rains they go as far north as they 12 think safe from the Arabs (Bongo or El Myat) there they 13 build temporary villages, no doubt owing to the 14 prevalence of mosquitoes. As the water dries up and the 15 mosquitoes decrease, the Dinkas move towards the Gurf. 16 Their camps are much less elaborate."</p> <p>17 Six point about Willis's description: it is a near 18 contemporaneous account of the Ngok by an official 19 observer; it is beyond doubt that he is referring to the 20 Ngok; the description of Ngok houses and place names 21 such as Bongo, Rob's old village and even the existence 22 of a ferry; the description of Bongo and El Myat as the 23 northernmost part of Ngok territory is consistent with 24 Wilkinson's account; Willis states these temporary 25 villages are occupied just after the rains.</p> <p style="text-align: center;">Page 125</p>	<p>16:07 1 the presentation, and Martin Pratt of IBRU Durham for 2 his work on the maps. I should like to note that 3 a significant fraction of the Government material 4 presented to you has been collected by them. The fact 5 that these two young lawyers with no prior knowledge of 6 the Sudan were able to collect and digest all this 7 information, mostly from libraries and archives in the 8 United Kingdom, puts the work of the experts to shame. 9 Of course, the experts took a little less time to 10 prepare their case than the seven months we had, but 11 that was their choice, and they were starting as 12 experts. The experts could have taken up to two years; 13 it was only because of their intemperate haste that the 14 report was presented when it was. 15 So I cannot agree with my friend that "the things 16 they [the experts] did are things that any one of us 17 would be proud of had we done". 18 Mr President, members of the Tribunal, in the 1980s 19 I produced for the Australian Law Reform Commission 20 a 1,000-page report on aboriginal customary law. 21 I worked with a dozen of Australia's finest 22 anthropologists with extensive land claims experience. 23 The care they took over their work stands in strong 24 contrast to the shoddy reasoning and question-begging 25 pseudo-legal formulations of the ABC experts.</p> <p style="text-align: center;">Page 127</p>
<p>16:05 1 This passage of 1909 specifically refutes the SPLM/A 2 wet season thesis, the thesis of the disappearing Ngok. 3 Rather than spreading out in the rains, they gather 4 together in a more concentrated way, building their 5 houses in places just to the north of the Bahr el Arab. 6 His estimate of the width of Ngok territory from 7 east to west as about 50 miles or two days' travel is 8 consistent with Dupuis's detailed map and with the 9 Civsec sketch map in its east-west orientation. 10 Finally, Willis's description of temporary villages 11 is consistent with Cunnison's analysis of the Ngok's 12 transhumant lifestyle, occupying different areas at 13 different times of the year, but always around the 14 Kiir/Bahr el Arab. 15 Mr President, members of the Tribunal, you will have 16 noted that in our written pleadings we make no 17 alternative submissions on tribal boundaries. What we 18 do say is that the ABC experts' tribal boundary bears 19 not the slightest relationship to the area occupied and 20 used by the nine tribes in 1905, or for that matter in 21 1933; an area which for the reasons I have given was 22 larger in 1933 than it would have been in 1905 and most 23 certainly cannot have been smaller. 24 Before concluding I'd like to thank Jacques Hartmann 25 and Charles Alexander for their material assistance with</p> <p style="text-align: center;">Page 126</p>	<p>16:08 1 In the light of the body of evidence I have 2 reviewed, and bearing in mind the mandatory requirement 3 on them to find the Abyei Area by means of scientific 4 enquiry and research, the outcome of the report, their 5 Abyei Area, is a scientific shambles. 6 I go further: the bizarre shape that a 1905 tribal 7 area would have in accordance with the contemporary 8 documentary evidence shows that this can't have been 9 intended. The area transferred to Kordofan can only be 10 understood and determined on the basis of a territorial 11 interpretation. It is the area of Kordofan to the south 12 of the Bahr el Arab, the area attributed to Sultan Rob 13 at the time of the transfer to Kordofan in 1905. That 14 area, and only that area, can be shown to have been 15 transferred. 16 Mr President, members of the Tribunal, this 17 concludes the Government of Sudan's first-round 18 submissions on delimitation. I thank you for your 19 attention. 20 THE CHAIRMAN: Professor Crawford, I thank you very much. 21 Mr Born, are you ready to begin? 22 MR BORN: Could I suggest that we take the break a little 23 early and then allow the presentation in one 24 continuous piece? 25 THE CHAIRMAN: The Tribunal agrees with this suggestion.</p> <p style="text-align: center;">Page 128</p>

<p>16:10 1 MR BORN: Thank you very much. 2 (4.10 pm) 3 (A short break) 4 (4.39 pm) 5 THE CHAIRMAN: Mr Born. 6 Submissions by MR BORN 7 MR BORN: Thank you, Mr Chairman. 8 The Tribunal will recall our presentation on Sunday. 9 That presentation demonstrated that we don't really need 10 to be here today. The ABC experts did not exceed their 11 mandate, and as a result the experts' delimitation and 12 definition of the Abyei Area in the ABC report is 13 entitled to final and binding status, and pursuant to 14 Article 2(b) the consequences of that are clear. 15 That resolves the parties' dispute before this 16 Tribunal and, as I say, makes it unimportant for us to 17 be here today. 18 Only in the extraordinary unlikely case that the 19 Tribunal were to conclude that the experts did exceed 20 their mandate is there any need for it to do anything 21 else beyond Article 2(b). In that event, and only that 22 event, would the Tribunal be presented with the question 23 under 2(c), with which we are all by this point well 24 familiar. 25 If the Tribunal does go on to consider the question</p> <p style="text-align: center;">Page 129</p>	<p>16:42 1 friends. We will instead look at the real people, the 2 real people of Sudan, and we will look at the land, the 3 rivers, the vegetation of Sudan. 4 When you see that, when you look at that in the 5 whole, we submit the Government's case will crumble. 6 You will see that the submissions by the SPLM/A are 7 confirmed consistently and uniformly by a wide range of 8 evidence which you can rely on, which is objective, 9 independent and coming at the same issues from a variety 10 of directions. 11 As you can see on the current slide, we will begin 12 with the geography of the Abyei Area and the Bahr 13 region. We will spend some time addressing scientific 14 evidence about the Bahr region. You will recall 15 Professor Crawford touched briefly on this; I will refer 16 to the way he described the Bahr region subsequently, 17 but I would emphasise now, at the outset, that you go 18 back and look at the transcript as to how he tries to 19 formulate and then reformulate and reformulate again how 20 he describes the Bahr. 21 We will turn next to the historic evidence of the 22 Ngok Dinka migration to the Bahr region. To an extent 23 it is oral tradition, but again has substantial 24 credibility because it's shared, it's agreed by the two 25 parties, save in some respects which I will address.</p> <p style="text-align: center;">Page 131</p>
<p>16:40 1 under 2(c), then it should go on to define the Abyei 2 Area as set forth in the SPLM/A's written submissions. 3 That area, briefly stated, encompasses the territory 4 extending north from the current Kordofan/Bahr el Ghazal 5 boundary to latitude 10°35' north and east from the 6 current Darfur/Kordofan boundary to 29°32' east. 7 Our submissions set out in detailed evidence from 8 a wide variety of sources establishing that this area, 9 this territory, was that of the nine Ngok Dinka 10 chiefdoms transferred to Kordofan in 1905. It is this 11 historic ancestral tribal territory of the Ngok people 12 that comprises the Abyei Area. 13 In the coming presentations we will review the 14 evidence -- the historical evidence, the environmental 15 evidence, the scientific evidence -- relevant to the 16 definition and delimitation of the Abyei Area. 17 Our approach -- and you can see a résumé of what we 18 will be looking at on the current slide -- will differ 19 from that of the Government. It will differ from that 20 of the Government in that we will focus on Sudan and we 21 will focus on the Sudanese people. We will focus on the 22 Ngok Dinka and on the Messiriya. 23 We will not confine ourselves, as the Government has 24 done, to Mr Percival and Mr Huntley-Walsh and 25 Mr Wilkinson and their British friends, their colonial</p> <p style="text-align: center;">Page 130</p>	<p>16:44 1 We will then look to the pre-1905 Condominium 2 record, such as it is, and we will see, as Mr Bundy put 3 it well today, that it isn't much. 4 We will look at the post-1905 documents, which 5 suffer from some of the same difficulties, but we will 6 spend considerable amounts of time with 7 Professor Cunnison, who figured hardly at all in 8 Professor Crawford's discussion, save to say that it 9 puts one to sleep. We will suggest that it does not put 10 one to sleep but rather commands your attention as it 11 commanded that of the ABC experts. 12 Then we will discuss the Ngok Dinka witness 13 testimony, as well as the community mapping report. We 14 will be assisted in that by Dr Peter Poole, who I will 15 introduce to you shortly. 16 First there are two preliminary points that I would 17 like to touch on. Initially there's a question, which 18 I thought we had addressed in the mandate section, of 19 the definition of the Abyei Area. 20 You will recall that Professor Crawford spent 21 an hour, an hour and a half discussing it, and 22 I answered it in rebuttal. We then saw Mr Bundy come 23 back and address it, and Professor Crawford do it again. 24 I will therefore come back and address once more the 25 definition in Article 1.1.2 of the Abyei Protocol of the</p> <p style="text-align: center;">Page 132</p>

16:46 1 Abyei Area. I will attempt to do so, though, in
2 a continuous way which puts together the language of the
3 Abyei Protocol and its purposes and its drafting history
4 of the historical documents. One of the fatal flaws to
5 the Government's case is to try to divorce these and
6 have you look at snippets of the historical record
7 without really appreciating what it means.

8 Second, Professor Crawford argued briefly yesterday
9 that in the event -- as I say, the extraordinarily
10 unlikely event -- that you were to conclude that there
11 was an excess of mandate, you then become a de novo
12 decision-maker. We.

13 Disagree. We think it's clear that you do not. We
14 have submitted in our written pleadings that in the
15 event that there's an excess of mandate, which may be
16 set aside, segregated from other portions of the report,
17 the remainder of the experts' report remains final and
18 binding. Only that portion of the ABC experts's report
19 which is affected by an excess of mandate is to be
20 ignored. Other portions remain, consistent with general
21 principles of law, final and binding.

22 Professor Crawford resisted that rather
23 straightforward proposition by saying that the parties
24 had, in Article 2(c) of the Arbitration Agreement,
25 waived those principles by agreeing that the Tribunal

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16:49 1 complex issues of anthropological fact from four
2 separate disciplines. We should contrast that to the
3 Government, who submitted no experts on these topics.
4 They submitted one cartographic expert.

5 Yet Professor Crawford tells you, based on no expert
6 evidence, and instead with the greatest of respect to
7 his assistants "two young lawyers", that the ABC
8 experts' work was a scientific shambles.

9 We will have a chance to see whether in fact it was
10 a scientific shambles when you look at the detailed
11 expert evidence that we have put in in support of the
12 ABC experts' scientific conclusions, and the time that
13 we will spend on the scientific evidence.

14 First, to introduce briefly the expert witnesses.

15 Professor John Anthony Allan who you will hear from
16 shortly, teaches and researches hydrology and related
17 environmental issues at King's College. He has 50 years
18 of research experience and is one of the leading
19 authorities in the world on the field. Among other
20 things, he has been awarded the 2008 Stockholm Water
21 Prize. He will address issues relating to the
22 environment, hydrology and soil of the Bahr region.

23 Second, Professor Martin Daly, who you will also
24 hear from, but tomorrow, is one of -- probably the
25 world's pre-eminent authority on the Anglo-Egyptian

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16:47 1 would decide, based on the submissions of the parties,
2 the issues under Article 2(c).

3 Obviously the submissions of the parties include --
4 indeed the language is directed principally towards --
5 but at a minimum it includes the parties' legal
6 submissions. Our legal submissions of course include
7 as, the Tribunal would expect, principles of finality
8 and res judicata.

9 Therefore, insofar as an excess of mandate were only
10 to affect one issue, it does not taint other aspects of
11 the experts' report. That only stands to common sense;
12 it only makes sense. If the experts rendered what would
13 be a completely valid decision on a number of issues,
14 the fact that they might have stepped over the line,
15 were one to think that, on some other issue in no way
16 taints the rest of their report.

17 It is common ground, moving on now, that the factual
18 and historical evidence in this case is exceptionally
19 complex and difficult. Professor Crawford called it --
20 and I can quote from the transcript at page [63],
21 line [18] -- "a very complicated question of fact",
22 a question of anthropological fact. That's true; we
23 don't disagree.

24 As a consequence, though, we have submitted -- the
25 SPLM/A has submitted -- expert testimony on these

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16:51 1 period in Sudanese history. The only other man who
2 arrivals him in expertise is Dr Johnson, who was one of
3 the ABC experts. Professor Daly is the author of The
4 Empire of the Nile: the Anglo-Egyptian Condominium and
5 Imperial Sudan: the Anglo-Egyptian Condominium, together
6 with dozens of other publications.

7 Third, you'll hear from Dr Peter Poole. He's one of
8 the world's leading authorities on community mapping.
9 He's conducted dozens of studies in the field, including
10 the first. He will address the community mapping report
11 that was prepared here, and can speak to the
12 Government's complaints about it, the ones that
13 Mr Crawford held back and didn't discuss with you.

14 Finally Mr Richard Schofield, a distinguished
15 geographer and specialist on boundaries, who'll address
16 some of the same issues that Mr MacDonald did.

17 I'd like to come back, though, to the fundamental
18 difference between how the SPLM/A has approached this
19 case and how the Government has approached it.

20 Look around the room. The people of Sudan, the
21 people of the Abyei Area, are very different from us.
22 They're different, but they have a complex and rich
23 culture; two complex and rich cultures. They're
24 different from mine and Professor Crawford's, but that
25 doesn't mean that we should ignore them, either by not

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<p>16:52 1 talking about them in our submissions, by not presenting 2 expert evidence or factual evidence about them, or by 3 falling asleep over discussions of them. That's not the 4 way to approach it. 5 It's instead something to be treasured and studied, 6 because in order to understand what the territory of the 7 nine Ngok Dinka chiefdoms was it's essential to 8 understand where they lived, who they were, and what 9 they were like. 10 You can't read snippets of dry historical documents 11 prepared by British administrators a century ago -- who, 12 as we will see, in Mr Bundy's words, had no idea about 13 the Ngok Dinka or their territory -- unless you 14 understand both the Messiriya and the Ngok Dinka. 15 That's the fundamental difference between how the 16 Government has approached this part of the case and how 17 we have: we have looked to the people, the land, the 18 culture, how they lived. When you do that, the evidence 19 comes alive and has a real meaning; not an arbitrary, 20 artificial meaning plucked out of context. 21 We suggest that the work of the experts that we've 22 put together to look at both people's cultures -- the 23 Messiriya's culture, which is different from ours, and 24 the Ngok's culture -- is essential to being able to 25 understand the historical record.</p> <p style="text-align: center;">Page 137</p>	<p>16:55 1 of, in the Netherlands here, 393 people per square 2 kilometre; 249 in the United Kingdom; and 137 in China. 3 The Abyei Area lies in southwestern Sudan, at the 4 border between the northern and southern parts of the 5 country. It's described graphically in Article 1.1.1 of 6 the Abyei Protocol. It's a bridge between the north and 7 the south linking the people of Sudan. One of the 8 witnesses today referred to the Ngok and the Messiriya 9 as brothers living together. 10 When we come back and look at the locations that are 11 reported of the two people, the Messiriya as well as the 12 Ngok, these observations, as well as the historical and 13 scientific evidence, will become important. 14 The same provision in 1.1.2 defines the Abyei Area 15 in terms I don't need to repeat. 16 Then finally, in answer to Professor Crawford's 17 repeated protest that the experts ignored the rights of 18 the Messiriya, Article 1.1.3 addresses those rights, and 19 addresses them specifically. It provides, as one would 20 expect, that the Messiriya and other nomadic peoples, 21 the Messiriya being nomads, retain their traditional 22 rights to graze and move across the territory of Abyei; 23 the territory of Abyei, of course, as you can tell from 24 the definitions, being the territory of the Ngok Dinka 25 into which the Messiriya came as brothers on the bridge</p> <p style="text-align: center;">Page 139</p>
<p>16:54 1 Professor Crawford recognised that these are complex 2 issues. The ABC experts recognise that they're complex 3 issues. One can go astray very easily. Think of the 4 difference in the terminology regarding the 5 Bahr el Arab. One can make grave and embarrassing 6 historical and factual mistakes without the benefit of 7 expert evidence. That's why the ABC experts were picked 8 for scientific expertise. That's why we have put in 9 scientific experts to assist you. 10 I'd suggest when you put that evidence together and 11 look at this in the real world, the real world of Sudan, 12 the Ngok Dinka and the Messiriya, you will see that the 13 SPLM/A's claims, far from a scientific shambles, make 14 logical, consistent and compelling sense. 15 I'd like to turn now to something the Government 16 hasn't bothered to show us: Sudan. We can look at Sudan 17 by putting the Abyei Area in context. 18 Sudan, needless to say, is vast and sparsely 19 populated. It's 1 million square miles, 2.5 million 20 square kilometres. It's important to note: in 1900 21 Sudan had a population density of less than one person 22 per square kilometre; Mr Mardon, one of the Government's 23 favourite authorities, tells us that. 24 In rural areas that's not much changed today. To 25 put that in context, it compares to population densities</p> <p style="text-align: center;">Page 138</p>	<p>16:57 1 to live together. 2 We'll come back to those observations as we look at 3 the evidence which the Government has not talked to you 4 about. 5 As defined by the ABC experts, the Abyei Area 6 encompasses a territory of approximately 7,200 square 7 miles, or 18,500 square kilometres. That's roughly 1% 8 of the Government of Sudan's total territory, and about 9 three-quarters the size of Belgium. I'll come back to 10 that reference in a bit. 11 As a reality check, you'll recall Professor Crawford 12 saying that the number of Ngok Dinka in 1905 was maybe 13 5,000, maybe 10,000, maybe 15,000; he wasn't sure quite 14 what. The SPLM/A has submitted evidence indicating that 15 the population was 50,000, but let's take the 16 Government's number of 15,000. 17 On the Government's case, those 15,000 Ngok Dinka 18 all supposedly lived in 2,700 square kilometres south of 19 the River Kiir. That would be a population density of 20 six people per square kilometre. On the other hand, if 21 you look at the Abyei Area as defined by the Abyei 22 experts, the ABC experts, you'd see a population density 23 of around one person per square kilometre. 24 Those are rough reality check figures, but as the 25 Government goes on about a scientific shambles, it's</p> <p style="text-align: center;">Page 140</p>

<p>16:58 1 sometimes helpful to have our feet on the ground, the 2 ground in the Abyei Area, as to what their numbers would 3 really mean. 4 As claimed by the SPLM/A -- and we can see this on 5 the slide -- the Abyei Area is irregularly shaped. It 6 runs 220 kilometres or so along the northern boundary, 7 has a western boundary extending south-southeast for 8 150 kilometres. 9 That boundary then goes south to where it meets the 10 current Kordofan/Bahr el Ghazal boundary. That boundary 11 then runs east for 80 kilometres, and then turns 12 northeast to run irregularly for around 110 kilometres, 13 part of the way turning into a straight line. Then the 14 eastern boundary runs 90 kilometres due north to meet 15 the place where we began. 16 Now we turn to the land itself. To the north of the 17 Abyei Area is the goz. It's important; the Government 18 I don't think mentioned this word once, or if it did, no 19 more. The goz, which figured quite significantly in the 20 experts' report, is an arid sandy region turning to 21 desert when one goes further north. It's at the north 22 of the Abyei Area. 23 To the south of the Abyei Area is the 24 Kiir/Bahr el Arab and its various tributary rivers. 25 South of the Kiir, in Bahr el Ghazal and unity states,</p> <p style="text-align: center;">Page 141</p>	<p>17:02 1 variations of the Abyei Area, which are distinctive; it 2 concerns the soil composition which is important; it 3 concerns the vegetation, which relates to the first two 4 categories; it concerns cattle species and animal 5 husbandry practices, which may be foreign to us and 6 which may put some of us to sleep, but which are 7 profoundly important in the context of this case; it 8 concerns agricultural crops, and it concerns housing. 9 All those different aspects of the area and the 10 people fit together. Again, it is revealing that the 11 Government has chosen not to address this evidence at 12 all. It is essentially uncontroverted. 13 As we've seen, there are a number of major rivers in 14 the Bahr region. They're shown on your current slide. 15 These include the Kiir, the Ngol, the Nyamora, as well 16 as a countless thread or network of tributaries. We 17 heard Mr MacDonald acknowledge yesterday the 18 complexities of these waterways, which are truly 19 formidable and infinitely varying. 20 He confirmed that, "The traveller was unable to get 21 any view of the ground to trace the twists and turns of 22 the rivers and the way that they were interwoven", and 23 we'll be able to see from satellite imagery just how 24 true that is. It is, in his words, a spaghetti bowl 25 forming a huge drainage basin that flows east to the</p> <p style="text-align: center;">Page 143</p>
<p>17:00 1 lie further river systems and vast swamplands, variously 2 called the sudd or the tooc. That river delta has been 3 described as one of the world's largest swamps. 4 To the west of the Abyei Area, as well as in parts 5 of the east, lie desert regions or mountains. 6 Taking a step back, the Abyei Area is a well-watered 7 and very fertile irregular rectangle, roughly 8 three-quarters the size of Belgium, lying between 9 largely arid desert zones to the north and west and 10 a vast swamp to the south. 11 As we will see, it was in this fertile rectangle 12 that the Ngok Dinka developed their traditional 13 lifestyle and had their ancestral homelands. We will 14 see how that lifestyle, observed and recorded 15 consistently by objective scientific observers, matched 16 that region precisely. That evidence we will suggest 17 provides some of the most reliable information on which 18 you, as the ABC experts, could base your decisions. 19 The record before the Tribunal contains 20 a substantial body of environmental evidence about the 21 Abyei Area. You will recall that Professor Crawford 22 mentioned this not once, although he was content to 23 consign the experts' work to the dustbin as a scientific 24 shambles. 25 This evidence concerns the climate and seasonal</p> <p style="text-align: center;">Page 142</p>	<p>17:03 1 White Nile. 2 Those rivers are fed by seasonal rains that 3 characterise the Bahr region. There's a dry season, 4 which Professor Crawford didn't talk to you about. 5 During the dry season, between December and March, this 6 area is hot and parched; "semi-desert", in the words of 7 one observer. 8 In contrast, between April and November the region 9 is marked by torrential rains. In the words of another 10 observer -- and this is recorded in our submissions -- 11 there are "awesome crashing downpours" which produce 12 widespread flooding. In turn, we will see that that 13 flooding inevitably and naturally produces 14 an extraordinarily fertile soil. 15 This slide shows the geography and soil composition 16 of the Bahr region. In the northwest, labelled in 17 yellow, we can see the goz, which extends south in that 18 part of the Abyei Area to around 10°10' north. The goz, 19 as I mentioned, is a sandy strip, generally arid, with 20 some, but relatively few, permanent Ngok settlements. 21 The Bahr, the region beneath the goz, beginning 22 immediately beneath the goz, extends south from that 23 sandy region to the Ngol and on to the Kiir and a little 24 south. 25 In the eastern parts of the Abyei region -- and</p> <p style="text-align: center;">Page 144</p>

<p>17:05 1 I mentioned there was one area on which we disagreed at 2 least to a small extent with the ABC experts -- in the 3 eastern region of the Abyei Area, the Bahr extends 4 somewhat further north, up to around or at least 10°35' 5 north, before the land begins to turn alkaline and arid. 6 The Bahr continues east to Lake Keilak, which you can 7 see on the current slide. 8 Importantly -- and again not mentioned by the 9 Government -- there are extraordinary differences 10 between the soil in the Bahr region, south of the goz, 11 and the soil of the goz itself and going further north 12 in Muglad. 13 The Bahr region is characterised by a black, fertile 14 cracking clay, which results from the seasonal flooding 15 that I mentioned. In contrast, in the goz and Muglad, 16 further to the north, there's a different kind of soil; 17 a reddish sandy soil intersected by sandy ridges with 18 a name -- Cunnison gave it the name -- Baggara repeating 19 pattern. 20 There is in the record before you a wealth of 21 uncontroverted scientific and environmental evidence 22 that establishes the vital differences between the soil, 23 in the way that I have just described, in the south of 24 the Bahr and in the north of the goz and further on in 25 Muglad.</p> <p style="text-align: center;">Page 145</p>	<p>17:08 1 MENAS report. MENAS explains that the Bahr is 2 characterised by fertile black clay soil, while the soil 3 in the Muglad region is reddish clay, interspersed with 4 sand ridges. 5 Professor Allan has addressed this issue in the 6 MENAS report and he will present his findings now to the 7 Tribunal. It's one things for me as counsel to make 8 submissions about scientific evidence; it is something 9 else to hear it from an expert. In particular 10 Professor Allan will explain the complexity of the Bahr 11 river system and its seasonal changes. 12 Professor Allan, if you could take the floor. 13 (5.09 pm) 14 PROFESSOR JOHN ANTHONY ALLAN (called) 15 THE CHAIRMAN: Professor Allan, the Tribunal welcomes you 16 and invites you to read the affirmation. 17 THE WITNESS: I solemnly declare upon my honour and 18 conscience that my statement will be in accordance 19 with my sincere belief. 20 Presentation by PROFESSOR ALLAN 21 THE WITNESS: Mr President and distinguished members of 22 the Tribunal, and other experts who know a lot about 23 Abyei in the room today, in addition to the experience 24 on the screen, I have expertise in using satellite 25 imagery. My experience to a great extent complements</p> <p style="text-align: center;">Page 147</p>
<p>17:06 1 Lloyd described it in 1907 as: 2 "In the north the soil is reddish sand, interspersed 3 with tracts of sand and clay mixed ... this gradually 4 increases further south until the red sand disappears 5 and black soil commences. South of latitude 10°30' 6 black soil predominates." 7 I would remind you again of Professor Crawford's 8 protestations about how there's no evidence of such 9 latitudes in the record. We'll come back to further 10 evidence. 11 Likewise, Gleichen wrote in 1905 of a "rich black 12 clay loam" in the Bahr, and observed that it was very 13 suitable for cultivation. 14 Professor Cunnison, who we are going to spend a lot 15 of time with -- we can agree with Professor Crawford at 16 least on his importance -- described the Bahr south of 17 the goz as having: 18 "... dark, deeply cracking clays and numerous 19 winding water courses all connected eventually to the 20 Bahr el Arab, a tributary at the White Nile. It also 21 contains two almost permanent lakes, Keilak, which lies 22 slightly southeast from Muglad, and Abeyard, to the 23 southeast corner of the country." 24 These conclusions are elaborated in the expert 25 evidence of Professor Allan, which is contained in the</p> <p style="text-align: center;">Page 146</p>	<p>17:09 1 that of Mr MacDonald. 2 Conventional surveying and cartography serve and 3 have served the interests of the powerful. It 4 especially served the interests of the colonial powers. 5 Colonial cartographers, usually military people, mapped 6 fixed strategic assets such as roads, railways, power 7 lines, canals and settlements. 8 The natural resources, in the white spaces between 9 those lines and dots, were the resources on which local 10 people depended for their livelihood. So that's what 11 we're going to be talking about in these few moments. 12 They weren't recorded by conventional cartographers, at 13 least in the early period of cartography about which 14 we've heard a great deal. 15 We're going to cover these topics, looking at the 16 climate, hydrology and soils of the area, and I'm going 17 to do it by looking at satellite imagery. 18 We're going to look at the dry season first, because 19 the dry season helps us identify the soils rather 20 better, as well as showing the position of the rivers. 21 We shall also look at two sections of the image to show 22 more detail. I wish we had more time to do more, but 23 we'll just do it with these two. 24 Before moving on, you can see the goz in the north. 25 That little projection of the goz is the projection of</p> <p style="text-align: center;">Page 148</p>

17:11 1 the goz which covers the area to the north right across
2 Sudan. It's a huge track, 200 or more kilometres wide.
3 So this little projection of the goz into the Abyei Area
4 is just part of that massive tract, which is of course
5 where the Messiriya have their lives and livelihoods.
6 The contrast between the two, that sandy area and
7 the dark area, is very clear on this dry season image.
8 If we could have the first extracts, you can see in that
9 case that the Kiir River, which is below Abyei, and the
10 tributary on which Abyei lies, you can see that -- not
11 so clearly on there, but you can see it clearly on the
12 screens here.
13 You can see that the tributary is a much bigger
14 river than the Kiir. So what I'm trying to show is the
15 complexity of the drainage, and the fact that you can
16 show that the Kiir, which is the stream going off to the
17 west, or coming from the west, in this season, the dry
18 season, is a discontinuous river; I hope it's clear on
19 your screens; and that the tributary is a much bigger
20 stream.
21 So the advantage of satellite images is that you can
22 show these dynamics.
23 The next area is an important area, because this is
24 the area where the travellers crossed the Zarga. Again,
25 especially on the screens at the front here, and I trust

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17:14 1 year out there. When the rains come, the rains fill the
2 crack, and then the crack is closed through the swelling
3 of the clay. But the important thing is that, unlike
4 the sandy goz, where the water goes down, the water
5 stays at the surface, where it evaporates.
6 So the loss of this water in this Bahr area, as well
7 as in all the cracking clay areas of the Sudan as
8 a whole, as well as in the swamps of the sudd, it is
9 normal to lose a huge amount of water during this period
10 in that time. But at the same time, because they do not
11 allow water to infiltrate, you get the large areas of
12 floods, and the ragaba and the khor all filled up with
13 water for many months of the year.
14 Finally I would like to just look at the vegetation.
15 As a geographer, as part of my professional experience,
16 geographers learn that environmental determinism doesn't
17 work. You can't say, "Well, that particular tract of
18 land will lead to that particular livelihood", because
19 you can't; people have choices, they can easily do
20 different things with land. So I'm not at all
21 suggesting that the Bahr region determines anything, or
22 the goz region determines anything.
23 All I'm saying is that these areas are, both of
24 them, susceptible to useful livestock rearing. One can
25 see -- and this is not relevant, I know -- but the goz

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17:13 1 on your screens, you can see very clearly that this
2 river is quite clear and evident. If we were to look at
3 the pixels we could easily measure the width of it,
4 which is 30-100 metres. Further to the west, of course,
5 it becomes much bigger.
6 So those are the dry season images, which have
7 helped us show the complexity of the drainage.
8 The wet season images are rather even better at
9 showing the complexity of the [drainage]. Let's have
10 the two extracts again. Here you can see that we've got
11 a very dark area to the west of Abyei in that first
12 extract. The second extract, which one is wanting to
13 show you the complexity of the streams, you can see how
14 very complex those streams are.
15 Turning to the soils, the next image, the difference
16 between the -- we've already heard a little about soils,
17 and I would just like to add some other detail, and that
18 is that the sandy soils of the goz are interesting
19 because sandy soils, when rain falls on them, the water
20 does in fact infiltrate very easily, and goes down
21 beneath, and there will be groundwater sources between
22 the goz; and it almost certainly feeds the northern
23 streams of the Bahr.
24 The cracking clay soils are characterised by cracks,
25 which are quite wide in the dry season, at this time of

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17:16 1 region, you could easily see now, if I was to give you
2 more detail, that there's a vast amount of cultivation
3 taking place in the goz region; mainly because of more
4 modern technology, but it was possible to cultivate even
5 in the goz region.
6 We've heard something about the clay soils being
7 fertile. They are certainly potentially more fertile in
8 the goz. These areas are in fact ideal for -- or let's
9 say people have adapted extremely well to the
10 agro-pastoral grazing activity.
11 So, looking just here finally at the dry season
12 image, we can see that there's very little vegetation.
13 There's a certain amount in the Bahr region, very little
14 in the goz. Then if we look at the wet season you can
15 see how -- the previous speaker has mentioned the rains,
16 and how they come, and you can see how, with those
17 rains, the area both of the goz, but especially the
18 Bahr, is very much covered with vegetation.
19 So, finally, thank you for your patience,
20 Mr President and members of the Tribunal. I would just
21 like to conclude by putting up these three points. The
22 water courses of the Bahr region form a complex network
23 of interwoven channels, and we've shown the dynamics of
24 those, and the interruption of the channels very
25 graphically.

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17:18 1 The Bahr region is more fertile than the goz; it's
2 well watered, at least in the wet season. The Bahr
3 region is hospitable to and consistent with the
4 agro-pastoral lifestyle, and it does extend not only in
5 the area between the two major rivers that we've been
6 talking about, but also in the area to the north and the
7 east.
8 Thank you very much.
9 THE CHAIRMAN: I thank you very much, Professor.
10 I turn to the Government.
11 (5.18 pm)
12 Cross-examination by MR BUNDY
13 Q. Thank you, Mr President. Professor Allan, I know that
14 we know each other very well, but for the record, I'm
15 Rodman Bundy, counsel for the Government of Sudan. It's
16 nice to see you.
17 Do you have the MENAS report in front of you?
18 A. Yes.
19 Q. Could you turn to the very last page, page 42, please.
20 A. Yes.
21 Q. Am I right there that it says:
22 "We confirm ['we' meaning Richard Schofield and
23 yourself] that the facts stated in this report and the
24 opinions expressed present our true and complete
25 professional opinion."

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17:21 1 Q. Could you point me to any contemporary document from the
2 1902, 1903, 1904, 1905 period where Condominium
3 officials state that there is no provincial boundary
4 between the two provinces?
5 A. I cannot.
6 Q. Were you responsible primarily for the last part of the
7 report dealing with the vegetation, climatic -- those
8 factors?
9 A. That's right.
10 Q. Could you point me to any contemporary document around
11 the time of the transfer in 1905 -- whether it's 1903,
12 1904, 1905 or 1906, any time around there -- which shows
13 that Condominium officials were considering
14 environmental evidence such as soils, climate, animal
15 husbandry in connection with the transfer?
16 A. I cannot, and of course you understand why that is:
17 because at that time people were not looking at those
18 sort of issues. It doesn't mean that the people who
19 were living and making their livelihoods in those areas
20 were not deeply aware of the differences between the
21 different sorts of soil and the ability to cross areas
22 and cross streams and all the other environmental issues
23 which are important to people making their livelihoods.
24 Q. Yes, I have no doubt that the people took into account
25 these factors in their day-to-day life, but my question

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17:19 1 That "we" is referring to the two of you?
2 A. Yes.
3 Q. Did you assist in preparing the entire report?
4 A. Did I ...?
5 Q. You were involved in the entire report's preparation?
6 A. What do you mean by "entire"? From the beginning of
7 a certain month, or --
8 Q. No, from page 1 to page 42; the report. Were you
9 responsible for only part of this report, or jointly
10 responsible for all of it?
11 A. I am responsible for part of it.
12 Q. But you confirm all of it in this statement, do you not?
13 A. Yes.
14 Q. Can I ask you about other aspects of the report then?
15 A. Yes.
16 Q. Could I ask you to turn to page 1 of the report,
17 "Summary of Conclusions". Could you look under
18 paragraph 3(a).
19 A. This is on page --
20 Q. Page 1, paragraph 3 -- actually I'm going to look at
21 paragraph 2, if I may. Could you read paragraph 2 under
22 "Summary of Conclusions", please.
23 A. "Our primary conclusion is that in 1905 there existed no
24 provincial boundary between Bahr el Ghazal and Kordofan
25 provinces."

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17:22 1 was: is there any evidence that Government officials
2 took into account these factors when they effectuated
3 the transfer in 1905?
4 A. Of course I'll answer "no", but I leave the Tribunal to
5 deduce what they will from that answer because the
6 direction you're taking the questions seems to me to
7 give no consideration to what was happening with the
8 people on the ground.
9 Q. The SPLM/A in its counter-memorial, and I will refer to
10 paragraph 1580, which I don't expect you to have in
11 front of you, the SPLM/A there, in speaking of the
12 transfer, says:
13 "The more direct, less speculative and reliable
14 approach is simply to look at what the Condominium
15 administrators said that they transferred in Kordofan in
16 1905, which was the Ngok Dinka and their territory."
17 So there the SPLM says: just look at what the
18 Government administrators of the time said they were
19 transferring.
20 Am I right that as far as you are aware, the
21 Government officials or administrators never said
22 anything about the environmental factors that you've
23 discussed in connection with the transfer?
24 A. I agree with that. Yes, I agree.
25 MR BUNDY: Thank you very much, I have no further

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<p>17:24 1 questions, Mr President. Thank you, Professor Allan. 2 THE CHAIRMAN: I thank you very much. Are there any 3 questions from the part of the Tribunal? No. 4 I thank you very much, Professor. 5 MR BORN: And I thank you as well, Professor Allan. 6 (5.25 pm) 7 Submissions by MR BORN (continued) 8 MR BORN: The reason that the soil, the rivers and the 9 seasonal changes in the Bahr region are important is 10 that the Ngok Dinka's lifestyle and agricultural 11 practices are precisely adapted to that environment of 12 the Bahr. 13 At the same time the Bahr region, the area which is 14 described by both Professor Cunnison and Professor Allan 15 as beneath the goz, is overtly hostile to the Messiriya 16 life, save for a short period of time during the dry 17 season. Again, that is essentially unchallenged, 18 uncontroverted evidence in the record and the Government 19 has not addressed it in the slightest, including in its 20 cross-examination just now of Professor Allan. 21 The evidence shows that the Ngok are farmers, with 22 the cultivation of sorghum (dura) playing a central role 23 in their lifestyle. The cultivation takes place in and 24 near Ngok villages during the wet season, before the 25 ground parches through the heat that Professor Allan has</p> <p style="text-align: center;">Page 157</p>	<p>17:27 1 The same two researchers observed that the Ngok and 2 other Dinka agricultural land is "for the most part 3 clean and well cultivated", showing "a high degree of 4 skill on the part of the cultivators". 5 The same researchers and others have explained that 6 the Ngok in the Abyei region cultivate on small-scale 7 farms based on the Ngok's household and village 8 structure, which we're going to look at. 9 The arable land is found "immediately around the 10 house in small gardens, together with larger fields 11 a kilometre or so away". The result is comparatively 12 extensive cultivation during the wet season. In one 13 report's words: 14 "The total extent of permanent cultivation may 15 easily, in the case of larger villages, amount to many 16 hundreds of acres." 17 Of course, in smaller villages, which was the case 18 with many Ngok villages, it would be much less 19 extensive. 20 The Ngok's particular crops and agricultural 21 practices reflect the peculiar, the distinctive 22 characteristics, the geography and the climate of the 23 Bahr. The Ngok's staple crop, sorghum or dura, is in 24 fact ideally suited to the landscape, the soil, the 25 climate of the Bahr.</p> <p style="text-align: center;">Page 159</p>
<p>17:25 1 explained in December and January. 2 Cunnison described this when he explained in 3 response to a proposal from the Government that the 4 Messiriya be placed into the Bahr that this would 5 intrude on the Ngok Dinka's traditional agricultural 6 territories. In his words -- and you can see this on 7 the slide, we will come back to it subsequently: 8 "The Bahr is the traditional land of the Dinka, who 9 return there and cultivate during the rains." 10 "Cultivating during the rains"; that's when they are 11 cultivating in the Bahr. 12 A 1978 report by the Sudanese Ministry of 13 Agriculture confirmed the same thing about the Ngok 14 agriculture. It observed that: 15 "The Ngok Dinka live in this area the year round; 16 Homr during the dry season." 17 The same author concluded: 18 "Ngok Dinka are more the settlers compared to other 19 tribes." 20 This was a report, again, by the Government. 21 Two well-known agricultural researchers, Stubbs and 22 Morrison, studied this. They wrote an article called 23 "Land and Agriculture of the Western Dinka". That 24 article explained that the Dinka is "known as 25 a cultivator". You can see that on the slide.</p> <p style="text-align: center;">Page 158</p>	<p>17:28 1 Stubbs and Morrison again emphasised these factors, 2 and in particular the lengthy and torrential rainy 3 season in the Bahr. They conclude: 4 "It is impossible to begin to cultivate the soil 5 before the rains begin and the crop must be ready for 6 harvest before the flood reaches its height." 7 That means that any crop [to] be grown, in their 8 words: 9 "... must be something that reaches its maturity 10 quickly and whose whole growing season is not more than 11 three months." 12 Stubbs and Morrison, studying this topic, explained 13 that sorghum is ideally adapted to this environment 14 because it is quick-maturing and capable of being 15 harvested 80-90 days after it is sown. 16 The Ngok Dinka's sorghum is also well suited to the 17 Bahr because it has resistance. Beswick, one of the 18 Government's favourite authors makes exactly that point 19 and says earlier inhabitants in the region, the Lual, 20 had to leave because they didn't cultivate sorghum. 21 The MENAS report, which we heard Professor Allan 22 briefly summarise, draws conclusions about this: 23 "The physical characteristics of the Bahr region and 24 probably some southern areas within the goz, such as 25 around Tebeldiya, are well suited to the Ngok Dinka's</p> <p style="text-align: center;">Page 160</p>

<p>17:29 1 agricultural-pastoral lifestyle. The Bahr region 2 itself, characterised by thick forest bush, vegetation 3 and crops, is an abundant resource and would clearly 4 support and promote a permanently settled community with 5 an agro-pastoral lifestyle and culture such as we 6 understand the Ngoks to be." 7 In contrast to the Ngok, the Messiriya are 8 principally nomadic herders. You will recall 9 Article 1.1.3 of the Abyei Protocol. They have no 10 permanent homes or villages and virtually no 11 agricultural interest. That is not something to be 12 devalued or, as Professor Crawford suggests, to be held 13 against them; it is a noble and proud lifestyle, it is 14 just a different one. 15 Cunnison, again the Government's own witness, 16 remarks that: 17 "Nomadism is the only way of life to which the 18 Misseriya are attuned, and they are masters of it." 19 He observed that they are a nomadic tribe with no 20 permanent homes. 21 The Messiriya, also in part because they were 22 nomads, disdained agricultural labour. Based on living 23 with the Messiriya, as Professor Crawford told you, for 24 two years, he wrote: 25 "Homr share with many other cattle people [but not</p> <p style="text-align: center;">Page 161</p>	<p>17:32 1 tooc land", in the Bahr. 2 Cunnison also described the very limited agriculture 3 that the Messiriya engaged in, limited to millet farming 4 near Muglad. He said: 5 "Bulrush millet, which is grown almost to the 6 exclusion of other crops, does best on sand, and the 7 Homr use the sand ridges in the Muglad for this reason. 8 Other areas used are parts of the goz and Babanusa, near 9 Muglad [that's to the north of Muglad]. While the 10 staple food is bulrush millet, few families cultivate 11 enough of this to last the whole year long." 12 We will see in the subsequent evidence that they 13 trade with the Ngok villages that they camp near in the 14 dry seasons to get other kinds of food. 15 This environmental and cultural evidence is 16 objective, it's consistent and it's uncontroverted. It 17 demonstrates that the soil of the Bahr was fertile black 18 clay to which the Ngok's agricultural lifestyle and 19 crops were perfectly adapted. In particular the Ngok 20 grew a staple crow, dura or sorghum, that not only 21 survived but flourished in the particular, and frankly 22 particularly harsh, seasonal climate in the Bahr. 23 In contrast, the soil in the north, in the goz and 24 in Muglad, was airy and sandy. It was ill-suited for 25 agriculture. That was precisely fine for the Messiriya</p> <p style="text-align: center;">Page 163</p>
<p>17:30 1 the Ngok] a dislike of manual labour and particularly of 2 cultivation." 3 He explained that: 4 "Cultivation of any kind requires periods at fields 5 at sowing and harvest, and these long periods in one 6 place are inconsistent with the needs of the Misseriya 7 cattle." 8 Moreover, just as the soil and climatic conditions 9 of the Bahr were ideal for Ngok agriculture, the 10 conditions further north in Muglad were ill-suited for 11 agriculture, and we heard Professor Allan address that 12 briefly. Cunnison says this very concisely, saying: 13 "The nature of the Misseriya's land itself favours 14 cattle rather than grain." 15 What little farming the Messiriya undertook was 16 circumscribed in geographic scope, occurring in Muglad, 17 referred to at the time -- and still -- as the Messiriya 18 headquarters. It focused on crops that were completely 19 unsuited to the Bahr. 20 Stubbs and Morrison, scientists who studied this, 21 concluded: 22 "Messiriya cultivation was limited to millet rather 23 than sorghum." 24 In turn, they explain that millet requires "a light, 25 sandy soil, found in the Muglad country but rare in the</p> <p style="text-align: center;">Page 162</p>	<p>17:33 1 because they didn't like to farm; they were nomads and 2 they had cattle. The only kind of agriculture that 3 could be sustained in the north, in the area of Muglad 4 and Babanusa, was millet, which grew on sand, and which 5 didn't grow in the south in the Bahr. 6 That is not an isolated piece of evidence; it is 7 instead a part of a consistent pattern. 8 If we look at the cattle of the two people, which 9 were extraordinarily close to both people's hearts, the 10 same thing applies: the Ngok cattle were physically 11 different and well suited to the Bahr than the Messiriya 12 cattle, which were suited to the areas to the north. 13 At the same time Ngok cattle-rearing and herding 14 practices were precisely adapted to the damper regions 15 of the Bahr, while the Messiriya's cattle and husbandry 16 practices were adapted to the dryer regions in Muglad 17 and Babanusa and to their seasonal nomadic treks. At 18 the same time the Messiriya's cattle were very 19 ill-adapted and could not survive in the Bahr. 20 It is undisputed that there are significant physical 21 differences between the Ngok and the Messiriya cattle; 22 this is referred to by the witnesses and the ABC 23 experts. 24 Ngok cattle are short-legged, they have a small hump 25 and they don't move well in sandy or desert terrain.</p> <p style="text-align: center;">Page 164</p>

<p>17:35 1 Instead they are very well adapted to damp, marshy 2 terrain, of the Bahr that Professor Allan has just 3 described. They are also immune to many of the 4 waterborne diseases and insects that naturally frequent 5 the Bahr region in the south. 6 Conversely, the Messiriya's cattle were well suited 7 to the drier lands around Muglad and to the 8 circumstances of the Messiriya's lifestyle. The 9 Messiriya's cattle were long-legged zebu with large 10 humps, smaller than a camel but still pronounced, and 11 well adapted to their long desert treks. 12 Professor Cunnison reported that for the Messiriya: 13 "A good bull is one which is a good walker and then 14 a good carrier. A good cow is one which is a good 15 walker and then a good milker and calver." 16 In Cunnison's words, the Messiriya chose cattle 17 based on an unproductive quality demanded by the nomadic 18 existence. 19 Similarly -- and this is important -- Bennett, John 20 and Hewison, in another scientific study, concluded: 21 "Neither type of cattle thrives in the other's 22 environment. In fact, a large proportion of Arab cattle 23 will die if maintained in the south during the rains." 24 To the same effect, citing the Messiriya's own 25 reports based on two years living with them, Cunnison</p> <p style="text-align: center;">Page 165</p>	<p>17:37 1 environment and the climate of their respective regions. 2 Here the evidence shows that both the Messiriya and the 3 Ngok migrate south with their cattle during the dry 4 season in search of more water and better pastureland. 5 Thus during the die season the Messiriya moved south 6 from the Babanusa region above Muglad, which is north of 7 the goz, into the Bahr; at the same time the Ngok moved 8 south from their permanent villages throughout the Bahr 9 to congregate around the principal waterways of the 10 region, which Professor Allan showed you on the 11 satellite photography. 12 The Government has changed its position fairly 13 fundamentally on this point, and it is a fairly 14 fundamental point. The Government's memorial claimed, 15 you will recall: 16 "In the wet season ... the Ngok went south to the 17 River Lol, not north." 18 That is wrong, and it fundamentally reorients the 19 locations of the tribe. If you look at the historical 20 evidence here -- and I'll go through it very briefly -- 21 from Professor Cunnison and others, it's exactly the 22 other way around. In the dry season the two tribes both 23 go south. 24 This has a fundamentally important effect on how you 25 view the historical documents and how you view where the</p> <p style="text-align: center;">Page 167</p>
<p>17:36 1 said that the Dinka cattle can "withstand mud better 2 than Misseriya cattle", which "do not have the facility 3 for moving in mud that Dinka cattle possess". 4 The scientific experts reached the same conclusion. 5 They observed that Ngok cattle were better adapted to 6 the wet conditions in the Bahr than the Messiriya. They 7 said: 8 "The Homr and Ngok have occupied these different 9 environments for long enough to be reflected in their 10 different breeds of cattle." 11 The environmental evidence argues against any 12 historical or long-term Homr occupation of the river 13 system. Again, this was the scientific experts, who 14 looked at this relying on all the other scientific data 15 in the record which I've referred to. 16 The Government's own witnesses make this point. 17 Zakaria Atem's witness statement says that the Messiriya 18 cattle leave the Bahr region when the rains begin, 19 saying: 20 "The reason for this is that the Misseriya cattle 21 are sensitive to the flies." 22 It's a reference to the fact that the Ngok cattle 23 are disease-resistant and the Messiriya are not. 24 The seasonal grazing and cattle-herding patterns of 25 both the Ngok and the Messiriya are adapted to the</p> <p style="text-align: center;">Page 166</p>	<p>17:38 1 tribes were in relation to each other at the times that 2 they were observed. 3 In his book Baggara Arabs, Professor Cunnison 4 explained: 5 "The southern part of the country, the Bahr, is the 6 area in which the Homr spend the latter half of the dry 7 season. It is characterised [and we saw this before] by 8 dark, deeply cracking clay and numerous winding 9 watercourses, all connected eventually to the 10 Bahr el Arab. Much of the Bahr has permanent Dinka 11 settlements [Much of the Bahr has permanent Dinka 12 settlements], although during most of the time that the 13 Homr occupy it, the Dinka are with their cattle south of 14 the Bahr el Arab." 15 Cunnison's witness statement made a similar point: 16 "During the wet season the Homr lived in settled 17 camps to the north in Babanusa. As the dry season came 18 the Messiriya moved first briefly to the Muglad, where 19 the cattle grazed on the remains of the millet harvest, 20 then they moved south through the extensive sandy goz to 21 the area called the Bahr." 22 Which we have just looked at with Professor Allan 23 and which I have just described, beginning just south of 24 the goz. 25 Historical descriptions are identical. Former</p> <p style="text-align: center;">Page 168</p>

<p>17:40 1 District Commissioner Davies, writing in the 1920s, 2 explained: 3 "When the Homr went south to the Kiir/Bahr el Arab 4 in the dry season the Dinka withdrew still further south 5 into Bahr el Ghazal province. But when the rains came 6 and the Arabs took their cattle north of the area 7 El Muglad, the Dinka, whose small breed of cattle had 8 acquired immunity to fly-borne diseases, moved up and 9 occupied the river region." 10 Again, a reference to this historic pattern, backed 11 up by the environmental evidence of where these people 12 could live as an environmental factor. 13 Again, there's no question but that the seasonal 14 pattern was going south in the dry season by both 15 tribes, and that is fundamentally important. 16 The witness testimony is the same if you look at it, 17 I would refer you to Herika Humeda Khamis at 18 paragraph 7 -- the reference will be in my slides and my 19 script -- as well as Zakaria Atem at paragraphs 25-26. 20 They explain the same thing. 21 The evidence also shows that both the Ngok and the 22 Messiriya cattle were ideally adopted to their 23 respective environments in the Bahr and the Muglad and 24 to the seasonal variations of those areas. 25 Importantly, the Messiriya cattle could not only not</p> <p style="text-align: center;">Page 169</p>	<p>17:42 1 of tribes, and they constructed substantial, permanent 2 homes that enabled them to weather, to survive the 3 torrential rains in the wet season. The characteristic 4 arrangements of Ngok Dinka homes were for there to be 5 two or three houses, called "tukuls", clustered 6 together, with the agricultural fields spread between 7 and around them, and some difference between the homes. 8 One source described: 9 "Dinka settlements are spread out over a vast 10 territory ... There are usually several miles between 11 clusters of huts and cattle byers in settlements or 12 villages, each accommodating only a few families whose 13 homesteads are all well separated." 14 Another source explained: 15 "Ngok Dinka villages are kept exceedingly clean, 16 there's plenty of space, and the huts are never crowded, 17 but built in groups of twos and threes, each group 18 surrounded by its own plot of cultivation." 19 Professor Crawford referred to other historical 20 reports of these clusters of two or three houses, two or 21 three tukuls, and suggested that meant there weren't 22 many people. On the contrary, what it suggests is that 23 the people that were there were very widely dispersed in 24 small settlements. That was the characteristic 25 Ngok Dinka lifestyle. As we look at the historical</p> <p style="text-align: center;">Page 171</p>
<p>17:41 1 flourish in the Bahr during the eight or nine months of 2 the wet season; they would die. They could not survive 3 the flies and the mosquitoes and the other insects. 4 Whereas the Ngok cattle would survive: they would 5 survive in the mud, and they were resistant to the 6 diseases. 7 When you look at the Ngok cattle-keeping practices, 8 the way that they dealt with how they handled their 9 cattle, it is precisely the same. The Ngok constructed 10 substantial cattle byres, which are called "luaks" or 11 "dugdugs", where their herds would be sheltered during 12 the rainy season. 13 Professor Crawford noted today that a dugdug is 14 a Ngok cattle camp or corral; that's at page [98], 15 line [2] of the transcript. These were large, sometimes 16 two-storey structures. Sometimes they were built on 17 stilts. The idea was that they would protect the cattle 18 in the wet season. 19 The Messiriya did not build similar structures; and 20 they couldn't because their nomadic lifestyle kept them 21 from staying in one place long enough to build something 22 like that. In any event, their cattle couldn't survive 23 in the Bahr during the wet season. 24 The same point applies to Ngok and Messiriya 25 dwellings. The Ngok were known as the master builders</p> <p style="text-align: center;">Page 170</p>	<p>17:44 1 reports, it is very important to keep that 2 characteristic in mind. 3 In contrast to the Ngok, who built these tukuls and 4 had these permanent villages, the Messeriya were 5 nomadic, as we've seen. They lived in tents, and they 6 didn't live in them permanently; they carried them 7 around with themselves. In Cunnison's words: 8 "The tribesmen are continually on the move and do 9 not have permanent houses anywhere, and so they are 10 obliged to carry all their household possessions about 11 with them. All the baggage, and nearly all of the 12 people of the household, are transported from place to 13 place on bulls." 14 Again, the cultures of the Ngok and the Messiriya 15 were precisely adapted to their respective environments, 16 with the permanent Ngok homes enabling them to survive 17 the torrential rains of the Bahr, and the diseases of 18 the Bahr, while the Messiriya instead moved north in 19 their tents to the dry, arid region of the goz and 20 beyond, in Muglad and Babanusa, where it was just fine 21 to have tents because, as we saw, it didn't rain. They 22 did so because their tents would not have protected them 23 in the Bahr the way that the Ngok's tukuls protected 24 them. 25 In sum, when you put all this environmental evidence</p> <p style="text-align: center;">Page 172</p>

<p>17:45 1 together -- and I realise to some extent it may be 2 tedious; it's not the most familiar, accessible source 3 to international lawyers, but it is scientific evidence 4 which the ABC experts looked at, which Professor Allan 5 looked at, which Stubbs and Morrison looked at, which 6 all the other authorities in the record have 7 described -- it portrays a Ngok Dinka lifestyle, ranging 8 from cattle, to the way they construct their houses, to 9 their cattle byers, to the types of crops they used, the 10 way they grow them, that fits precisely with the Bahr, 11 whereas the Messiriya's lifestyle cannot survive in the 12 Bahr for eight or nine months -- the rainy season -- of 13 the year. They can come there, and must come there to 14 some extent, in the dry season; they're nomads. But 15 they can't live there in the wet season. It is instead 16 where the Ngok Dinka live.</p> <p>17 The Government no doubt will say, "Oh, just because 18 the Ngok could live in the Bahr doesn't mean they did 19 live in the Bahr". In fact, as we'll see, that is 20 contradicted by what Professor Cunnison says, it's 21 contradicted by the witness evidence, and it is -- more 22 importantly, in a sense -- contradicted by common sense.</p> <p>23 The Government's case essentially is that the Bahr 24 was empty, save for when the Messiriya came there in the 25 dry season. Here you have a fertile, well-watered wedge</p> <p style="text-align: center;">Page 173</p>	<p>17:47 1 such length is basically uncontroverted. It is 2 different from what we international lawyers are used 3 to, but it is scientific evidence objectively recorded 4 by multiple people at different times in scientific 5 works. It deserves our respect, as did the ABC experts. 6 It paints a picture of the Ngok in the Bahr, throughout 7 the Bahr. It paints a picture of the Messiriya, north 8 in their headquarters in Muglad, coming south into the 9 Bahr to mingle with the Ngok during the dry season. 10 That makes perfect sense and it is objectively recorded.</p> <p>11 With that background, which hasn't been addressed at 12 all by the Government, I'd like to move on to the 13 migration evidence. Because it is essentially agreed in 14 most part, I'm not going to spend much time on it.</p> <p>15 The sources regarding the migration describe the 16 Ngok as arriving in two directions, in two separate 17 migrations: the Alei and the Achak chiefdoms migrated 18 from the north and the regions around Muglad, and then 19 ended up around Turda and Nyama; the other Ngok Dinka 20 chiefdoms arrived from the east, settling around the 21 Ngol.</p> <p>22 The sources that describe this are written well 23 before the current dispute arose, and they provide 24 a consistent description of Ngok occupation of the 25 entire Bahr region; while less extensive Messiriya oral</p> <p style="text-align: center;">Page 175</p>
<p>17:46 1 of land in between desert on the north, desert on the 2 west, drier area and mountains on the east, and swamp on 3 the south; a beautiful area of real estate, fertile, 4 precisely suited to the Ngok Dinka's lifestyle, that is 5 supposedly empty. That makes no sense.</p> <p>6 It also contradicts everything we know about the 7 Messiriya and the Ngok being brothers, and Abyei Area 8 being a bridge between the two people. How can it be 9 a bridge if it's empty and the Ngok don't live there?</p> <p>10 If the Ngok congregate about the Bahr el Arab during 11 the dry season, where do they come from? They migrate 12 south in the dry season. They migrate south from 13 somewhere to the Bahr el Arab. Where they migrate south 14 from is from the area north of the Ngol, around the 15 Ngol, between the Ngol and the Kiir. They migrate from 16 the drier, swampier regions on either sides of the river 17 to the rivers themselves. That is where they spend 18 their dry seasons. And they cultivate the areas in 19 between the rivers during the wet season, where their 20 lifestyle is precisely suited to that territory.</p> <p>21 The Government's hypothesis that this bridge is 22 empty, that these people who are brothers live in 23 completely different places, is profoundly wrong.</p> <p>24 Moving on, it's important to emphasise that that 25 environmental evidence which I have gone on about at</p> <p style="text-align: center;">Page 174</p>	<p>17:49 1 tradition corroborates that. That evidence, at least up 2 to a certain point in the 19th century, is largely 3 undisputed.</p> <p>4 The Government, as we've seen, originally said that: 5 "Prior to 1905 the western Dinkas, including the 6 Ngok Dinka, were located to the south of Bahr el Arab." 7 They also claimed that the Ngok territory was 8 always: 9 "... squarely south of the Bahr el Arab and in the 10 province of Bahr el Ghazal."</p> <p>11 The Government now says: when it said those things 12 it really meant on the Bahr el Arab, or north and south 13 of the Bahr el Arab; I have some difficulty with that 14 understanding. But in any event, they have changed 15 their position. And instead they now say -- and I'll 16 quote from their reply memorial: 17 "... there is general agreement that some 18 [Ngok] Dinka tribes in the 18th century migrated north 19 of the Bahr el Arab."</p> <p>20 More specifically the Government says: 21 "... the Ngok migrated to the north up around the 22 Ragaba ez Zarga."</p> <p>23 Professor Crawford spent some time criticising oral 24 traditions. We have no disagreement that oral 25 traditions need to be handled delicately, need to be</p> <p style="text-align: center;">Page 176</p>

<p>17:50 1 looked at carefully, need to be corroborated. Here's 2 a situation though where both the Government and the 3 SPLM/A agree on what the oral tradition said up to 4 a certain point in time. What it said was that the Ngok 5 had migrated to the areas around the Ngol; and, in the 6 case of the Alei, in the area of Muglad. 7 The Government changed its story in its subsequent 8 submissions, and said that although the Ngok moved 9 there, migrated there in the 18th and 19th centuries, 10 they then moved further south. I would suggest that 11 when you look at the historical evidence that is in the 12 record on this point, it is entirely inconsistent with 13 that description. 14 I'm not going to take you through it piece by piece. 15 But what is described, quite naturally, is that after 16 the Ngok had migrated to these regions individual 17 paramount chiefs moved south in particular cases. There 18 is no description at all of all the Ngok Dinka people, 19 as the Government claims, moving south from the areas in 20 which they lived. 21 If you look at the witness statements of the two 22 parties, and in particular Majak Matet Ayom, they 23 describe two stages of migration. They describe the 24 Bahr being established by their grandparents, and so 25 forth.</p> <p style="text-align: center;">Page 177</p>	<p>17:53 1 headquarters to Mirok; his headquarters, not his entire 2 people. Again, a description of the residences and 3 places where the paramount chief had their headquarters, 4 not the location of all the Ngok Dinka people. 5 When you look through the writings of Francis Deng, 6 which are also described in the materials, exactly the 7 same thing comes out of that. He describes the Dinka 8 holding their territory, the paramount chief moving 9 south himself, but the Ngok Dinka holding their 10 territory, to which the Government admits/acknowledges 11 they had migrated to and were in up until the 12 mid-19th century. 13 I would suggest that when we take a snapshot there, 14 at just before the Mahdiyya began, we have a picture of 15 the Government essentially conceding, based on the oral 16 traditions which Professor Crawford found so 17 unpersuasive, that the Ngok had migrated into the area 18 of the Bahr, where the environmental evidence indicates 19 they would be, and the Government's then suggesting that 20 they had moved further south. Again, there is no 21 evidence at all suggesting any such sort of massive 22 population move by all of the Ngok Dinka to the south. 23 With that, I'd like to very briefly turn to the 24 Mahdiyya itself, moving through the evidence in 25 historical order.</p> <p style="text-align: center;">Page 179</p>
<p>17:51 1 You can look at that witness testimony, you can look 2 at the oral traditions that it reported. The 3 Government's account of how, although the Ngok were 4 located in exactly the place where the environmental 5 evidence says that they would be, they moved all south, 6 is simply not supported by any of the evidence that they 7 rely on. 8 I'd like to move on quickly, though, and pick up 9 with the discussion of Stefano Santandrea. The 10 Government relies on Stefano Santandrea, and it 11 acknowledges that he said that the first of the Ngok to 12 cross the Nile was Kuol, in search of wider grazing 13 areas for their increasing numbers of cattle. The Kuol 14 settled along the Ngol, called in Arabic the 15 Ragaba ez Zarga. The Government then says that Alor 16 pushed further south on, invading the territory of the 17 Begi or the Girma, and arrived as far as Abyei. 18 The Government suggests that this shows the 19 migration of all the Ngok, and I would suggest that that 20 is incorrect. If you read the documentary evidence it 21 only describes an individual paramount chief moving his 22 residents south to the region of what's today 23 Abyei Town. 24 That's confirmed, if you read his subsequent 25 descriptions of Biong's heir Arop, who shifted his</p> <p style="text-align: center;">Page 178</p>	<p>17:54 1 Professor Daly addressed this briefly. But with the 2 Ngok located in the Bahr, the Mahdiyya, beginning in 3 1881 and continuing through 1898, a 17-year-long bitter 4 religious war had, as Professor Daly describes it, 5 an asymmetric effect on the two people. The Mahdiyya 6 affected the Messiriya significantly: they sided with 7 the Mahdiyya. The Ngok Dinka remained essentially out 8 of the fray; they were unscathed by the Mahdiyya, 9 whereas the Messiriya suffered disastrous losses. 10 This is not something we need to spend significant 11 amounts of time on, but again, just to orient ourselves 12 so that when we come to look at the subsequent evidence, 13 the notion that the Messiriya would have been in 14 a position to push into Ngok territory at that point, or 15 the Ngok to be incapacitated and to have withdrawn 16 further to the south is simply not borne out by the 17 evidence. 18 Henderson wrote: 19 "The majority of the Homr joined the Khalifa at 20 an early stage ... but suffered heavy casualties at the 21 battle of Toski." 22 Deng similarly observed that the Ngok were spared 23 the worst of the Mahdist period. He described that as 24 a relatively peaceable period for them, and one where 25 the Dinka were "left alone by the Mahdists". Again,</p> <p style="text-align: center;">Page 180</p>

<p>17:56 1 this makes it extremely unlikely that the Ngok would 2 somehow have been pushed out of their historic 3 territories further south. 4 With that I'd like to turn to the Condominium 5 documentary record, beginning in 1898 or so. The 6 Government, as we've seen, puts huge reliance on this 7 particular part of the record. In particular it claims 8 that this part of the record provides "an abundance of 9 evidence". I think it's important that we look at this 10 evidence with the same sort of scepticism and reserve 11 that we look at other parts of the record. 12 To some extent we, as lawyers, may gravitate towards 13 documents or historical documents, in some ways. But 14 these documents have profound limitations that it's very 15 important to understand as we try to interpret them. 16 They are important evidence, we can learn important 17 things from them, but they have limitations and need to 18 be viewed with care. 19 First, the documentary record from the early 20 Condominium years is extraordinarily sparse. The 21 parties have produced between them two dozen or so 22 documents that bear on the period between 1900 and 1910. 23 In part that's because there simply weren't many 24 documents produced. 25 There was a very small, understaffed Condominium</p> <p style="text-align: center;">Page 181</p>	<p>17:59 1 report where people were, or where the Ngok Dinka were, 2 in particular. They weren't there doing a survey of the 3 tribes; they were reporting on a wide range of different 4 things. References to the Ngok, and to the Messiriya 5 for that matter, were random and sporadic. 6 I'd like to take us back to what Mr Bundy said about 7 what Condominium officials knew about the Ngok Dinka in 8 1905. He said: 9 "It is self-evident that as of 1905 Government 10 officials would have had no knowledge of tribal 11 locations." 12 That's the transcript, page [20], line [19]. 13 That's right. Percival and Wilkinson and Mahon and 14 others simply had no idea, based on what Mr Bundy called 15 "rapid treks" and a couple of days' visit to the region, 16 where exactly the Ngok or even where roughly the Ngok 17 were. Their observations can therefore provide 18 occasional pinpricks or data points on an area 19 three-quarters the size of Belgium, but they can't tell 20 us anything comprehensive. 21 These are extraordinarily limited observations and 22 are not a reliable source of saying the Ngok weren't 23 here in these places. 24 Professor Crawford referred to in, if you will, the 25 most extreme example of this, Henderson's truck ride</p> <p style="text-align: center;">Page 183</p>
<p>17:57 1 Administration in the first decade of the 20th century. 2 The country had just moved from wartime conditions to 3 semi-security, and the Condominium was focused on very 4 different things than producing documents about the 5 remotest parts of the country. The surest testimony, or 6 the surest evidence of that, is when you look at the 7 very limited number of documents and the very short 8 length of the documents that are in the record about 9 that region. 10 Second, those documents from the Condominium period 11 which are available involve an extremely limited number 12 of visits by not even a whole handful of Condominium 13 officials to the Abyei region. All of those visits 14 involved exploratory treks or reconnaissances that 15 lasted a few weeks or -- as we'll see -- days, and they 16 followed a very limited number of routes, that did not 17 penetrate the huge expanse of the Bahr or the Abyei 18 region. 19 Mr Bundy, you will recall, said this morning that 20 Wilkinson could have "spent only a couple of days on the 21 relevant rivers"; that's the transcript at page [6], 22 line [5]; and that Percival made only "a rapid trek from 23 north to south"; that's page [7] at line [9]. 24 Moreover, although the Condominium accounts contain 25 important facts, in most cases their purpose wasn't to</p> <p style="text-align: center;">Page 182</p>	<p>18:00 1 from Muglad to Abyei Town. He said Henderson was 2 a serious official, a serious British administrator, and 3 you can rely on his observations of what he saw on this 4 truck trip. 5 That's a 200-kilometre trip on a road. It's a bit 6 like driving from Brussels on the highway south from 7 Brussels, the E411, to the southern border of Brussels 8 and observing what you see out of your window. You 9 obviously aren't going to see very much of Belgium at 10 all. You'll report that Belgium doesn't have Belgian 11 people in it, it has highway signs and gas stations. It 12 doesn't enable you to see the vast expanse of what 13 Belgium is. 14 Henderson could see no more from his truck trip than 15 you or I could see if we drove down the motorway, just 16 like Henderson drove down the road from Muglad to Abyei. 17 Instead what we can look at is the observations of 18 Cunnison and of Tibbs and other people who lived and 19 worked in the region for substantial periods of time, 20 and of the people themselves, who can describe the area. 21 Third, we need to put in context also what the Bahr 22 was. It was 12,000 square miles, roughly the size of 23 Belgium again. It had no roads. Unlike Belgium, where 24 you might drive off the highway and be able to see 25 people, it had no roads, no tracks. It was unexplored</p> <p style="text-align: center;">Page 184</p>

<p>18:02 1 and to a substantial extent unexplorable. One of the 2 early Condominium officials described the Ngok territory 3 as: 4 "... difficult to traverse at all times of the year 5 and so distant from an administrative centre that it has 6 been rarely visited." 7 The routes of the Condominium officials, when we 8 look at them, never penetrated to the north of the Ngol, 9 except along a single corridor extending from Fauwel to 10 Lake Keilak. The officials' treks never went west or 11 north, through the vast expanse of the Bahr lying 12 between the Ngol and the goz. As Professor Daly will 13 explain to us, British knowledge of the Ngok was based 14 on a few hours' path-crossing. 15 Given the limited extent of the Condominium 16 exploration, it is particularly important to note that 17 most of it occurred during the dry season as well. The 18 reason was that, unlike the Ngok, the Condominium 19 officials couldn't travel in this entire region during 20 the wet season, and they never went there. All of the 21 observations that we have are from the dry season. 22 That's fundamentally important. That's one of the 23 reasons that I spent the time taking you through the 24 migration patterns which may be a little bit tedious, 25 but it's fundamentally important to realise that the</p> <p style="text-align: center;">Page 185</p>	<p>18:05 1 a little explanation -- the Condominium officials 2 typically travelled from the north with Arab armed 3 contingents and Arab guards. That is not to be 4 critical -- that made sense, that was who they were 5 working with in the north -- but it affected, naturally, 6 what they saw when they came south. 7 The Ngok Dinka were afraid -- we're going to see 8 particular examples of that -- of slave raiding. They 9 hid, and we will see further examples of that. 10 Professor Crawford scoffs at it, but they hid from the 11 Condominium officials and they dissembled about where 12 they were to the Condominium officials. 13 That is not something to treat as an odd excuse. 14 The lack of evidence is no evidence. It is something 15 that you need to appreciate in order to understand the 16 historical record. 17 One, as a lawyer, looks at these documents and says, 18 "Ah ha, black and white, I can see it. Here's the 19 document, it says A". But we all need to look at this 20 record in light of all of the things that I have said 21 and in light of these somewhat subjective factors -- and 22 I use those words advisedly -- one needs to assess this 23 documentary evidence with judgment and scientific 24 analysis. That is why the ABC experts were picked, and 25 it requires putting these documents into a particular</p> <p style="text-align: center;">Page 187</p>
<p>18:03 1 times when the Condominium officials were there was the 2 time of the dry season, when the Ngok had migrated 3 south. 4 When they said places were uninhabited or when there 5 were wandering parties of Arabs, it was because the time 6 of year was when the Ngok wouldn't be there. It would 7 be a little bit like going out at night and saying, 8 "There's no sun here". Of course not. There's no sun 9 here. It's because the Ngok, moved south during the dry 10 season. When the Condominium officials were making 11 their observations, it was at a time when the Ngok were 12 not in their traditional places where they were during 13 the wet season. 14 Mr Tibbs, who was writing in the 1950s, 15 substantially later than the early explorations and when 16 they would have been a lot more access, explained: 17 "I never visited the Ngok during that period [the 18 wet season] because the conditions made it impossible 19 for us to penetrate the region at all between May and 20 November." 21 If Mr Tibbs in the 1950s, with modern technology, 22 couldn't penetrate it, people like Percival and 23 Wilkinson and other certainly couldn't, and they didn't; 24 we know from the dates of the report. 25 Also -- and again this is a point that requires</p> <p style="text-align: center;">Page 186</p>	<p>18:06 1 historical social and cultural context. 2 It is different from our context. We look at 3 documents and assume they mean what they say. We are 4 used to, as lawyers, the plain language rule: a contract 5 means what it says, a treaty means what it says. We 6 need to view these documents through a different lens; 7 we need to view them through the lens of the people of 8 the area, and of the seasons and of the ecology and of 9 the environment of the area, because it profoundly 10 affects the way one values that evidence. 11 Finally, there were also -- and that's been referred 12 to repeatedly by almost every speaker -- the 13 inaccuracies and uncertainties in the documents 14 themselves. 15 Even if one were to read the plain language of the 16 documents, one would not know what exactly it means, in 17 part because there weren't geographic landmarks and 18 because when one refers to the rivers, the Condominium 19 officials used multiple names for the same river or the 20 same name for different rivers. The confusion about the 21 Bahr el Arab is one example, but the same confusion 22 existed for the Bahr el Homr. Others names were used: 23 the Gurf, the Ngol, the Kiir; we heard other names today 24 and I won't go through them. 25 The Government essentially ignores all of this; it</p> <p style="text-align: center;">Page 188</p>

<p>18:07 1 essentially takes the documents and tries to walk 2 through them, saying: there weren't Ngok here, there 3 weren't Ngok there, therefore there weren't Ngok 4 anywhere. That was not the case. The Ngok obviously 5 lived somewhere. 6 On the Government's case, the Ngok lived essentially 7 to the south and maybe just a touch to the north of the 8 Kiir. That is fundamentally wrong. That is 9 inconsistent with what the environmental evidence shows, 10 it is inconsistent with what the documentary evidence 11 shows, and it does not accord with the basic concept of 12 the Bahr in the Abyei region being the bridge between 13 the north and the south where the Messiriya and the 14 Ngok Dinka came together. 15 In fact, when we look at the documentary record, 16 what we can see is that the Ngok Dinka were observed, 17 were specifically observed in a number of identifiable 18 places. We will also see that there were other places 19 where there weren't references to them, but it is 20 illegitimate to draw negative inferences about the Ngok 21 not being in the vast expanse of the Bahr because on 22 certain occasions Condominium officials did not report 23 the Ngok being in particular places. That is 24 an inaccurate negative inference which is not 25 sustainable on the facts of this case.</p> <p style="text-align: center;">Page 189</p>	<p>18:10 1 a powerful negative inference that the parts of the maps 2 that have not been produced are supportive of the SPLM/A 3 case and contrary to the Government's case, and at 4 a minimum that it underscores the limitations on the 5 documentary record. 6 It is illegitimate to say that because the 7 documentary record does not indicate the presence of 8 Ngok in this place or another place, they couldn't have 9 been there, because the Government's production of 10 partial documents and the SPLM/A's limited access to the 11 documentary record itself dramatically shows how the 12 documentary record itself has inherent gaps and 13 limitations. 14 If one doesn't have a complete documentary record, 15 if one only has partial documents, one can't draw 16 negative inferences about what's on the pieces of paper 17 that haven't been produced or that we haven't had access 18 to. 19 Moving on to the specific documents, let's start 20 with the pre-1905 Condominium documents. Preliminarily 21 I'd like to note again how the Government has changed 22 its case here. 23 The Government's original case -- and this I think 24 relates back to the definition of the Abyei Area -- was 25 that the Ngok were located south of the Kiir. The</p> <p style="text-align: center;">Page 191</p>
<p>18:09 1 Finally -- and with an eye towards my time -- it is 2 important to note that the documentary record in this 3 case suffers from an additional and important 4 limitation. It's difficult to say precisely what the 5 extent and consequences of that limitation are, but it's 6 also impossible to ignore it. 7 There is in the Survey Department a substantial body 8 of documents. The Government has relied on those 9 documents. It has had substantial access to those 10 documents. It produced with its reply memorial for the 11 first time additional documents in support of its case. 12 The SPLM/A, as the Tribunal knows, has not had 13 similar access. I don't want to go into procedural 14 fighting between lawyers, but we did not obtain the 15 access that the Government had to those records. 16 In addition, the Government has submitted partial 17 copies of documents. As you've seen, the Government has 18 submitted parts of maps which were complete maps, but 19 they have only put in parts. One does not need to go 20 into the question of: did the Government do this 21 deliberately or not deliberately? The fact of the 22 matter is that there were complete documentary records 23 which we have not had access to and Government has 24 relied on parts of those. 25 We would suggest that that strongly supports both</p> <p style="text-align: center;">Page 190</p>	<p>18:11 1 Government's case now is that the Ngok are located on or 2 predominantly to the south of the Kiir. The Government 3 doesn't explain what it means by "on or predominantly 4 south of the Kiir", but when we look at the documentary 5 evidence we see that in fact there are a number of 6 recorded historical observations of the Ngok well to the 7 north of the Kiir and to the north of the Ngol. 8 It is also clear that the Ngok paramount chief by 9 1905 was recorded as living to the north of the Kiir; 10 Sultan Rob or Arop Biong was living to the north of the 11 Kiir in a town called Burakol. 12 Only three Condominium officials, a total of three, 13 documented explorations to the Abyei Area before 1905: 14 those were Mahon, Wilkinson and Percival. Saunders did 15 not travel to the Abyei Area; Huntley-Walsh, who 16 occasionally is mentioned by the Government, travelled 17 there after 1905, and there's no evidence that Bayldon 18 ever went to the Abyei Area; he certainly never records 19 that. 20 So we're left with Mahon, Wilkinson and Percival, 21 all of which, when you read them carefully, support the 22 SPLM/A's claims and contradict the Government's claims. 23 I emphasise: read them carefully. To some extent 24 working with these documents is a little bit like doing 25 detective work, one has to read them carefully, but that</p> <p style="text-align: center;">Page 192</p>

<p>18:13 1 is because of the context in which they arose. 2 Mahon was the Governor of Kordofan, and he reported 3 on two trips that he made to Kordofan in 1901 and 1902. 4 Those trips illustrated: (1) the confused terminology at 5 the time with regard with the rivers of the Bahr. He 6 uses both the terms Bahr el Arab and Bahr el Homr 7 apparently to refer to the Ngol; (2) the Messiriya being 8 confined to the area around the Muglad, consistent with 9 the evidence that I've previously described, migrating 10 from the south to the Ngol during the dry season; and 11 (3) the Ngok being located on the Ngol, or the 12 Ragaba ez Zarga, in the dry season. 13 Mahon's first trek through southwestern Kordofan is 14 reported in November and December of 1901 -- dry 15 season -- in Sudan Intelligence Report No. 90, dated 16 January 31st 1902. 17 In his report Mahon notes the locations of the 18 Messiriya, saying that they had their headquarters in 19 Muglad, substantially to the north of the goz, and that 20 in the dry season they "go south to the Bahr el Arab". 21 It's almost certain that that was a reference to the 22 Ngol/Ragaba ez Zarga. 23 You will remember that Professor Crawford said this 24 morning that, "The Ragaba ez Zarga in this period was 25 dominantly called the Bahr el Arab" -- that's in the</p> <p style="text-align: center;">Page 193</p>	<p>18:15 1 Mahon make made a second trek in southern Kordofan 2 in 1902, this time to the Abyei Area itself. It's 3 described in Sudan Intelligence Report No. 92. His 4 report described the Ngok locating: 5 "... Sultan Rob's country on the Bahr el Homr about 6 two days from Ambady." 7 Mahon's reference to Sultan Rob's country on the 8 Bahr el Homr is almost certainly a reference to the Ngol 9 again. As you will see, the Bahr el Homr and the 10 Bahr el Arab were used interchangeably as references, 11 while they referred to the Kiir/Bahr el Arab as the 12 Kiir, the Gurf, the Bahr el Jange or the Bahr el Dinka. 13 As we will see, his description of a subsequent trek 14 in 1903 uses exactly the same terminology. This doesn't 15 mean that Sultan Rob was on the Ngol. That's not what 16 he said. He's talking about Sultan Rob's country; 17 there's a difference between a person and a country. 18 When he refers to where Sultan Rob's country was, he is 19 referring to it being on the Ngol. 20 As I've said, that's precisely consistent with the 21 grazing patterns and the seasonal migrations that we've 22 previously talked about. 23 Mahon's report also described the fact that Rob's 24 place is a great trade centre for Bahr el Ghazal, and 25 a lot of ivory comes there. That is a reference further</p> <p style="text-align: center;">Page 195</p>
<p>18:14 1 transcript at page [90], line [3] -- which is exactly 2 consistent with the environmental evidence, the cultural 3 evidence that we've described. 4 The Messiriya would be to the north of the goz; they 5 would come south during the dry season on to the Ngol. 6 That would be the area where they camped near to the 7 villages of the Ngok Dinka and it makes perfect sense. 8 The fact that there are Messiriya in the Bahr and 9 Messiriya in the Abyei Area is not inconsistent with the 10 Ngok Dinka being there; on the contrary, it is precisely 11 consistent with that because all the evidence shows that 12 where the Messiriya came in the dry season was where 13 they mixed with the Ngok Dinka. 14 That is why the witnesses said that these people are 15 brothers. They wouldn't be brothers if they didn't mix, 16 and the time that they mixed was during the dry season. 17 This wouldn't be a bridge if the two people didn't 18 mingle together, as they have harmoniously done in the 19 last three days, if they weren't coming together during 20 the dry season. 21 The way that happened was by the Messiriya coming 22 south into the Ngok territory, and if it wasn't Ngok 23 territory, as the Government says, if the Ngok weren't 24 really there, then there's no way that that mingling 25 would occur.</p> <p style="text-align: center;">Page 194</p>	<p>18:17 1 south to Sultan Rob's village, where there was an active 2 trading centre; one hesitates to say a "bustling 3 commercial centre", but it was something that would 4 inspire Mahon to refer to it as a great trade centre. 5 Obviously a substantial number of people, it was the 6 Ngok centre, and recorded quite clearly in the 7 documentary evidence. 8 The second of the pre-1905 explorations in the Abyei 9 Area was by Wilkinson, who we've heard reference to. He 10 trekked from El Obeid to Lake Keilak, which we've seen 11 in the satellite photography; then entering, from 12 Keilak, what he called Dar el Jange, from the northeast, 13 again in the dry season, 1902. And he travelled south 14 to reach Fauwel, which is just north of the Ngol. The 15 reference to the Dar el Jange is -- I think it's 16 undisputed -- a reference to the Ngok Dinka. 17 After arriving in Fauwel, Wilkinson headed south and 18 crossed what he called the Bahr el Arab; we heard 19 previous reference to that. It's conceded that when he, 20 Wilkinson, referred to the Bahr el Arab, he in fact 21 meant the Ngol/Ragaba ez Zarga, and not the Kiir. That 22 was the conclusion that the experts reached. We heard 23 it discussed by Mr MacDonald, and we heard it discussed 24 this morning. And I think it's undisputed in the record 25 that when Wilkinson came south from Fauwel and reported</p> <p style="text-align: center;">Page 196</p>

18:18 1 reaching the Bahr el Arab, he meant the Ngol.
 2 After he crossed what is the Ngol, he noted the
 3 country of the Dinka chief called Ruweng lay to the
 4 east. Then about 15 miles south of the Ngol he reported
 5 -- and Professor Crawford referred to it this morning:
 6 "The first Dinka village of Bombo is reached."
 7 It's clear at this stage that he's describing Ngok
 8 villages. Contrary to the Government's initial claims
 9 about the Ngok being located south of the Kiir, here in
 10 the dry season one of the officials following a single
 11 route reports a Dinka village 10 miles at least to the
 12 north of the Kiir.
 13 He went on to report then:
 14 "These villages, neatly built, are used by the
 15 Dinkas in the rains and as long as the water lasts. At
 16 the present date, 2.2.02 [February 2nd 1902], all the
 17 inhabitants had left and were grazing their herds of
 18 cattle where grass and water were to be found."
 19 He does not say these are uninhabited villages. He
 20 instead says: this is where the Ngok [live], but during
 21 the dry season they have left, they have gone to the
 22 rivers. That is exactly consistent with the
 23 environmental evidence.
 24 It also suggests why, during the dry season, the
 25 Condominium officials wouldn't see many Ngok: the Ngok

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18:21 1 called the Kiir, which is the Kiir/Bahr el Arab in
 2 today's terminology. And he described his approach
 3 there as:
 4 "The Kiir River or Bahr el Jange is struck as one
 5 reaches the settlements of Sultan Rob. The river here
 6 is a most pleasant sight. The district on the north
 7 bank is called Mareig, the district on the south bank is
 8 called Massian, and Sultan Rob lives in the latter.
 9 Much dura is cultivated."
 10 The name of the district Mareig on the north bank is
 11 obviously a reference to the Ngok Dinka. The Ngok Dinka
 12 cultivated, as we saw, sorghum; "Mareig" is the local
 13 name for sorghum. There's no doubt but what the
 14 reference to the settlements on the north bank is again
 15 another reference to Ngok villages.
 16 When we look at the map of this region -- and I'm
 17 afraid this is put together a little in an ad hoc way --
 18 one can see the description of Sultan Rob's settlement
 19 on the south bank of the Kiir at this point referred to
 20 as "Massian"; it's very likely a reference to Mathiang;
 21 it's on the south bank of the Kiir to the southeast of
 22 the current location of Abye Town, and this is
 23 Wilkinson's sketch map.
 24 The same map labels the area to the north of the
 25 Kiir as Dar el Jange or Dinka.

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18:20 1 were all south on the rivers where their cattle could
 2 graze and have pasture. It makes perfect sense,
 3 therefore, that during the dry season the Condominium
 4 officials would not be encountering significant numbers
 5 of Ngok. As we're going to see, there are other reasons
 6 that they wouldn't find the Ngok also, but that is
 7 a profoundly important one.
 8 Wilkinson goes on to report:
 9 "... reached Etai where the first Dinkas were met.
 10 Here there were large settlements and the people were
 11 most friendly."
 12 The descriptions of villages, large settlements,
 13 neatly built houses, headquarters of a local chief are
 14 all exactly consistent with the descriptions that I've
 15 given based on the environmental and cultural evidence
 16 of how the Ngok lived.
 17 At the same time, the absence of the Ngok cattle
 18 herds and the Ngok people is consistent with the
 19 seasonal grazing.
 20 Wilkinson then records about 28 miles from the Ngol
 21 that he reached what he called the Kiir River or
 22 Bahr el Jange, and the settlements of Sultan Rob. It's
 23 now common ground that the river referred to by
 24 Wilkinson is the Kiir/Bahr el Arab. He'd gone from the
 25 Ngol, which he called the Bahr el Arab, down to what he

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18:23 1 At that point Wilkinson turned north and returned to
 2 Fauwel, following much the same route that he had
 3 arrived from. He noted:
 4 "When leaving Sultan Rob's settlement, the country
 5 here is open and much dura cultivated. Dinka dwellings
 6 are dotted about, and the country presents a most
 7 prosperous aspect."
 8 Again, this is going north from the Kiir, going back
 9 to Fauwel. He doesn't say how far north that extended,
 10 but that's because of the nature of the Condominium
 11 records: he didn't keep precise records of how far he
 12 was observing particular peoples.
 13 It's also important to note that the reference of
 14 all the Dinka leaving in some of these records -- and
 15 I'll come back to this -- is inconsistent I think with
 16 both the historical record and with the cultural and
 17 environmental evidence, which is that not all the Dinka
 18 left; a substantial number of Dinka would remain in the
 19 villages, or at least a significant number of Dinka
 20 would remain in the villages during the wet season,
 21 while parts of the people would go south with the
 22 cattle.
 23 In total Wilkinson's notes referred to about a dozen
 24 substantial Ngok villages on the one route that he took
 25 between the Ngol and the Kiir. That includes places

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18:24 1 like Bombo, Teehac, Etai, Mareig, Gohea and El Myat. He
2 refers more generally to a number of other smaller
3 villages; and when you think back to the traditional
4 structure of two or three tukuls clustered together,
5 it's likely these didn't even necessarily have names,
6 saying that Dinka dwellings are dotted about, and
7 referring to numerous settlements.

8 He also refers of course to dura being cultivated,
9 the Ngok Dinka's traditional sorghum, their traditional
10 staple crop. And those are all precisely consistent
11 with the environmental evidence that we discussed.

12 Again, this was a dry season trek, and it only
13 followed a single route. It provides evidence -- good
14 evidence -- of where some Ngok were. It provides no
15 evidence at all about 98% or 99% of that entire region,
16 which he could not have gone to, he did not go to; he
17 followed a single route.

18 Finally -- and then perhaps it would be an opportune
19 time to stop; it's been a long time, and lots of
20 discussion of tukuls and dura and rainy season and so
21 forth -- Wilkinson's trek notes also fairly strongly
22 suggest -- but I will admit fully that to some extent we
23 are engaging in detective work here. One has to do that
24 with that record.

25 I have no doubt that what the Government will come

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18:27 1 record that is incomplete; the best the Government has
2 and the best that we have.

3 One has to bring scientific appreciation, and
4 appreciation of the area and the region, to those
5 references in order to understand what they mean. One
6 can't dismiss them and say they mean nothing, or they're
7 unintelligible. One has to, if one is going to engage
8 with this, bring scientific discrimination to them.

9 Perhaps with that it would be an opportune time to
10 stop.

11 THE CHAIRMAN: I thank you very much, Mr Born.

12 I draw the attention of the two parties to the fact
13 that tomorrow morning the hearings will begin at
14 9 o'clock, not 9.30. Be careful!

15 Thank you very much.

16 MR BORN: Thank you, Mr Chairman.

17 (6.28 pm)

18 (The hearing adjourned until 9.00 am the following day)

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18:25 1 back and say is that it's inappropriate to engage in
2 detective work, but the truth of the matter is one must
3 bring appreciation and care to the documentary record.

4 When one looks at Wilkinson's trek notes, he
5 describes passing Fula Hamadi, about 29.5 miles north of
6 the Ngol. He reported for the first time:

7 "... small villages, mere collections of three or
8 four huts passed at El Jaart and Um Geren."

9 His notes had previously referred to Arab
10 settlements. And when he referred to Arab settlements
11 or villages, he would denominate them as such. In this
12 area he doesn't, and I would suggest to you that this
13 is -- it's indirect, it's circumstantial, but I would
14 suggest to you that this is strong evidence of
15 Ngok Dinka villages in this region. It's two or three
16 huts, which is consistent with the Ngok Dinka style,
17 which we've seen on multiple occasions.

18 In this area where the Arabs were "wandered Arabs",
19 as Professor Crawford and Mr Bundy told us about half
20 a dozen times, wandered Arabs didn't build houses;
21 wandered Arabs lived in tents. Therefore, if there are
22 villages consisting of two or three houses here, two or
23 three huts, tukuls, they have to be Ngok.

24 I fully admit this is circumstantial and indirect
25 evidence, but it is the best we have from a documentary

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