

**IN THE MATTER OF AN AD HOC ARBITRATION  
PURSUANT TO THE ARBITRATION AGREEMENT  
IN THE HAGUE, THE NETHERLANDS**

**PCA No. GOS-SPLM 53,391**

**BETWEEN**

**THE GOVERNMENT OF SUDAN**

**AND**

**THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY**

**THE SUDAN PEOPLE'S LIBERATION MOVEMENT/ARMY  
REPLY MEMORIAL**

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Table of Contents

I. SUMMARY OF ARGUMENT .....1

A. The Government Has Failed to Establish That the ABC Experts Exceeded Their Mandate.....2

1. The Government’s Challenges to the ABC Report Do Not Constitute “Excesses of Mandate” and Are Beyond this Tribunal’s Jurisdiction.....2

2. The Government’s Eleven Purported “Excess of Mandate” Claims Are All Spurious .....4

3. The Government Waived Any Objections to the ABC Report.....15

B. The Government’s Discussion of the Historical Locations of the Ngok Dinka and Misseriya and Purported Definition of the Abyei Area Are Demonstrably Wrong .....15

1. The Government’s Claim that the Ngok Dinka Were Located Entirely South of the Kiir/Bahr el Arab in 1905 is Conclusively Disproved by the Evidence.....16

2. The Government Mischaracterizes the Kordofan/Bahr el Ghazal Boundary and the ABC Experts’ Analysis of that Boundary .....19

3. The Government’s Interpretation of the Parties’ Agreed Definition of the Abyei Area Is Manifestly Wrong.....20

II. THE GOVERNMENT HAS FAILED UTTERLY TO ESTABLISH THAT THE ABC EXPERTS EXCEEDED THEIR MANDATE .....24

A. The Government Ignores the Presumptive Finality of Adjudicative Decisions and Disregards the Specialized Character of the ABC Proceedings.....27

1. The Government Acknowledges That the ABC Proceedings Were Adjudicative in Nature.....28

2. The Government Ignores and Distorts the Specialized Character of the ABC and the ABC Proceedings.....28

3. The Government Ignores the Presumptive Finality and Validity of Adjudicative Decisions, Particularly Concerning Boundary Determinations .....31

4. The Government Ignores Generally Applicable Principles Regarding the Allocation and Nature of the Burden of Invalidating Adjudicative Decisions.....33

B. The Government Distorts and Improperly Expands the Grounds on which the ABC Experts’ Report May be Challenged.....36

1. The Government Ignores the Definition of Excess of Mandate in the Abyei Arbitration Agreement .....37

2. The Purported Violations of “Procedural Conditions” Alleged by the Government Do Not Fall Within the Definition of An Excess of Mandate.....39

3. The Purported Violations of “Mandatory Criteria” Alleged by the Government Do Not Fall Within the Definition of An Excess of Mandate.....50

4. The Purported Excess of Substantive Mandate Claims the Government Asserts Do Not Fall Within the Definition of An Excess of Mandate.....55

C.	The Three Procedural Breaches Alleged by the Government Were Not Excesses of Mandate and Were Instead Entirely Appropriate Procedural Actions Fully Consistent with the Parties’ Agreements .....	57
1.	The Alleged Procedural Breaches Do Not Fall Within the Definition of Excess of Mandate .....	57
2.	The Government Ignores or Distorts the Terms of the Parties’ Procedural Agreements .....	57
3.	The Government Ignores or Distorts the Legal Standards Applicable to Claims of Procedural Unfairness .....	67
4.	The Government’s Complaints About the Khartoum Meetings Are Contrived and Frivolous .....	81
5.	The Government’s Complaints About the Millington Email Are Contrived and Frivolous .....	103
6.	The Government’s Complaints About the ABC Experts’ Efforts to Reach Consensus Are Contrived and Frivolous .....	109
D.	Three of the “Substantive” Breaches Alleged by the Government Were Not Excesses of Mandate and Were Instead Manifestly Correct Interpretations of the Parties’ Agreements and the Evidentiary Record .....	127
1.	The ABC Experts Did Not Commit a Substantive Excess of Mandate by Refusing to Answer the Question Presented to Them .....	128
2.	The ABC Experts Did Not Answer a Different Question from that Asked .....	133
3.	The ABC Experts Did Not Ignore the Stipulated Date.....	141
4.	The Government’s Complaints About the ABC Experts’ Supposed Failure to Fulfill Their Mandate are Merely Inadmissible Objections to the Substance of the ABC Report .....	148
5.	In Any Event, the ABC Experts’ Interpretation of Article 1.1.2 of the Abyei Protocol Was Plainly Correct.....	156
6.	The ABC Experts’ Interpretation of Their Mandate Is Entitled to Substantial Deference and Could Only Be Invalidated in Rare and Exceptional Cases .....	157
7.	If the ABC Experts Were Assumed (Contrary to Fact) to Have Overstepped Their Substantive Authority, Any Such Excess Could Not Be Regarded as “Flagrant,” “Glaring” or “Manifest” .....	159
E.	The ABC Experts Did Not Allocate Grazing Rights Beyond the Abyei Area ....	160
1.	The ABC Experts Did Not Commit An Excess of Mandate by Purporting to Confer Rights on the Ngok Dinka Outside the Abyei Area.....	160
2.	The ABC Experts Did Not Limit the Misseriya’s Traditional Rights ....	171
F.	The Four Violations of “Mandatory Criteria” Alleged by the Government Were Not Excesses of Mandate and Were Instead Entirely Appropriate Aspects of the ABC Experts’ Reasoning .....	172
1.	The Violations of “Mandatory Criteria” Alleged by the Government Do Not Fall Within the Definition of An Excess of Mandate .....	172
2.	The Government Ignores or Distorts the Legal Standards Applicable to Claims of Violations of Mandatory Law .....	173
3.	The Government’s Complaints About the ABC Experts’ Purported Failure to Give Reasons Are Frivolous.....	181
4.	The Government’s Complaints About the ABC Experts’ Purported “Equitable” or “ <i>Ex Aequo Et Bono</i> ” Decision Are Frivolous.....	200

5.	The Government’s Complaints About the ABC Experts’ Purported Reliance on “Unspecified Legal Principles” Are Frivolous .....	214
6.	The Government’s Complaints About the ABC Experts’ Purported Attempt to Allocate Oil Resources Are Frivolous.....	216
G.	The GoS Excluded or Waived Any Rights to Claim that the ABC Experts Exceeded Their Mandate .....	219
1.	The Parties’ Agreement that the ABC Report Is “Final and Binding” and Entitled to “Immediate Effect” Waives Any Right to Challenge the Report.....	219
2.	The GoS Waived any Rights it Might Have Had to Challenge the ABC Experts’ Decision.....	220
III.	THE GOVERNMENT’S PURPORTED DEFINITION OF THE ABYEI AREA IS DEMONSTRABLY WRONG.....	222
A.	The Government’s Claim that the Ngok Dinka Were Located Entirely South of the Kiir/Bahr El Arab in 1905 Is Demonstrably Wrong.....	224
1.	The Government’s Claim that the Ngok Dinka Did Not Use and Occupy Territory North of the Kir/Bahr el Arab in 1905 is Conclusively Disproved by the Pre-1905 Documentary Record.....	225
2.	The Government’s Claim That the Ngok Dinka Did Not Use and Occupy Territory North of the Kir/Bahr el Arab in 1905 Is Conclusively Refuted by the Post-1905 Documentary Record .....	263
3.	The Government’s Claim That the Ngok Dinka Did Not Use and Occupy Territory North of the Kir/Bahr el Arab in 1905 Is Refuted by the Cartographic Evidence .....	293
4.	The Government Ignores A Highly Probative Body of Witness Testimony, Oral Traditions and Environmental Evidence Which Flatly Contradict Its Claim that the Ngok Dinka Did Not Occupy Territory North of the Kiir/Bahr el Arab.....	309
5.	A Community Mapping Project Confirms that the Ngok Dinka Occupied and Used the Territory of the Abyei Region Centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab.....	340
B.	The Government Mischaracterizes the Kordofan/Bahr el Ghazal Boundary and the ABC Experts’ Analysis of that Boundary.....	343
1.	The ABC Experts Identified A Significant Mistake Made by Anglo-Egyptian Officials with Regard to the Locations of the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab and the Use of the Term “Bahr el Arab” ...	345
2.	The Government’s Suggestion that the Ngol/Ragaba ez Zarga Was “A Seasonal Creek” Is Manifestly Wrong.....	345
3.	The Government’s Suggestion that the Confusion About the “Bahr el Arab” Was Not Widely Shared by Anglo-Egyptian Officials Is Demonstrably Wrong.....	350
4.	The Government’s Suggestion that Anglo-Egyptian Confusion over the “Bahr el Arab” Was Short-Lived Is Demonstrably Wrong .....	351
5.	The Provincial Boundary between Kordofan and Bahr el Ghazal Was Indefinite and Indeterminate in 1905 .....	354
6.	The Government Misinterprets the Conclusions that the ABC Experts Drew from Anglo-Egyptian Confusion About the “Bahr el Arab” .....	360

7.	The Government Draws Implausible Consequences from Its Misinterpretation of the Conclusions that the ABC Experts Drew from Anglo-Egyptian Confusion About the “Bahr el Arab” .....	362
8.	The Government Ignores the ABC Experts’ Conclusion That the Anglo-Egyptian Considered the Nine Ngok Dinka Chiefdoms the Nine Ngok Dinka Chiefdoms to Belong to Bahr el Ghazal in 1905 .....	363
9.	The Government Ignores the Evidentiary Consequences that Must Be Drawn from Anglo-Egyptian Confusion About the “Bahr el Arab” .....	365
C.	The Government’s Interpretation of the Parties’ Agreed Definition of the Abyei Area Is Manifestly Wrong .....	366
1.	The Abyei Area Was the Entire Area of the Nine Ngok Dinka Chiefdoms Which Were Transferred to Kordofan in 1905 .....	367
2.	Alternatively, the Area That the Anglo-Egyptian Government Transferred to Kordofan in 1905 Consisted of All of the Territory of the Nine Ngok Dinka Chiefdoms.....	381
D.	The Area of the Nine Ngok Dinka Chiefdoms Transferred to Kordofan in 1905 Comprises All of the Territory North of the Current Bahr el Ghazal/Kordofan Boundary to Latitude 10°35’N.....	385
IV.	REQUEST FOR RELIEF .....	388

## I. SUMMARY OF ARGUMENT

1. This arbitration presents issues of vital importance to the Sudanese people and the international community. These issues concern the Ngok Dinka's right to their historic homeland in the Abyei Area and, more fundamentally, the rule of law in contemporary affairs. Regrettably, the Government's position in this arbitration ignores – and would do grave violence to – both the people of the Abyei Area and the rule of law.
2. The Government's Memorial advances a laundry list of eleven different objections to the decisions made by the ABC Experts. Although disguised as supposed "excesses of mandate," the GoS's objections in fact disregard and gravely distort both the parties' agreements regarding the ABC proceedings and the provisions of the Abyei Arbitration Agreement. Thus, the Government purports to equate the ABC Experts with an ICSID or commercial arbitration tribunal, ignoring the tailor-made provisions of the parties' procedural agreements regarding the ABC; the Government similarly disregards its own officials' active participation in the ABC proceedings – including in a number of the very procedural actions that the GoS now challenges. At the same time, the Government attempts to equate this Tribunal with an ICSID annulment panel, ignoring the terms of the parties' Arbitration Agreement and urging this Tribunal to exceed its own jurisdictional authority.
3. As detailed in this Reply Memorial, there is no merit to any of the GoS's purported objections, which are both inadmissible in these proceedings and fundamentally inconsistent with the parties' agreements and the rule of law. The ABC Experts addressed and unanimously decided precisely the matters that the parties submitted to them, after applying specifically tailored fact-finding and dispute resolution procedures, collaboratively developed by and with the parties themselves. The GoS's refusal now to honor its commitment to respect the ABC Experts' decision contradicts basic principles of *pacta sunt servanda* and *res judicata*, fundamental to the rule of law.
4. It bears emphasis that this case involves two parties who cooperatively designed a *sui generis* dispute resolution procedure and agreed to the selection of five distinguished experts in African history, politics, ethnography and law – including three respected African professors. With the parties' active participation, those Experts overcame substantial logistical, security and other constraints and unanimously rendered a well-reasoned decision that bespeaks deep expertise. It is fundamental to the rule of law, and to the rights of the people of the Abyei Area, that the parties' repeated promises to respect the ABC Experts' decision as final and binding be given full effect. Any other result would gravely undermine the rule of law and the efficacy of consensual dispute resolution agreements in modern affairs.
5. The Government's Memorial also advances – without even the pretense of evidentiary support – factual claims that can only be described as frivolous. According to the GoS, the Ngok Dinka resided entirely below the Kiir/Bahr el Arab in 1905, confined to a narrow, 14-mile wide strip of swampland on the south bank of the river.
6. That position is comprehensively refuted by a substantial and uniform body of historical documentation, cartographic evidence, witness testimony and environmental/cultural evidence, as well as by a recently conducted Community Mapping Project. In reality, the evidence demonstrates beyond a shadow of a doubt that in 1905 the Ngok Dinka lived throughout the Bahr region, extending north from the Kiir/Bahr el Arab,

past the Ngol/Ragaba ez Zarga, to the *goz*. Although there is no reason (or jurisdictional authority) for this Tribunal to reconsider these issues of fact, the evidentiary record makes it unmistakably clear that the ABC Experts' factual findings regarding the Ngok Dinka's ancestral homeland were correct – and that the Government's claims to the contrary are manifestly wrong.

A. *The Government Has Failed to Establish That the ABC Experts Exceeded Their Mandate*

7. The Government's Memorial advances a collection of eleven separate objections to the ABC Experts' actions and the ABC Report. In particular, the Government alleges three purported violations of "procedural conditions," four supposed "substantive" excesses of mandate and four alleged breaches of "mandatory criteria." The Government claims that each of these various alleged violations constitutes an "excess of mandate" by the ABC Experts.

8. As detailed in Part II below, the GoS's eleven complaints are all spurious, advanced in an attempt to sow as much confusion as possible and to relitigate the substance of the parties' dispute and the ABC Experts' procedural actions. That is true for multiple, independently sufficient reasons, any one of which suffices to dismiss the Government's claims. Indeed, in many instances, it is difficult to discern any good faith basis for the GoS's complaints about the ABC Report, most of which ignore the terms of the parties' agreements, the parties' actions during the ABC proceedings and the terms of the ABC Report, as well as long-settled principles of law.

1. The Government's Challenges to the ABC Report Do Not Constitute "Excesses of Mandate" and Are Beyond this Tribunal's Jurisdiction

9. First, the vast majority of the Government's laundry list of complaints fall outside the scope of this Tribunal's authority under Article 2 of the Abyei Arbitration Agreement. In all but arguably one instance (involving alleged grazing rights in the *goz*), the GoS's complaints cannot be categorized as an "excess of mandate" under Article 2 of the Arbitration Agreement. Despite the Government's efforts to rewrite this Tribunal's mandate, its complaints are simply not admissible grounds for this Tribunal to disregard the ABC Report.

10. This Tribunal's authority under Articles 2(a) and 2(b) of the Abyei Arbitration Agreement is limited to a straightforward and uncomplicated issue. Article 2(a) of the Agreement provides that the only basis on which this Tribunal may disregard the ABC Report is by reference to "whether or not the ABC experts had, on the basis of the agreement of the Parties, as per the CPA, *exceeded their mandate WHICH IS 'to define (i.e., delimit) and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.'*"

11. Under Article 2(a), the sole basis for this Tribunal to disregard the ABC Report is an excess of the ABC Experts' mandate. Article 2(a) does not permit open-ended challenges to the ABC Report for purported violations of "procedural conditions" or for breaches of supposed "mandatory criteria." Nor does Article 2(a) refer more generally to concepts of nullity or invalidity of arbitral awards, for example, by incorporating the well-known lists of grounds of invalidity or nullity included in instruments such as the New York Convention, the ICSID Convention or the Draft ILC Convention on Arbitral Procedure. Any of these

approaches could have been adopted as a basis for this Tribunal's authority to disregard the ABC Report, but none was.

12. Instead, the parties provided, in clear and mandatory terms, for a bespoke definition of "excess of mandate" in Article 2(a) ("**their mandate WHICH IS...**"). Article 2(a) did not define this Tribunal's authority by reference to the ABC Experts having "exceeded their mandate **which is** set forth in the Rules of Procedure" or having "exceeded their mandate **which is** reflected in generally recognized mandatory criteria."

13. Rather, Article 2(a) defined the concept of "excess of mandate" by reference to the ABC Experts' substantive task "which is" defining and delimiting the Abyei Area. The relevant issue under Article 2(a) – and the **only** issue – is therefore whether the ABC Experts decided matters falling outside the scope of ("exceeding") the category of decisions which was submitted to them. That category of decisions – comprising the ABC Experts' mandate – was "to define ... and demarcate" the Abyei Area, which is precisely what the ABC Report does. With only the arguable exception of the GoS's objection regarding grazing rights in the goz (which, as discussed below, is without any factual or legal basis), none of the Government's eleven challenges to the ABC Report fall within this definition of an "excess of mandate."

14. Even if Article 2(a) did not provide an express definition of "excess of mandate" (which it does), the Government ignores well-settled authority addressing the meaning of an excess of mandate. These authorities make clear that an excess of mandate is limited to cases where the tribunal "**decides upon that which was not in fact submitted to them**" (Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session) or "**delimits, in whole or in part, a boundary in areas not covered by the terms of reference and thus exceeds the territorial scope of its jurisdictional powers.**" (Kaikobad, *The Quality of Justice: 'Excès de Pouvoir' in the Adjudication and Arbitration or Territorial and Boundary Disputes*). Consistent with these authorities, the ICJ and other international tribunals have consistently refused to permit procedural objections to be advanced as either "excess of mandate" or jurisdictional challenges.

15. This conclusion is confirmed by the very legal authorities relied upon by the Government in support of its purported "excess of mandate" claims (i.e., the ICSID Convention, the New York Convention and various national arbitration statutes). All of these authorities distinguish carefully and explicitly between an **excess of mandate** (addressed in Article 52(1)(b) of the ICSID Convention, Article V(1)(c) of the New York Convention and Article 34(2)(a)(iii) of the UNCITRAL Model Law) and a violation of either **procedural guarantees or public policy/mandatory law rules** (addressed in Article 52(1)(d) and (e) of the ICSID Convention, Articles V(1)(b), V(1)(d) and V(2) of the New York Convention and Articles 34(2)(a)(ii), (iv) and 34(2)(b) of the UNCITRAL Model Law).

16. For all these reasons, there is no basis for the Government's current effort to challenge the ABC Report on the grounds of alleged violations of "procedural conditions" and "mandatory criteria." These types of complaint simply do not constitute an "excess of mandate," and are therefore not within this Tribunal's authority as defined by Article 2 of the Abyei Arbitration Agreement.

17. Similarly, at least three of the four purported excesses of "substantive mandate" alleged by the Government are nothing of the sort. Rather, these complaints are



disagreements by the Government with the ABC Experts' decision on the merits of the parties' dispute.

18. As discussed in detail below, the Government's purported "substantive mandate" complaints do not concern the ABC Experts allegedly deciding disputes outside or in excess of their mandate (either as defined by the Abyei Arbitration Agreement, or otherwise). Rather, the Government's complaints involve disagreements with how the ABC Experts substantively interpreted the Abyei Protocol's definition of the Abyei Area ("area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905"). That disagreement with the merits of the ABC Experts' decision is plainly not the basis for an excess of mandate claim.

19. Any contention that a misinterpretation of the definition of the Abyei Area by the ABC Experts would constitute an excess of mandate is wholly implausible. That can be demonstrated by considering this Tribunal's mandate under Article 2(c), which is to "*define (i.e., delimit)* on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905." If the ABC Experts' misinterpretation of this formula was an excess of substantive mandate – as the Government suggests – *then the same would be true of an alleged misinterpretation of the same formula by this Tribunal*. If the ABC Experts exceeded their mandate by adopting the "wrong" definition of the Abyei Area, then this Tribunal would be subject to exactly the same attack, with only the identity of the party making the challenge to be determined.

20. That result is no less (or more) absurd than claims that the ABC Experts' alleged misinterpretation of the definition of the Abyei Area could be an excess of mandate. Rather, in each case, the decision-maker's interpretation of what is meant by "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" is merely a substantive interpretation of law, or a factual assessment, not subject to review or challenge as an excess of mandate. Indeed, it is precisely to avoid such absurd, never-ending possibilities of challenge, that an error of substance, law, treaty (and contract) interpretation or fact simply is not grounds for claiming an excess of mandate.

21. In sum, the Government's supposed procedural and "mandatory criteria" complaints, as well as all but one of its alleged substantive mandate claims, would not constitute excesses of mandate (even if one assumed that they had some factual or legal basis, which they do not). As such, these complaints do not fall within this Tribunal's authority and do not provide admissible grounds for disregarding the ABC Report. That is a complete and independently sufficient basis for dismissing all of the Government's complaints.

## 2. The Government's Eleven Purported "Excess of Mandate" Claims Are All Spurious

22. Second, even if the Government's laundry list of complaints were admissible in these proceedings (which they are not), all of those complaints are wholly without substance either as a matter of fact or law. In many instances, the GoS's allegations are contradicted by the clear terms of the parties' agreements and the explicit statements of the parties before the ABC. In all instances, the Government's complaints rest on highly selective and misleading presentations of legal authority, which simply do not give rise to the various "general principles of law and practice" alleged by the GoS Memorial.

- a) The Government Ignores the Presumptive Finality of Adjudicative Decisions and Disregards the Specialized Character of the ABC Proceedings

23. Preliminarily, the Government misconceives both the character of the ABC and its proceedings as well as the legal consequences of the ABC Report. The GoS Memorial begins by acknowledging – as it must – the adjudicative character of the ABC and the consensually-agreed ABC proceedings. Despite that, the Government’s Memorial then ignores the general principles of law that apply to such adjudicative decisions, while crudely and incorrectly attempting to equate the ABC and its proceedings with an international arbitral tribunal and this Tribunal with an ICSID annulment panel.

24. Thus, the Government contends that “the entire mechanism by which the ABC and the Experts were entrusted with their task *closely resembled that found in international arbitral practice.*” (GoS Memorial, at para. 132.) According to the Government, this permits “[r]eference to arbitral practice in general, including annulment proceedings under Article 53 [sic; presumably intended by the Government to be Article 52] of the ICSID Convention, ... given that *the Tribunal is called upon to act in a manner that is, at least as concerns this aspect of its task, similar to that of an annulment panel.*” (GoS Memorial, at para. 131.)

25. This analysis is confused and wrong. In adopting it, the Government ignores fundamentally important and distinctive features of the ABC and the ABC proceedings, including: (a) the composition and structure of the ABC and its 15 members (which included both partisan, party-appointed members and impartial ABC Experts); (b) the independent, investigatory authority of the ABC Experts to conduct their own research and fact-finding, including through consulting archives and other relevant sources of information wherever they might be available; (c) the broad procedural discretion of the ABC Experts; (d) the unique and complementary areas of expertise of the ABC Experts, particularly in matters of Sudanese and African history, geography, ethnography and law; and (e) the deliberately informal, collaborative and non-technical character of the ABC proceedings.

26. These various characteristics of the ABC and the ABC proceedings render inapposite most of the international investment and commercial arbitration rules cited by the Government. The simple point is that, contrary to the Government’s suggestions, the parties did not submit their dispute to an ICSID tribunal of international arbitration practitioners, applying the ICSID Rules. Instead, the parties submitted their dispute to five African history and ethnography experts, who applied the tailor-made ABC Rules of Procedure. The rules and other authorities governing ICSID or international commercial arbitrations are, by their terms, wholly inapplicable to the very different procedural context of the ABC’s investigative activities.

27. Moreover, while acknowledging the adjudicative character of the ABC proceedings and attempting to rely on particular ICSID or ICC rules, the GoS’s Memorial ignores entirely the general principles of law applicable to consensually-agreed adjudicatory decisions, such as the ABC Experts’ boundary determination. In particular, the Government disregards the presumptive finality of the ABC Experts’ decision as well as the fundamentally important general principles of law limiting the scope of any challenge to any adjudicative decision:

- a. an excess of mandate, like other grounds for challenging an adjudicative decision, is an exceptional conclusion, as to which the party refusing to comply bears a heavy burden of proof;

- b. any excess of mandate must be shown to be “manifest,” “flagrant,” “glaring,” “substantial” and unambiguous; and
- c. errors of law, fact or treaty interpretation are not grounds for finding an excess of mandate.

28. The foregoing conceptual errors attend the Government’s discussion of each of its eleven purported objections to the ABC Experts’ actions and decision. All of the Government’s objections depart from a mistaken premise – namely, that the ABC can be equated with an ICSID or ICC arbitral tribunal and that this Tribunal can be equated with an ICSID annulment Committee or national recognition court – while ignoring well-settled principles of finality which are applicable generally to all adjudicative decisions. As detailed below, these flaws infect and provide recurrent grounds for dismissing the Government’s entire case.

b) The Three Procedural Breaches Alleged by the Government  
Were Neither Violations of the Parties’ Agreement Nor  
Otherwise Irregular

29. The Government first alleges three purported violations of “procedural conditions” by the ABC Experts that it claims constitute excesses of mandate. These alleged violations of the parties’ procedural agreements are: (a) the ABC Experts’ meetings with several Ngok and Twic Dinka community members in Khartoum; (b) an email exchange with a third party (Mr. Millington, of the U.S. Embassy and a representative to IGAD); and (c) the ABC Experts’ purported failure to act through the Commission in issuing its decision in the ABC Report. None of these purported procedural objections has any substance (even if they fell within the definition of an excess of mandate, which they do not).

30. Most fundamentally, the Government’s analysis ignores the terms of the parties’ agreements regarding the ABC proceedings and the tailor-made and highly-collaborative character of the ABC process. Entirely absent from the Government’s Memorial is any recognition of the exceptional character of the ABC and its work – where two warring parties laid down their arms, mutually selected a specialized and neutral body of largely African experts to resolve their dispute, and then constructively participated in a remarkable three-month long proceeding. Also absent from the GoS’s analysis is any acknowledgment of the diligence and care of the ABC Experts (and the entire ABC), who labored under formidable time constraints, logistical challenges and security issues to produce an exhaustive and well-reasoned Report.

31. The Government’s procedural complaints ignore the substantial innovations and achievements of the ABC process and instead demonstrate a shabby effort to identify purported procedural irregularities in the ABC Experts’ actions. In so doing, the Government’s procedural criticisms proceed from the entirely erroneous premise, outlined above, that the ABC Experts should be treated as if they were an ICSID or ICC arbitral tribunal, rather than a boundary commission applying *sui generis* procedures and possessing broad, independent, investigative authority. Considered in the context of the parties’ actual agreements and actions regarding the ABC, the Government’s current procedural complaints are disingenuous and groundless.

32. Even if one were to look only at the selectively cited sources of authority that the Government considers relevant, its analysis of the ABC Experts’ procedural authority is

fundamentally flawed. In particular, the Government fails to consider: (a) the broad procedural discretion of international arbitral tribunals and similar adjudicative bodies under general principles of law; (b) the elevated burden of proof applicable to attempts to invalidate adjudicatory decisions based on claims of procedural unfairness; and (c) the presumptive adequacy of procedural decisions by international arbitrators and similar adjudicative bodies under general principles of law.

33. Turning to the Government's individual procedural objections, there is no merit at all to the Government's complaints about the ABC Experts' Khartoum meetings with Ngok and Twic Dinka community members. That is true for multiple, independently sufficient reasons, all of which must be considered in the context of very substantial deference to the ABC Experts' procedural decisions and the very heavy burden of proof that the Government bears:

a. The parties' agreements and the Rules of Procedure granted the ABC Experts broad procedural discretion and investigatory powers. Those powers included the ABC Experts' authority to meet independently with third parties and conduct other research, with a specific guarantee that "*Commission members should have free access to members of the public other than those in the official delegations at the locations to be visited.*" (ABC Rules of Procedure, Art. 7.) Conversely, the parties' agreements imposed no prohibitions against meetings such as those that took place in Khartoum, leaving the ABC Experts free to pursue exactly such investigations.

b. The Khartoum meetings were also wholly consistent with the parties' procedural expectations, as specifically discussed at the time by the parties. The Government and SPLM/A appointees on the ABC, along with the ABC Experts themselves, discussed both the ABC Experts' general authority to meet with third parties, as well as the specific subject of the Khartoum meetings, to which the Government raised no objection. On the contrary, it was a prominent Government supporter and current Presidential adviser (Bona Malwal) who arranged the Khartoum meeting between the ABC Experts and the Twic Dinka.

c. Even if there were some basis for objecting to the Khartoum meetings (which there is not), the Government waived any objection it might have had. The Government did so both by not raising such objections during the ABC proceedings and by reason of its awareness of and involvement in arranging the Twic Dinka meetings. Indeed, the Government also expressed its appreciation for the ABC Experts' efforts in conducting additional meetings in Khartoum. Only now, after the Government has decided to dishonor its obligation to accept the ABC Report, has it raised any objection to the Khartoum meetings – an opportunistic litigation tactic that well-settled authority precludes.

d. Even if one assumed (contrary to fact) that the Khartoum meetings violated some (unspecified) provision in the parties' procedural agreements, this would not be the sort of serious violation of a fundamental procedural guarantee that would permit the ABC Report to be disregarded. Insofar as any violation occurred at all, that breach would at most have been an inadvertent misunderstanding of the limits of the ABC Experts' investigative authority, no different in substance than the ABC Experts' meetings with Mr. and Mrs. Tibbs, Professor Cunnison and the various curators at the Sudan archives – all meetings which the Government conspicuously makes no attempt to challenge.

e. The Government also does not identify any harm suffered as a result of the Khartoum meetings, much less the sort of grave prejudice required to disregard an adjudicative decision on the basis of a procedural irregularity. Here, the Khartoum meetings resulted in nothing more than cumulative and largely immaterial information, which had no effect on the ABC Experts' decision.

34. There is also no basis for the Government's purported complaints about the Millington email. Again, that is true for multiple, independently sufficient reasons, all of which must again be considered in the context of substantial deference to the ABC Experts' procedural decisions and the very heavy burden of proof that the Government bears:

a. As already noted, the ABC Experts were granted broad procedural discretion and investigatory powers, including the powers independently to conduct such research as they deemed appropriate and to meet with third parties. Nothing forbade, and the parties' procedural arrangements instead contemplated, contacts by the ABC Experts with third parties such as Mr. Millington.

b. Even if one assumed (contrary to fact) that the Millington email somehow violated the parties' procedural agreements, that would not have been a serious violation of a fundamental procedural guarantee – and, as noted above, it is only such a violation that would permit the ABC Report to be disregarded. Rather, any such violation would at most have been a single email exchange, made in inadvertent misunderstanding of the limits of the ABC Experts' investigative authority, again no different in character than contacts that the Government has not protested (e.g., with Mr. and Mrs. Tibbs, Professor Cunnison and curators at the Sudan archives).

c. Finally, and in any event, the Government does not identify any injury arising from the Millington email, much less the sort of grave prejudice required to disregard an adjudicative decision. Here again, the Millington email provided nothing more than cumulative information that had no effect on the ABC Experts' decision. Indeed, the notion that a single email exchange between a third party and one of the ABC Experts, involving a tangential issue, could provide grounds for invalidating the entire ABC Report is scarcely serious.

35. Likewise, there is no basis for the Government's complaints that the ABC Experts failed to act through the Commission by making insufficient efforts to reach consensus among the ABC members before issuing the final ABC Report. Once more, this is true for multiple, independently sufficient reasons, which must all be considered in the context of the very substantial deference to which the ABC Experts' procedural decisions are entitled and the very heavy burden of proof that the Government bears:

a. The parties' procedural agreements specifically provided that the ABC Experts (as distinguished from the ABC as a whole) were themselves to prepare the final ABC Report and present it to the Presidency. Nothing in the parties' agreements required the ABC Experts to circulate a draft report to the full Commission prior to presenting the final ABC Report to the Presidency. The ABC Rules of Procedure required only that the ABC use reasonable efforts to achieve a consensus during the ABC proceedings. Nothing in the parties' procedural agreements limited or restricted how the ABC Experts might seek to achieve consensus among either the ABC members or the parties. There can be no dispute that the ABC made diligent efforts to achieve a consensus on multiple occasions and there is no basis for suggesting that the

ABC Experts were required to take any further steps prior to delivering their final Report.

b. The parties repeatedly and specifically discussed the presentation of the ABC Experts' final Report to the Presidency before it occurred. These discussions were conducted without any suggestion by the Government that the course being adopted by the ABC Experts was improper or that the Government wanted or expected the ABC Experts to circulate a draft Report. To the contrary, the Government made it clear that it wanted no further efforts by the ABC Experts to achieve a consensus before they delivered the final ABC Report, that any such efforts would be futile and that the Government wanted the ABC Experts to proceed to a final decision.

c. Even if one assumed (contrary to fact) that the ABC Experts' efforts to achieve a consensus were inadequate and violated some provision in the parties' procedural agreements, that would not have been the sort of serious violation of a fundamental procedural guarantee required to invalidate an adjudicative decision. Rather, the only provision that the Government suggests might have been violated involved nothing more than an expectation that the ABC Experts would use reasonable efforts to achieve consensus (the ABC Experts "will endeavour" to find a consensus). Moreover, this provision had not been included by the parties in any of their procedural agreements and had instead been introduced into the ABC Rules of Procedure by the ABC Experts themselves. The notion that a violation of this sort of provision could invalidate the entire ABC Report is again scarcely serious.

d. The Government waived any possible objection to the ABC Experts' approach to achieving consensus. It did so by specifically inviting the ABC Experts to prepare their final Report, by rejecting the possibility of consensus or compromise and by participating in arrangements for the presentation of the ABC Experts' final Report without indicating any objections.

e. Finally, and in any event, the Government does not identify any injury arising from the ABC Experts' unsuccessful efforts to achieve consensus among the Commission members, much less the sort of grave prejudice required to disregard an adjudicative decision on the basis of a procedural irregularity. In fact, the parties and the ABC made three separate efforts to achieve consensus – each of which was rejected by the Government. At the same time, as the transcripts of the ABC proceedings show, the Government made very clear that it was unwilling to accept any compromise on the question of the Abyei Area boundaries. In the circumstances, there is no basis for suggesting that further efforts to achieve consensus among the Commission members would have been successful and there can therefore have been no prejudice (serious or otherwise) from the ABC Experts' actions.

36. In these circumstances, the Government has entirely failed to sustain its very heavy burden of proving some sort of grave violation of a fundamental procedural guarantee by the ABC Experts – much less a procedural violation that would begin to justify disregarding the ABC Report. Rather, by all appearances, the Government has disingenuously contrived after-the-fact procedural complaints, from circumstances that it was well aware of and took part in arranging, in a cynical effort to sow confusion and attempt to relitigate the substance of the parties' dispute.

c) The Four Supposed Excesses of Substantive Mandate Alleged by the Government Are Spurious

37. The Government asserts that the ABC Experts exceeded their “substantive mandate,” defined by the GoS Memorial as “the scope of the consent given by the Parties to the [ABC Experts] to resolve the dispute” submitted to them. (GoS Memorial, at paragraphs. 227-229.) In particular, the Government alleges that the ABC Experts committed four separate substantive excesses of mandate based on allegedly: (a) “refus[ing] to decide the question asked;” (b) “answering a different question than that asked;” (c) “ignoring the stipulated date of 1905;” and (d) “allocating grazing rights within and beyond the Abyei Area.”

38. Each of the first three of these alleged “substantive” breaches amounts to either the same, or a closely related, complaint. None of these alleged excesses of substantive mandate has any basis. That is true for multiple, independently sufficient reasons.

39. In particular, none of the Government’s claims about the ABC Experts’ supposed disregard of their substantive mandate is supported by the contents of the ABC Report, the terms of which flatly contradict each of the Government’s claims. Indeed, when one reads the ABC Report with any care, it is very difficult to understand how the Government could seriously make the claims that it does. Moreover, in an unfortunate number of instances, the GoS Memorial’s approach to advocacy has been to misquote – without ellipses or other explanation – relevant excerpts from the ABC Report. That effort to twist the ABC Experts’ analysis into a more vulnerable target is as regrettable as it is ineffective.

40. In fact, as their Report makes unmistakably clear, the ABC Experts carefully answered the question that was put to them – which was “to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.” (Abyei Protocol, Art. 5.1.) The ABC Report specifically restated this question in its Preface and then addressed it at length in a 45-page, single spaced main report, together with five Appendices (which totalled another 206 pages) and several maps.

41. The ABC Report concluded with a detailed definition of the Abyei Area (by reference to latitudes and longitudes). The ABC Experts then set forth latitudinal and longitudinal lines defining the Abyei Area’s geographic scope in a “Final and Binding Decision.” (ABC Report, p. 21.) Those coordinates were then drawn by a cartographer on Map 1 (titled “*Abyei Area Boundaries*”).

42. Given the terms of the ABC Report, it is entirely misconceived to contend that the ABC Experts refused to “carry out the task” or refused to “answer the question” put to them, or that they answered “the wrong question.” The ABC Experts fulfilled precisely the task that they were mandated to perform by defining and delimiting the Abyei Area as defined in the Abyei Protocol.

43. The ABC Experts also plainly did not “ignor[e] the stipulated date of 1905” – again, as even a cursory reading of their Report confirms. In total, the 1905 date is referred to some 48 times in the ABC Report, the text of which makes crystal clear that the ABC Experts regarded the location of the Ngok Dinka and Misseriya in 1905 as the decisive issue and time period for their decision. It was for these reasons that the ABC Experts said – in a sentence that the Government’s discussion studiously fails to quote, address or even mention – that:

“it was necessary for the experts to avail themselves of relevant historical material produced both *before and after 1905*, as well as *during that year*, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms *AS IT WAS IN 1905*.” (ABC Report, Part I, at p. 4, **Appendix B** (emphasis added).)

Again, even a partisan and blinkered reading of the ABC Report cannot help but see the simple truth that the ABC Experts addressed precisely the question put to them in Article 5.1 of the Abyei Protocol, focusing specifically on the “stipulated date of 1905.”

44. In reality, the complaints in the GoS Memorial are inadmissible, after-the-fact efforts by the Government – under various guises – to wriggle out of its promise to honor the ABC Report and to relitigate different aspects of the merits of the parties’ dispute. At the end of the day, what the Government complains of is nothing more than the ABC Experts’ refusal to accept the GoS’s implausible interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol. Of course, for the reasons outlined above, even if such a refusal were erroneous (which it was not), it would be a substantive mistake of law or fact, and not an excess of mandate. Indeed, the Government acknowledges as much by addressing the substantive interpretation of the definition of the Abyei Area in Chapter 6 of its Memorial (and not in Chapters 4 and 5).

45. In any event, as discussed below, it is clear that the ABC Experts’ interpretation of Article 1.1.2 was entirely correct. Moreover, the Government’s case does not even remotely begin to overcome the well-settled deference to adjudicatory bodies’ interpretations of their mandates, much less to demonstrate a “flagrant,” “manifest” and “glaring” excess of mandate. Again, in these circumstances, there is simply no basis for the Government’s substantive excess of mandate claims.

46. The Government also claims that the ABC Experts exceeded their substantive mandate by “allocating grazing rights beyond and limiting them within the ‘Abyei Area.’” According to the GoS Memorial, the ABC Report did this in two ways: (a) “in seeking to confer on the Ngok grazing rights outside the ‘Abyei Area;” and (b) in seeking to limit within the Abyei Area the exercise of rights conferred by Article 1.1.3 of the Abyei Protocol.” (GoS Memorial, at para. 249.) Both of these claims are baseless, once more resting on wholly artificial misreadings of the ABC Report.

47. In fact, the ABC Experts did no more than confirm that their decision did nothing to alter the pre-existing grazing and related rights of the Misseriya and Ngok Dinka in the region. This was made perfectly clear – in language from the ABC Report which the Government again unhelpfully chooses to omit from its Memorial – providing that “[t]he Ngok and Misseriya *shall retain* their established secondary rights to the use of the land ... .” The ABC Experts’ statements on this issue were nothing more than a savings clause; far from being an excess of mandate, the ABC Experts’ statements were designed to ensure that no excess of mandate might be claimed.

48. In any event, the ABC Experts would have been well within their mandate, including their incidental jurisdiction, to address issues of the parties’ grazing rights, had they chosen to do so. Moreover, even had they exceeded their remedial authority, it would be entirely implausible to suggest that the ABC Experts committed the sort of “flagrant” or “glaring” excess of mandate that would be required to disregard their decision by supposedly erring in their treatment of one category of traditional land use rights (grazing) in a limited region.



49. Finally, even if the ABC Experts were found to have exceeded a portion of their mandate in their treatment of grazing rights (which they did not), this would not permit disregarding the remainder of their decision regarding the Abyei Area's boundaries. At most, their decision on grazing rights would be null and void and, in any case, it is well-settled that if the erroneous part of an award is separable from the rest of the decision, only this part will be invalidated – not the decision as a whole. Here, invalidating the ABC Report's treatment of grazing rights would have no effect whatsoever on other aspects of the Report. Instead, it would concern only incidental rights to a 10-mile wide strip of harsh and arid *goz*, and not the remainder of the boundary determination.

d) The Four Violations of "Mandatory Criteria" Alleged by the Government Are Spurious

50. The Government next alleges that the ABC Experts committed four violations of "mandatory criteria." These violations are allegedly: (a) "failure to state reasons capable of supporting the decision;" (b) reaching a decision "on the basis of an equitable division or ... *ex aequo et bono*;" (c) "apply[ing] unspecified 'legal principles in determining land rights;'" and (d) "attempt[ing] to allocate oil resources."

51. Even if one were to look only to the selectively cited sources of mandatory rules that the Government proffers, its analysis is misconceived. In particular, the Government fails to consider: (a) the well-settled rule that an arbitral award or other adjudicatory decision may be invalidated for a violation of mandatory law only in very rare and exceptional cases; (b) the equally well-settled principle that violations of mandatory laws or public policy will only be found where there is a serious and direct violation of a fundamentally important, mandatory legal rule; and (c) the fact that an arbitral award must be interpreted to uphold, and not to find fault with, it.

52. The Government's Memorial ignores all of these well-settled principles of law, instead straining both to create mandatory legal rules (where none exist) and to twist the text of the ABC Report to create flaws (again, where none exists). There is no basis for any of these claims as to violations of the Government's purported "mandatory criteria." That is true for multiple, independently sufficient reasons (again, quite apart from the fact that such claims do not fall within an excess of mandate).

53. Most fundamentally, the purported "mandatory criteria" alleged by the Government simply do not exist as general principles of law. Notably, the Government does **NOT** rely on the parties' agreements to justify these principles – because the parties' agreements impose no such requirements. Rather, as its label indicates, the Government purports to derive these "mandatory criteria" entirely from legal authority external to the parties' agreements and, in particular, from international investment and commercial arbitration authority.

54. The Government's effort to construct purported mandatory rules, applicable to the ABC Experts, relies on an eclectic, but confused, grab-bag of ICSID and commercial arbitration authorities. Most of these authorities are cherry-picked from inapposite legal regimes and have little relevance to the *sui generis* procedures of the ABC. Even if they were relevant, however, these authorities fail entirely to support the supposed mandatory criteria claimed by the Government:

- a. The authorities cited by the Government do not establish any generally applicable mandatory rule of law requiring reasoned awards – even in the context of

arbitral awards, and certainly not in the context of this boundary commission proceeding. To the contrary, even the international investment and commercial arbitration authorities relied upon by the Government demonstrate nothing more than a diversity of approaches to the requirement of reasoned awards – with some jurisdictions not requiring reasons (save where the parties have so agreed), other jurisdictions requiring reasons but not permitting either annulment or non-recognition of unreasoned awards and other jurisdictions mandatorily requiring reasoned awards. This diversity in no way establishes the mandatory rule the Government claims. Even if such a rule existed in investment or commercial arbitration (which it does not), it would not apply to the *sui generis* ABC proceedings to which the parties in this case agreed.

It bears emphasis that the parties' agreements regarding the ABC Experts did not impose any requirement for a reasoned decision. On the contrary, the only thing that the parties required (in Article 1.2 of the Terms of Reference) was demarcation of the Abyei Area on a map. This contrasts starkly with the Abyei Arbitration Agreement's provisions in these proceedings, which provide for a reasoned award – confirming that the parties knew how to draft and impose such a requirement when they wished to do so. In the ABC proceedings, the parties imposed no such requirement and, although they did not do so, the ABC Experts would have been entirely free to issue a decision on the definition of the Abyei Area without explaining the reasoning that led them to that decision.

b. The authorities cited by the Government also do not establish any generally applicable rule of law requiring that *ex aequo et bono* decisions must be made only with the express consent by the parties. Again, different legal traditions adopt different approaches to the subject, with some national and international approaches permitting *ex aequo et bono* decisions absent contrary agreement and others adopting the reverse presumption. The Government cites nothing indicating that either approach has crystallized into a generally applicable, mandatory rule in the context of arbitral awards – much less in the context of boundary commission decisions as would be relevant here.

It again bears emphasis that nothing in the parties' agreements regarding the ABC Experts imposed any prohibition on *ex aequo et bono* decisions. That contrasts with the provisions of the Abyei Arbitration Agreement, which impose precisely such a limitation – again evidencing that the parties were perfectly able to impose such a limitation when they chose to do so. In the present case, although they did not do so, the ABC Experts would have been entirely free to decide on the definition of the Abyei Area *ex aequo et bono* had they concluded that this was what was appropriate.

c. Finally, the Government does not cite any authority for its other two supposed “mandatory criteria.” It refers to nothing in support of any rule against an award relying on unspecified legal principles – whatever that may be – or justifying invalidation of awards for supposedly improper, subjective motivations by members of the tribunal. That is because there is no authority for either proposition – both of which have been rejected in the few cases in which they have been suggested. Certainly, nothing supports the conclusion that these are general principles of law applicable to the ABC Report.

55. In any event, even assuming that there was some legal basis for the Government's so-called "mandatory criteria," which there is not, the ABC Experts did not violate any of these supposed rules:

a. The ABC Experts did not fail to state reasons in the ABC Report and, on the contrary, produced a 250 page report (with appendices) that provided an extremely thorough and expert set of reasons comparing favorably to decisions by most international and national tribunals. This more than satisfies any possible requirement for reasoned decisions – particularly given the *sui generis* character of the ABC and the ABC proceedings. The Government's effort to identify two "gaps" in the ABC Report is both legally irrelevant (because such gaps would not constitute an absence of reasons justifying invalidation of the ABC Report) and wrong (because it is the Government's criticisms of these supposed gaps, and not the ABC Experts' reasoning, that is flawed). In reality, the Government's criticism is at best an illegitimate effort to advance a substantive disagreement with the ABC Experts' analysis, rather than a complaint about lack of reasons.

b. The ABC Experts also did not render an *ex aequo et bono* decision. That is apparent from a simple reading of the ABC Report, as well as from the Government's contradictory complaint that the ABC Experts wrongly applied African land law principles.

The only basis cited by the Government for its complaint about a supposed *ex aequo et bono* decision is the ABC Experts' allocation of the *goz* (defined in the ABC Report as the area between latitudes 10°10'N and 10°35'N) equally between the parties. It is clear from the ABC Report, however, that the ABC Experts in no way rendered an *ex aequo et bono* decision; instead, in dealing with the *goz*, they carefully considered the terms of the Abyei Protocol and the evidence, as well as principles of African land law. Moreover, even if one ignored the ABC Experts' express reliance on principles of African land law (which negate any complaint that the ABC Experts' decision was *ex aequo et bono*), nothing precluded the Experts from relying on principles of equity to resolve the specific question of the allocation of the *goz*, which both parties had historically used in varying but, according to the ABC Experts, equal ways. Applying equitable principles in these circumstances would not have constituted a decision *ex aequo et bono* and instead would have been entirely consistent with well-settled international authority permitting the application of principles of equity – which form an integral part of international law.

c. There is also no basis for the Government's complaint that the ABC Experts improperly relied on supposedly unspecified legal principles of African land law. Putting aside the fact that nothing (in law or in the parties' agreements) forbids such reliance, the ABC Report in fact identifies, with authority, such principles as the land law principles of British-governed colonies in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries and specifically the Sudanese Condominium. As its Memorial makes clear, the Government's real complaint is with the substance of the legal rules applied by the ABC Experts, but this is not the basis for an excess of mandate claim.

d. Finally, the Government's claim that the ABC Experts were secretly and improperly motivated by a desire to allocate oil resources is a tawdry jury point entirely irrelevant to any excess of mandate claim. In particular, the GoS Memorial claims that the location of the eastern boundary of the Abyei Area allows an inference

of improper motivations to include oil fields within the Abyei Area. In fact, had the Government's advisers bothered to examine either the parties' positions before the ABC or the location of the 1956 provincial borders, they would have seen that the boundaries established by the ABC were entirely explicable on grounds having nothing to do with oil wells. Similarly, the purported "smoking gun" statements by ABC members are in fact exactly the opposite – they are nothing more than unexceptional explanations of what the ABC Experts did in defining the Abyei Area.

56. There is, accordingly, no basis for the Government's various "mandatory criteria" claims (even if they did fall within an excess of mandate, which they do not). Even if there was a legal foundation for such claims, which there is not, they simply are not supported by the terms of the ABC Report or the ABC Experts' actions.

### 3. The Government Waived Any Objections to the ABC Report

57. Finally, the Government has in any event waived its objections to the validity of the ABC Experts' decision. The GoS did so both in its agreements relating to the ABC proceedings in the Comprehensive Peace Agreement and then in its conduct during those proceedings.

58. There is no need to repeat the analysis set forth in the SPLM/A's Memorial (at paragraphs 792 to 826). Nothing in the Government's Memorial addresses in any fashion the Government's repeated and explicit waivers of any rights to challenge the ABC Experts' decision.

59. Here, the GoS raised no jurisdictional, procedural or other objection at any time during the ABC's work – in which it actively participated. Instead, the GoS repeatedly and explicitly affirmed that the Commission's decision would be final and binding. As Ambassador Dirdeiry said: "***When a decision is agreed and accepted beforehand to be final and binding, it is not acceptable by anybody to deny the right of that committee or body to issue that decision. And, it's unmanly of any person not to accept that decision and respect it.***" (See Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 2). Indeed, even after the ABC Report was published, the GoS provided no comprehensible articulation of any excess of mandate claims. In these circumstances, the GoS has either waived or is estopped from asserting excess of mandate (or any other) claims in these proceedings.

#### *B. The Government's Discussion of the Historical Locations of the Ngok Dinka and Misseriya and Purported Definition of the Abyei Area Are Demonstrably Wrong*

60. The final section of the Government's Memorial – Chapter 6 – purports to provide an historical analysis of the locations of the Ngok Dinka and Misseriya in 1905 and to define the boundaries of the Abyei Area. The GoS attempts to do so by addressing: (a) very briefly, the supposed location of the Ngok Dinka (and the Misseriya) in 1905; (b) at greater length, the alleged location of the Kordofan/Bahr el Ghazal boundary in 1905; and (c) virtually not at all, the Government's interpretation of the Abyei Area, as defined in Article 1.1.2 of the Abyei Protocol.

61. There is no need for this Tribunal to revisit the factual conclusions of the ABC Experts, particularly given their specialized expertise and detailed investigations and

evidence-taking. Even if one were to do so, however, the discussion in Chapter 6 of the Government's Memorial is manifestly wrong in all respects:

a. The Government's case rests on the egregiously inaccurate factual claim that the Ngok Dinka were located entirely to the south of the Kiir/Bahr el Arab, in a narrow, 14-mile wide strip of swampland running along the southern bank of that river: "[p]rior to 1905, *the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab.*" (GoS Memorial, para. 332 (emphasis added).) As discussed below, that claim is demonstrably wrong. It is rejected by an overwhelming body of consistent, detailed evidence and it was unanimously rejected by the five ABC Experts on African history, geography and ethnography.

b. The Government's case also rests on the equally misconceived legal claim that – no matter where, or how far north, the Ngok Dinka might have lived in 1905 – any territory north of the Kiir/Bahr el Arab was necessarily excluded from the Abyei Area. Again, that is absurd; the parties never for a moment considered such a result, which would have excluded all of the nine Ngok Dinka Chiefdoms from the vast majority of the lands they occupied and used in 1905, including three of the nine Ngok Dinka Chiefdoms in their entirety, Abyei town and the homes of the past several Paramount Chiefs from the Abyei Area.

c. Finally, the Government's position rests on an inaccurate and selective presentation of the historical documentation and cartographic evidence concerning the character and location of the provincial boundary between Kordofan and Bahr el Ghazal in 1905. That presentation elevates a disputed reference to the "Bahr el Arab," as to which the Anglo-Egyptian officials were clearly confused in 1905, into the basis for dividing the Ngok Dinka's ancestral homeland in two; again, that is as inaccurate as it would be unjust.

62. Part III of this Reply Memorial addresses each of the Government's claims with regard to the definition of the Abyei Area. It shows that all of the Government's positions are wrong, in some instances relying on unfortunate, but outright, misquotations of the relevant documentation and mischaracterizations of the evidence.

1. The Government's Claim that the Ngok Dinka Were Located Entirely South of the Kiir/Bahr el Arab in 1905 is Conclusively Disproved by the Evidence

63. First, as discussed in Part III(A) below, the Government's discussion of the location of the Ngok Dinka in 1905 is based on a highly selective and misleading presentation of the pre-1905 Condominium records and accounts of miscellaneous European explorers. That review dwells on materials that are at best irrelevant (such as 18<sup>th</sup> century travellers who did not come within 100 miles of the Abyei region or discussions of the "Western Dinka" – a completely different tribal grouping than the Ngok Dinka).

64. At the same time, the Government's Memorial disregards many of the most important historical documents, including critical trek reports (by Percival in 1904 and 1905) and other Condominium records (by Mahon, Wilkinson, Lloyd and Boulnois). Equally, the Government's claims ignore entirely the extensive witness testimony, cartographic materials and environmental/cultural evidence that was presented to the ABC (and which is attached to the SPLM/A Memorial). Likewise, the Government fails to consider much of the post-1905

documentary record, including, most strikingly, the detailed discussion of the locations of the Ngok Dinka and Misseriya by Professor Cunnison – the Government’s own witness.

65. As a consequence, the Government advances the incredible factual claim that the Ngok Dinka lived only south of the Kiir/Bahr el Arab in 1905. Among other things, the Government’s claim is directly contradicted by an extensive, uniform body of specific and first-hand observations by Condominium officials (including Mahon, Percival, Wilkinson and Lloyd) made between 1901 and 1905, recorded in nearly two dozen separate documents. That body of evidence demonstrates beyond any serious doubt that “Sultan Rob” and the Ngok Dinka lived in permanent settlements extending from the Kiir/Bahr el Arab to the Ngol/Ragaba ez Zarga and reaching further north to the *goz* in the northwest of the Bahr region and toward Lake Keilak in the northeast.

66. That conclusion is confirmed by a substantial body of cartographic evidence, post-1905 documentary materials, oral traditions, witness testimony and environmental/cultural evidence – all of which the Government ignores. In particular:

a. Some 25 separate maps, prepared over a period of 40 years, depict the Ngok Dinka as occupying the territory of the Bahr region, extending north from the Kiir/Bahr el Arab to the *goz* in the northwest of the Bahr region and toward Lake Keilak in the northeast of the Bahr region, while depicting the Misseriya as centered on the Muglad region.

b. Some 26 different Ngok Dinka witnesses provide a highly detailed set of personal accounts attesting to the occupation and use of the Bahr region by the Ngok over the past century; these accounts provide reliable detail and corroboration of the documentary record. In contrast, to date, whether for tactical reasons or otherwise, the Government has chosen to place no Misseriya witness testimony before the Tribunal in support of its case.

c. The post-1905 documentary record consistently confirms the location of the Ngok Dinka throughout the Bahr region. That record includes Professor Cunnison who repeatedly states, in his published works, that “[t]he *Muglad* is regarded by the *Humr as their home*,” whereas by contrast “[m]uch of the Bahr has permanent Dinka settlements,” noting expressly that the “Dinka have *permanent homes*.”<sup>1</sup> No post-1905 document supports the Government’s specious claim that the Ngok Dinka were confined to the territory south of the Kiir/Bahr el Arab (or, for that matter, the Ngol/Ragaba ez Zarga).

d. The environmental and cultural evidence demonstrates how the Ngok Dinka lifestyle is adapted to the damp conditions of the Bahr (as reflected in their agriculture, animal husbandry, architecture and seasonal grazing patterns), while the Misseriya lifestyle is adapted to the arid conditions north of the *goz*. No piece of environmental or cultural evidence supports the Government’s claims about the Ngok Dinka in this arbitration.

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<sup>1</sup> Cunnison, “*The Humr and their Land*,” 35(2) SNR 54-55 (1954), **Exhibit-FE 18/20**; Cunnison, *Some Social Aspects of Nomadism in a Baggara Tribe* in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan*, Proceedings of the Tenth Annual Conference 11th-12th January 1962, 112, **Exhibit-FE 4/11** (emphasis added).

67. While ignoring this directly relevant, highly-probative evidence, the Government's Memorial advances a number of propositions which are little short of incredible:

a. The GoS claims that the Ngok Dinka move with their cattle to the south in the rainy season. (GoS Memorial, paragraph. 359.) That is demonstrably wrong and is contradicted by the Government's own witness (Professor Cunnison) and its own historical authorities. In fact, it is indisputable that the Ngok Dinka move with their cattle to the south in the *dry* (not *rainy*) season, just as all other peoples of the region do.

b. The Government claims that the Kiir/Bahr el Arab was a "physical barrier," that prevented passage of the Ngok Dinka across the watercourse. (GoS Memorial, paragraph. 290.) That is clearly wrong, as explained by both historical documentation and contemporary experts (in the attached Expert Report by MENAS). In fact, the Kiir/Bahr el Arab is readily forded during most of the year; it is routinely crossed and used as a means of transport by local canoes throughout the year.

c. The Government treats the Ngok Dinka as a section of the "Western Dinka," and relies on authorities discussing the historic location of the Western Dinka. (GoS Memorial, paras. 332-336.) That is manifestly incorrect: the Western Dinka were an entirely different grouping of people, located nearly 100 miles from the Abyei region, and having nothing to do with the Ngok Dinka.

d. The GoS claims, without citing authority, that there were only a small number of Ngok Dinka villages in 1905. (GoS Memorial, paragraph. 336.) That is contradicted by a wealth of documentary and cartographic evidence, which the Government ignores, that confirms more than 250 permanent settlements. These include (by no means an exhaustive list): Kol Arouth [Arabic: Grinti], Wun Deng Awak, Dhony Dhuol, Maper Amaal, Thigei, Rumthil, Majok Alor, Koladet, Alal, Kech, Riet, Maker Abyior, Langar, Mabek, Noong, Dokura, Ruba, Nyama, Thur, Thuba, Nyama, Dupo, Gol-Gol, Wunchuei, Mitrok, Burakol, Tajalei, Amuk, Pandeng, Pachol, Pariang, Michoor, Nyadak Ayuung, Niag, Ajaj, Pakur, Miding, Mardhok, Anyak, Rum Ameer, Mabok, Leu [Lou/Lau], Mithiang Diil, Agok, Mabek, Morol, Agany Achueng, Akur, Aait, Abouch Achaak, Abunabo, Abyei, Adem-Dem, Aghany, Akuoich Achaak, Alal Chier, Alal Kueng Achueng, Alich, Ameth Aguok, Ameyok, Amiet, Apaboung Achaak, Aruk-Dul, Athoba, Athoijang, Awol Achueng, Awouachot, Ayailieth, Baar Aboich Diil, Baar Achaak, Bagai, Bandura, Bany-Aguot, Bar-Agok, Bogeck, Chol Thaat, Dadaker, Dakjur, Dhiau-Ajith, Dob Matein, Dong-Nyala, Dongup Alei, Dub Gier, Duchar, Dum Wuot Achaak, Dungguji, Galaar, Gem Chul, Geny-Chuk, Giarich, Gok-Mou, Gom Goi, Gop-Acuil, Yuen, Guelbek Alei, Guilbek Manyuar, Hany, Jalak, Jamena, Jorweng, Kaar-Alei, Kaba Achaak, Kariang, Kol Akoic Diil, Kol Ngol Nyang, Kol-Agut, Kol-Ayok, Kol-Cum, Kol-Kuin, Kollang Achueng, Kol-Ngor, Kolom-Aliab, Kol-Thiou, Kool Rank, Kueradum, Kuthaku, Loor-Ayen, Mabek Ngol, Maber Manyuar, Mabior, Mading Achueng, Magak, Makeir Awet, Maker Agoot, Makuac, Ngol, Makuac-Bar-Agok, Malam, Malek-Goubil, Mareng Diil, Marial-Achaak, Math-Thouny, Mawal Alei, Mayen Baar Achaak, Midrok, Mijer, Mijok Alor, Minyang Lor, Miodhol, Miokol, Miyen Koor, Miyom, Miyom-Akuei, Mlual Ador Achueng, Moykol Abior, Naynay Biong, Ngabageir, Nhom Ngok, Nyinaweir, Nyinebouny, Nyokriang, Paatal, Panjang, Patal Achueng, Pathalang, Paweny, Pawol, Pelnuer, Pookloor, Pouth Achaak, Puripiu, Raantilraan, Rum Ajiec, Rum Lou, Rumegok, Rummaki, Rum-Mareng, Taaramaat, Thim-Thoi,

Thurkugi, Todac, Wac-Anguom, Wangchuk, Wayang, Wayang Diil, Wejwej, Wun Goc, Wun-Ahoat, Wun-Beim, Wundup, Wunkiir, Wun-Ruok, Yakagany Achaak, Yar Ahoot and Zeen. Among other things, as specifically reported by first-hand Condominium observations, the Paramount Chief of the Ngok Dinka lived in the village of Burakol, north of the Kiir/Bahr el Arab, in the vicinity of the current Abyei town, in 1905.

68. Putting aside the Government's profoundly flawed factual discussion, an overwhelming body of evidence demonstrates that in 1905 the Ngok Dinka lived throughout the Bahr region, centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, extending north to the *goz* and to the northeastern reaches of the Bahr region towards Lake Keilak. The Government's contrary claim that the Ngok Dinka lived only south of the Kiir/Bahr el Arab in 1905 is completely false. Indeed, it is difficult to imagine that such a factual claim could seriously be advanced in these proceedings.

69. The Government's factual claims are also rebutted by a Community Mapping Project that the Ngok Dinka people have conducted over the past weeks in parts of the Abyei Area. Despite formidable logistical and other obstacles and delays, the Ngok Dinka and a professional community mapping expert have used global positioning system technology to mark and locate, on a topographical map, the locations of Ngok Dinka villages, settlements, burial sites, birth places, and other points of historic cultural importance. The resulting Community Mapping Project Report is included with this Reply Memorial. Despite the formidable logistical and other obstacles that the Community Mapping Team encountered, within the scope of the Report it fully corroborates the conclusion that the Ngok Dinka lived north of the Kiir/Bahr el Arab, extending throughout the Bahr region.

## 2. The Government Mischaracterizes the Kordofan/Bahr el Ghazal Boundary and the ABC Experts' Analysis of that Boundary

70. Second, as discussed in Part III(B) below, the Government's treatment of the 1905 boundary between Kordofan and Bahr el Ghazal is distorted and inaccurate. Contrary to the GoS's claims, there was no determinate boundary, much less a definite or permanent boundary, between Kordofan and Bahr el Ghazal in 1905.

71. As discussed in the SPLM/A Memorial, there was no constitutional, legislative or executive decision or declaration establishing the Kordofan/Bahr el Ghazal boundary as of 1905. At most, there were a limited number of references to an approximate, uncertain and provisional boundary at the "Bahr el Arab."

72. As the Anglo-Egyptian authorities recognized at the time, however, there was a high degree of geographical confusion about the Bahr region generally, and even greater confusion specifically about the identity and location of the "Bahr el Arab." In particular, the "Bahr el Arab" was understood by a number of Anglo-Egyptian officials (including Wilkinson, Mahon, Percival, Boulnois and Lloyd) to refer to what was in fact the Ngol/Ragaba ez Zarga, while other Condominium officials had different understandings of what the term meant. This confusion was widespread among Condominium officials and was not clarified by responsible officials until at least 1907. In these circumstances, there was no determinate provincial boundary between Kordofan and Bahr el Ghazal prior to or in 1905.

73. The high degree of geographical confusion is confirmed by the cartographic evidence, which demonstrates that no provincial boundary had been identified on any Sudan



Government map before 1905 – or, for that matter, 1910 at the earliest. Even then, the only provincial boundaries referred to were both identified as approximate and were repeatedly altered over the course of some two decades.

74. Again, in these circumstances, it is impossible to conclude that there was any definite or determinate Kordofan/Bahr el Ghazal boundary at the time of the 1905 transfer of the Ngok Dinka. Indeed, the existence of this sort of confusion and complexity is precisely why the parties agreed to have a body of experts on African history and geography evaluate the evidence and define the boundaries of the Abyei Area. In any event, as discussed below, the nature or location of any purported Kordofan/Bahr el Ghazal provincial boundary is irrelevant in these proceedings, because the definition of the Abyei Area does not depend on the location of any such boundary.

3. The Government’s Interpretation of the Parties’ Agreed Definition of the Abyei Area Is Manifestly Wrong

75. Third, as discussed in Part III(C) below, the Government’s definition of the Abyei Area rests on an unarticulated and unsustainable interpretation of the Abyei Protocol. In particular, the Government’s definition rests on the unexplained premise that the “*area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905*,” defined in Article 1.1.2 of the Abyei Protocol, is to be interpreted solely by reference to purported Sudanese provincial boundaries and without regard to the location of the territory that the Ngok Dinka actually occupied and used in 1905.

76. The Government’s interpretation of the Abyei Protocol’s definition of the Abyei Area is manifestly wrong. As detailed in the SPLM/A’s Memorial (at paragraphs. 1095-1189), the definition of the Abyei Area refers to the area inhabited and used by the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905. This definition does not encompass *some* of the territory of the Ngok Dinka in 1905, or *some* of the Ngok Dinka Chiefdoms as they existed in 1905, but *all* of that territory and *all* of those Chiefdoms. That is clear from the language and linguistic structure of the parties’ agreed definition of the Abyei Area, the purposes of the Comprehensive Peace Agreement (incorporating the Abyei Protocol) and the character and language of the 1905 records of the transfer of the Ngok Dinka.

77. Considered linguistically, the language of Article 1.1.2 (“the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905”) has a simple and straightforward meaning. As discussed in the SPLM/A’s Memorial (paragraphs. 1095-1122), Article 1.1.2 means “the area of the nine Ngok Dinka chiefdoms *that were* transferred to Kordofan in 1905.” That meaning is compelled by the grammatical rule of proximity, explained in the expert report of Professor David Crystal OBE, which can be illustrated by the classic English nursery rhyme:

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

78. The natural reading of this rhyme is to take each “that” clause as defining the immediately preceding noun. Applied to the language of Article 1.1.2, the natural reading is to relate the phrase “transferred to Kordofan” back to the immediately preceding noun of “chiefdoms.” It would disregard the rule of proximity and strain the syntax of the sentence to the breaking point to interpret it in any other way.

79. Consistent with this, the term “area” in Article 1.1.2 serves to describe quantitatively the nine Ngok Dinka Chiefdoms being transferred, emphasizing that the nine Ngok Dinka Chiefdoms are capable of being properly defined and demarcated. The phrase makes perfect sense grammatically and is plainly the most plausible reading of the provision.

80. Contrary to the Government’s (unexplained) construction, Article 1.1.2’s language does not mean “*the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905*” (GoS Memorial, para. 19) or “that part of the area of the nine Ngok Dinka chiefdoms that was transferred to Kordofan in 1905” (as the Government’s assertions imply). If the draftsmen of the Article 1.1.2 phrase had intended it to refer to that part of the “area of the nine Ngok Dinka chiefdoms” that was being transferred to Kordofan, then the phrase would have read “*that part of the area* of the nine Ngok Dinka chiefdoms *that was* transferred to Kordofan in 1905.”

81. Any other definition of the Abyei Area would arbitrarily divide the territory of the Ngok Dinka, and the nine Ngok Dinka Chiefdoms, both as it existed in 1905 and as it exists today. Any such division, leaving some of the Ngok Dinka Chiefdoms’ territory within the Abyei Area and some outside the Abyei Area, would be perverse: it would sunder the Ngok Dinka people and their historic territory, in direct contradiction to the language and purposes of the Comprehensive Peace Agreement and Abyei Protocol (as well as all earlier statements of the rights of the Ngok Dinka to self-determine). It would be no less irrational than defining the Abyei Area to exclude Abyei town itself.

82. The Government’s interpretation would also confine the Ngok Dinka to a strip of swampland, approximately 14 miles in width, along the southern bank of the Kiir/Bahr el Arab. That would exclude the Ngok Dinka people from what is indisputably their historic homeland centered on the Bahr region, including their historic center in the vicinity of Abyei town and Burakol. These results would be utterly implausible and profoundly inequitable.

83. Moreover, the central purpose of the definition of the Abyei Area in the Abyei Protocol was to specify that region within which the residents (the “Members of the Ngok Dinka Community and other Sudanese residing in the Area”) would be entitled to participate in the Abyei Referendum (provided for by Articles 6 and 8 of the Abyei Protocol). Only residents of the Abyei Area will be entitled to participate in the Referendum on the question whether they would be included in the South or the North, simultaneously with the imminent Southern Sudan referendum in 2011.

84. The entire reason for the Abyei Referendum was to permit the Ngok Dinka – who had consistently contended over the past decades that their tribe belonged to southern Sudan – to vote on whether or not to be included in the South. In these circumstances, it would make no sense to treat the Abyei Area as including only *some* of the Ngok Dinka and their historic territories. That would contradict the principles of self-determination underlying the Abyei Protocol, as well as both parties’ consistent recognition that the Ngok Dinka were a unitary and highly cohesive political and cultural entity.

85. It would be even less plausible to suggest that the Abyei Area could extend no further north than the Kiir/Bahr el Arab River, on the grounds that this was putatively the Kordofan/Bahr el Ghazal border in 1905, as urged in the Government’s Memorial. That would have the bizarre result of positioning *Abyei town* – the undisputed center of Ngok Dinka political, cultural and commercial life for more than a century – *outside of the Abyei*

**Area.** It is inconceivable that the Abyei Protocol could have been intended to allow such a result.

86. Suggesting that the Abyei Area could extend no further north than the Kiir/Bahr el Arab River would also produce the equally bizarre result that only six of the nine Ngok Dinka Chiefdoms would be included within the Abyei Area (with the Alei, Achaak and Bongo Chiefdoms being excluded). Yet still it would exclude the majority of the lands occupied and used by those six, as *all* of the nine Ngok Dinka Chiefdoms occupied and used lands above the Kiir/Bahr el Arab. Again, it is inconceivable that the parties – when referring in Article 1.1.2 to the area of the “*nine* Ngok Dinka chiefdoms” – actually intended to include only (part of) *six* of the nine Ngok Dinka tribes in the definition of the Abyei Area. That would not only have rendered otiose Article 1.1.2’s reference to “*nine*” Chiefdoms, but it would have disregarded the essential and exceptional political, cultural and historic unity of the Ngok Dinka people, while tearing into two the Ngok Dinka people’s unique centralized political structure, with a Paramount Chief above nine sub-tribes and chiefs.

87. Article 1.1.2 is also only sensibly interpreted as referring to the territory of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905 because this is the way in which the Sudan Government’s transfer documents in 1905 addressed the issue. In every one of the Anglo-Egyptian instruments referring to the 1905 transfer of the Ngok Dinka, reference was made to a transfer of the Ngok Dinka’s Paramount Chief, or to a transfer of the territory or country of the Ngok Dinka’s Paramount Chief, not to some portion thereof.

88. In particular, each of the Sudan Government’s 1905 transfer instruments addresses the disposition of either “Sultan Rob” himself (the British title for the Ngok Dinka Paramount Chief Arop Biong) or of “Sultan Rob’s” territories or country, not to some sub-chiefs or some part of those territories:

a. “It has been decided that *Sultan Rob, whose country is on the Kir river*, and Sheikh Rihan of Toj ... are to belong to Kordofan Province.” (Sudan Intelligence Report, No. 128, March 1905, at p. 3 (emphasis added));

b. “*The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei* are now included in Kordofan *instead of the Bahr El Ghazal ....*” (Kordofan Province Annual Report 1905, at p. 111 (emphasis added));

c. “In the north *the territories of Sultan Rob* and Sheikh Gokwei *have been taken from this Province and added to Kordofan.*” (Bahr el Ghazal Province Annual Report 1905, at p. 3 (emphasis added)).

89. In each of these Sudan Government instruments, the reference was to (a) “Sultan Rob” (not one or a few of his sub-chiefs) and his “country” (not a part thereof) belonging to Kordofan; (b) the “Dinka Sheikh, Sultan Rob” (not some of his followers or territories) being included in Kordofan; and (c) “the territories of Sultan Rob” (not some of his territories) being added to Kordofan. In none of these instruments was there any indication that only some of Sultan Rob’s people, sub-chiefs, country or territory would belong to Kordofan.

90. With this historical background, it would make no sense to interpret the Sudan Government’s 1905 transfer of the Ngok Dinka as only involving a part of the Ngok territory. This would be directly contrary to what was stated in the 1905 transfer instruments – which

constitute those actions by the Sudan Government that were most specifically focused on the transfer of the Ngok Dinka.

91. Finally, as discussed above, there was in fact no determinate provincial boundary between Kordofan and Bahr el Ghazal in 1905 which would have permitted definition of the Abyei Area except by reference to the territory of the nine Ngok Dinka Chiefdoms. Both before and after the 1905 transfer of the Ngok Dinka, the provincial boundary was uncertain and indeterminate, rendering it unusable as a basis for defining the Abyei Area.

92. For these reasons, the Government's effort to divide the territory of the Ngok Dinka, based upon the putative location of an approximate 1905 provincial boundary between Kordofan and Bahr el Ghazal, is wholly misconceived. That effort ignores both the overwhelming factual evidence as to the location of the historic homeland of the Ngok Dinka and the clear language and purposes of the Abyei Protocol. In an effort to deny the Ngok Dinka their ancestral homeland, the GoS has manufactured a non-existent colonial boundary and sought to use that boundary to divide the historic territory of the Ngok Dinka in two. Nothing of the sort was contemplated by the parties and nothing of the sort is supported by the historical evidence.

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93. As detailed in the SPLM/A's Memorial, all legal systems rest upon the validity of consensual agreements and the finality of adjudicative decisions. Those principles are of peculiar importance in the context of boundary determinations, on which stability and peace depend. Here, warring parties put down their arms and collaboratively agreed upon and implemented a remarkable dispute resolution process, which they repeatedly affirmed would be "final and binding" and entitled to "immediate effect." That process produced an equally remarkable decision, unanimously rendered by five preeminent experts in Sudanese and African affairs, including three experts from the African continent, after an extensive fact-finding process.

94. The five ABC Experts did not "exceed their mandate:" They did precisely what they were asked to do, in close collaboration with the parties. The Government's current refusal to honor the ABC Experts' decision rests on an entirely inapposite effort to equate the ABC with an ICSID arbitral tribunal and on grossly misleading factual claims. The Government's refusal is a cynical attempt to relitigate the Abyei dispute in a new forum, and to delay the Abyei Referendum (and prolong the suffering of the Ngok Dinka people), which brings discredit on the GoS and the rule of law. As the GoS previously put it: "***When a decision is agreed and accepted beforehand to be final and binding, it is not acceptable by anybody to deny the right of that committee or body to issue that decision.***" That is a promise the Government should be directed, forthwith, finally to honor.

## II. THE GOVERNMENT HAS FAILED UTTERLY TO ESTABLISH THAT THE ABC EXPERTS EXCEEDED THEIR MANDATE

95. The Government's Memorial sets forth a scatter-shot collection of eleven separate objections to the ABC Experts' actions and the ABC Report. In particular, the Government alleges three purported violations of "procedural conditions," four supposed "substantive" excesses of mandate and four alleged breaches of "mandatory criteria."<sup>2</sup>

96. Regrettably, the number and diversity of the Government's objections makes it necessary to devote considerable space to explaining and rebutting these putative complaints. That is not because these objections have any substance (which they do not). Rather, it is because the Government's litigation tactic is to raise as many complaints as conceivably possible – accompanied by an eclectic collection of legal authorities and by unfortunate mischaracterizations and misquotations from the ABC proceedings – in the hope that the resulting dust will prevent the wheels of justice from turning. That tactic is misconceived, but it necessitates a lengthy Reply Memorial.

97. As detailed in this Part II, all eleven purported complaints on the GoS's laundry list of objections are entirely spurious. That is true for at least four independently sufficient reasons, any one of which suffices to dismiss the Government's objections. Fundamentally, the Government's objections invite this tribunal to exceed its jurisdiction and, having done so, to ignore both the terms of the parties' agreements regarding the ABC and well-settled principles of law regarding the presumptive finality of adjudicative decisions.

98. First, with one arguable exception, all of the GoS's complaints are outside this Tribunal's authority under Article 2 of the Abyei Arbitration Agreement to disregard the ABC Report based on an "excess of mandate." As such, the Government's complaints are inadmissible in these proceedings.

99. Article 2(a) of the Arbitration Agreement provides that the only basis for challenging the ABC Report in these proceedings is "whether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, *exceeded their mandate which is 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.'*"<sup>3</sup> Under Article 2(a), the sole basis for this Tribunal to disregard the ABC Report is narrowly defined as an excess of the ABC Expert's mandate.

100. Article 2(a) does not permit the ABC Report to be challenged or disregarded based on purported violations of "procedural conditions," or for violations of procedural rights, or for more general concepts of nullity of arbitral awards. Likewise, Article 2(a) does not incorporate the (well-known) lists of grounds of invalidity or nullity included in instruments such as the New York Convention, the ICSID Convention or the Draft ILC Convention on Arbitral Procedure/ILC Model Rules. Instead, Article 2(a) provides that an "excess of mandate" is defined by reference to that category of disputes which the parties submitted to the ABC ("*their mandate WHICH IS...*"). That definition is both clear and consistent with well-settled authorities defining the concept of an excess of mandate.

101. The supposed excesses of mandate alleged by the Government are nothing of the sort. As discussed in detail below, the Government's complaints do not concern the ABC Experts allegedly deciding disputes outside of their mandate, but rather involve the ABC Experts

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<sup>2</sup> See GoS Memorial, at paras. 196-226, 227-253, 254-275.

<sup>3</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial** (emphasis added).

either making procedural decisions or substantively interpreting the Abyei Protocol's definition of the Abyei Area ("area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905") in a way contrary to the Government's position. Neither of these types of complaints is the basis for an excess of mandate claim under the parties' Arbitration Agreement; rather, they are illegitimate efforts by the Government to relitigate the ABC Experts' substantive interpretation of the Abyei Protocol.

102. Second, even if the Government's laundry list of complaints were admissible in these proceedings (which it is not), all of those complaints are spurious. The GoS's objections ignore, and are contradicted by, the unambiguous terms of the parties' agreements and the explicit statements of the parties during the ABC proceedings. Likewise, the Government's complaints rest on highly-selective and misleading presentations of legal authority, which simply do not support the various "general principles of law and practice" which the GoS Memorial alleges.

103. Preliminarily, the Government misconceives not only the character of the ABC but also the legal consequences of the ABC Report. The GoS Memorial acknowledges, as it must, the adjudicative character of the ABC and the ABC proceedings. At the same time, however, the Government incorrectly equates the ABC and its proceedings with an international arbitral tribunal and this Tribunal with an ICSID annulment Committee.

104. This analysis is misconceived. In adopting it, the Government ignores fundamentally important and distinctive features of the ABC proceedings, including the Commission's composition and structure, its independent investigatory authority and the broad procedural discretion of its ABC Experts. These various characteristics of the ABC and the ABC proceedings render inapposite most of the international investment and commercial arbitration conventions, rules and other authorities cited by the Government.

105. At the same time, while acknowledging the adjudicative character of the ABC proceedings, the GoS's Memorial entirely ignores those general principles of law which are clearly applicable to all adjudicative decisions, including decisions such as the ABC Experts' boundary determination. In particular, the Government disregards the presumptive finality of adjudicative decisions, as well as the fundamentally important principles of law limiting the scope of any challenge to such decisions: (a) an excess of mandate, like other grounds for challenging an adjudicative decision, is an exceptional conclusion, as to which the party refusing to comply bears a heavy burden of proof; (b) any excess of mandate must be shown to be "manifest," "flagrant" or "glaring;" and (c) errors of law, fact or treaty interpretation are not grounds for finding an excess of mandate.

106. Third, even if they were admissible in these proceedings (which they are not), none of the eleven purported excesses of mandate alleged by the Government has any merit. Rather, each of these various complaints is contradicted by both the parties' agreements and contemporaneous conduct, as well as by the legal authorities cited by the Government itself.

107. The Government first alleges three purported violations of "procedural conditions" by the ABC Experts which supposedly constitute excesses of mandate. There is no merit to the Government's various procedural complaints. That is true for multiple, independently sufficient reasons, including: (a) the substantial legal obstacles that must be overcome to assert any such procedural objection; (b) the fact that the parties' agreements either did not prohibit or specifically permitted the procedural actions of the ABC Experts challenged by the Government; (c) the fact that the Government was aware of and either approved or did

not object to the challenged procedural actions; and (d) the fact that none of the alleged procedural violations was either serious nor the cause of any material prejudice.

108. The Government next asserts that the ABC Experts exceeded their “substantive mandate,” defined by the GoS Memorial as “the scope of the consent given by the Parties to the [ABC Experts] to resolve the dispute” submitted to them.<sup>4</sup> Again, none of the Government’s claims about the ABC Experts’ supposed disregard of their substantive mandate are supported by the contents of the ABC Report, the terms of which flatly contradict each of the Government’s claims. The reality is that the Government’s purported objections are nothing more than efforts to relitigate the ABC Experts’ substantive interpretation of the definition of the Abyei Area in the Abyei Protocol.

109. As their Report makes unmistakably clear, the ABC Experts specifically and carefully answered the question that was put to them – which was “to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.”<sup>5</sup> The ABC Experts neither failed to answer this question, nor answered some different question; much less did they ignore the stipulated date of 1905 – again, as even a cursory reading of their Report confirms.

110. In fact, the complaints in the GoS Memorial are nothing more than inadmissible efforts by the Government – under various guises – to relitigate different aspects of the merits of the parties’ dispute. At the end of the day, what the Government complains of is nothing more than the ABC Experts’ refusal to accept the GoS’s implausible interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol – a refusal that, even if it were erroneous, would be a substantive mistake and not an excess of mandate. In any event, as also discussed below, the ABC Experts’ interpretation of Article 1.1.2 was precisely correct – and certainly not the sort of “flagrant” or “glaring” excess of mandate that would be required to warrant invalidating the ABC Report.

111. Next, the Government alleges that the ABC Experts committed four violations of “mandatory criteria.” Once more, there is no conceivable basis for any of these claims. That is true for multiple, independently sufficient reasons, including: (a) the substantial legal obstacles that must be overcome to assert any such “mandatory criteria” objection; (b) the fact that the law simply does not support the existence of the purported mandatory criteria alleged by the Government; and (c) the fact that the ABC Report did not even remotely transgress the Government’s purported “mandatory criteria,” because, *inter alia*, it was a fully reasoned decision and was not an *ex aequo et bono* decision.

112. In addition, the Government claims that the ABC Experts exceeded their mandate by “allocating grazing rights beyond and limiting them within the ‘Abyei Area.’”<sup>6</sup> In fact, the ABC Experts did nothing more than confirm that their Report did nothing to alter the pre-existing grazing and related rights of the Misseriya and Ngok Dinka in the region. This was made perfectly clear – in language from the ABC Report that the Government unhelpfully chose to omit from its Memorial – providing that “The Ngok and Misseriya *shall retain* their established secondary rights to the use of the land north and south of this boundary [e.g., the northern boundary of the Abyei Area].” The ABC Experts’ statements on this issue were nothing more than a savings clause; far from being an excess of mandate, these statements served to ensure that no excess of mandate might be claimed.

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<sup>4</sup> GoS Memorial, at paras. 227-229.

<sup>5</sup> Abyei Protocol, Art. 5.1, **Appendix C to SPLM/A Memorial**.

<sup>6</sup> GoS Memorial, at p. 84, Heading (iv).

113. Fourth, the Government has in any event waived its objections to the validity of the ABC Experts' decision. The GoS did so both in its agreements relating to the ABC proceedings in the Comprehensive Peace Agreement and then in its conduct during those proceedings.

A. *The Government Ignores the Presumptive Finality of Adjudicative Decisions and Disregards the Specialized Character of the ABC Proceedings*

114. Preliminarily, the Government misconceives both the character of the ABC and its proceedings and the legal consequences of the ABC Report. While acknowledging the adjudicative character of the ABC proceedings, the GoS's Memorial entirely ignores the well-settled general principles of law applicable to adjudicative decisions. In particular, the Government disregards the presumptive finality of the ABC Experts' decision as well as the fundamentally important principles of law limiting the scope of any challenge to such an adjudicative decision: (a) an excess of mandate, like other grounds for challenging an adjudicative decision, is an exceptional conclusion, as to which the party refusing to comply with a decision bears a heavy burden of proof; (b) any excess of mandate must be shown to be "manifest," "flagrant" or "glaring;" and (c) errors of law, fact or treaty (contract) interpretation are not grounds for finding an excess of mandate.

115. At the same time as it ignores the general principles of law that apply to all adjudicative decisions, the Government's Memorial incorrectly attempts to equate the ABC and its proceedings with an international investment or commercial arbitral tribunal and this Tribunal with an annulment panel constituted under the auspices of the International Centre for the Settlement of Investment Disputes ("ICSID"). In each instance, the Government attempts to import particular rules from the specialized legal regimes applicable under ICSID or other institutional arbitration frameworks.

116. In so doing, the Government entirely ignores fundamentally important and distinctive features of the ABC and the ABC proceedings, including: (a) the composition and structure of the ABC and its 15 members (which included both partisan party-appointed members and impartial ABC Experts); (b) the independent investigatory authority of the ABC Experts to conduct their own research and fact-finding, including through consulting archives and other relevant sources of information wherever they might be available; (c) the broad procedural discretion of the ABC Experts; (d) the unique and complementary areas of expertise of the ABC Experts, particularly in matters of Sudanese and African history, geography, ethnography and law; and (e) the deliberately informal, collaborative and non-technical character of the ABC proceedings.

117. By ignoring these distinctive features of the ABC, the Government fundamentally distorts its analysis of the Commission's proceedings and relies upon entirely inapposite rules designed for other types of dispute resolution mechanisms. That disregards both the true character and purposes of the parties' agreed ABC dispute resolution mechanism and the purposes and limitations of other dispute resolution regimes.



1. The Government Acknowledges That the ABC Proceedings Were Adjudicative in Nature

118. The GoS's Memorial acknowledges – as it must – that the ABC Experts constituted a form of adjudicatory body. As discussed below,<sup>7</sup> however, the Government's characterization of the ABC Experts and their proceedings ignores important aspects of the parties' agreements and of the ABC process. Nonetheless, with regard to the basic character of the ABC as an adjudicatory body, there is no dispute between the parties.

119. Thus, the Government contends that “the entire mechanism by which the ABC and the Experts were entrusted with their task *closely resembled that found in international arbitral practice*,” reasoning that the Abyei Protocol “contained *a compromissory clause recording the Parties' consent to have a third party decide a defined dispute* (the definition of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905).”<sup>8</sup> Accordingly, the Government's Memorial turns to purported “general principles and practices,” which it contends “emerge and can be borrowed from similar instances where *disputes have been submitted to third-party settlement*,” focusing on “the general practice of international courts and arbitral tribunals.”<sup>9</sup>

120. The Government's analysis of the ABC Expert's actions – procedural, substantive and otherwise – then goes on to focus entirely on a highly-selective presentation of authorities and commentary drawn from international commercial and investment arbitration, practice of the International Court of Justice (“ICJ”) and occasional references to state-to-state arbitrations.<sup>10</sup> In particular, the Government argues that “[r]eference to *arbitral practice in general, including annulment proceedings under Article 53* [sic; presumably intended by the Government to be Article 52] *of the ICSID Convention, is apposite* given that the Tribunal is called upon to act in a manner that is, at least as concerns this aspect of its task, similar to that of an annulment panel.”<sup>11</sup>

121. The Government's position thus correctly acknowledges the essentially adjudicatory character of the ABC and the proceedings before the ABC. That character is explained in greater detail in the SPLM/A's Memorial (at paragraphs 562-591). Given this characterization of the ABC proceedings, there can be no dispute as to the application of the various general principles of presumptive finality and extremely limited review of the ABC Experts' decision (as discussed below<sup>12</sup>). These general principles of law apply to all adjudicative decisions rendered pursuant to consensual international dispute resolution mechanisms, and clearly govern analysis of the ABC proceedings and the ABC Report.

2. The Government Ignores and Distorts the Specialized Character of the ABC and the ABC Proceedings

122. While correctly acknowledging the adjudicatory character of the ABC, the Government proceeds to adopt a gravely distorted view of the ABC and its proceedings – a view that ignores and misrepresents the terms of the parties' agreements and the specialized character of the ABC Experts. In particular, the Government's Memorial attempts to equate

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<sup>7</sup> See below at paras. 122-128.

<sup>8</sup> GoS Memorial, at para. 132 (emphasis added).

<sup>9</sup> GoS Memorial, at para. 130 (emphasis added).

<sup>10</sup> See, e.g., GoS Memorial, at paras. 143-149, 151-191.

<sup>11</sup> GoS Memorial, at para. 131 (emphasis added).

<sup>12</sup> See below at paras. 129-136.

the ABC and its procedures with an international arbitral tribunal and to international arbitral proceedings in investment or commercial arbitrations, and similarly to equate this Tribunal to an ICSID annulment tribunal.<sup>13</sup> Both of these positions ignore and distort essential characteristics of the ABC and the ABC proceedings, and the central role of the parties' consent in prescribing their own, specifically tailored dispute resolution mechanisms.

123. As described above, the Government contends that “the entire mechanism by which the ABC and the Experts were entrusted with their task *closely resembled that found in international arbitral practice*.”<sup>14</sup> As a consequence, the Government applies the “general law and practice” relating to international investment and commercial arbitrations to the ABC’s work.<sup>15</sup> (Among other things, the Government (revealingly and) incorrectly refers to the ABC’s Rules of Procedure as the “*Arbitration Rules*”<sup>16</sup> – a label in fact never used by the parties or any of the ABC instruments.)

124. With regard to the ABC, the Government ignores the fact that the “Abyei Boundaries Commission” was a *boundary commission* and was *not an arbitral tribunal* (investment or commercial) or an international court. This is evident from a number of salient features of the ABC and the procedures before it – all of which the Government entirely omits from its analysis:

- a. instead of being a tribunal of arbitrators, the Abyei Boundaries Commission was a commission of experts: that is evident in the name of the ABC (“*Commission*”),<sup>17</sup> as well as in the various specific features discussed below;
- b. the number and composition of the ABC (15 members, including *10 party-appointed and overtly partisan and partial members*), which differed markedly from international investment and commercial arbitral practice (with three or five member tribunals composed entirely of impartial members);<sup>18</sup>
- c. the nature and qualifications of the ABC Experts, who were *experts in Sudanese and regional history, geography, politics, public affairs, ethnography and culture*,<sup>19</sup> and who were not “arbitration” or “investment arbitration” practitioners;
- d. the investigatory procedures that the ABC Experts were affirmatively expected to use, including provisions for the ABC Experts to conduct independently such scientific and other research as they considered relevant (“*The experts shall consult the British archives and other relevant sources on the Sudan wherever they may be available. . .*”<sup>20</sup>), which differed markedly from arbitral practice where wholly

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<sup>13</sup> See above at paras. 102-104.

<sup>14</sup> GoS Memorial, at para. 132 (emphasis added).

<sup>15</sup> See above at paras. 119-120.

<sup>16</sup> GoS Memorial, at para. 211 (“This was a clear failure of due process and a patent breach of Arbitration Rule 14”) at p. 75, Heading (iii) (“Failure to act through the Commission (Arbitration Rule 14)”), and at pp. 94-95.

<sup>17</sup> Abyei Annex, Art. 1 (“there shall be established by the Parties Abyei Boundaries *Commission*”), **Appendix D to SPLM/A Memorial**; ABC ToR, Preamble (“to draw the Terms of Reference of the Abyei Boundaries *Commission*”), **Appendix E to SPLM/A Memorial**.

<sup>18</sup> See Abyei Annex, Art. 2, **Appendix D to SPLM/A Memorial**.

<sup>19</sup> See SPLM/A Memorial, at paras. 596-601, 604. The biographies of the five ABC Experts appear at **Exhibits-FE 13/7** (Johnson), **13/21** (Muriuki), **13/22** (Berhanu), **14/12** (Gutto), **19/29** (Pettersson).

<sup>20</sup> ABC ToR, Art. 3.4, **Appendix E to SPLM/A Memorial**; see also Abyei Annex, Art. 4 (“In determining their findings, the Experts in the Commission shall consult the British Archives and other relevant sources on Sudan wherever they may be available...”), **Appendix D to SPLM/A Memorial**.

*ex parte* independent investigations by arbitral tribunals are generally not the practice;<sup>21</sup>

e. the provision for open public meetings involving all interested residents at a number of locations throughout the Abyei Area at which the ABC gave laymen’s explanations of its purpose and functions,<sup>22</sup> which contrasts with the confidential and structured procedural character of arbitral (and judicial) proceedings;

f. the express guarantee that “as occasions warrant, *Commission members should have free access to members of the public* other than those in the official delegations at the locations to be visited,”<sup>23</sup> which contrasts with the limitations on contacts between commercial and investment arbitrators and potential witnesses; and

g. the emphasis on “*the spirit of goodwill*”<sup>24</sup> and “*partnership*,”<sup>25</sup> and “*informal yet businesslike*”<sup>26</sup> proceedings, without incorporation of (any of the numerous available) institutional arbitration rules,<sup>27</sup> and the procedural formalities those rules entail.

125. As these various characteristics illustrate, it is essential to note – as the Government consistently fails to do – that the ABC was *not* an arbitral tribunal and was *not* expected or required to follow either a specific set of arbitration rules or some constructed blend of aspects of “general” arbitral practice. The ABC was an adjudicative body, but it was not, as the GoS Memorial would have it, a body that “closely resembled” an ICSID or an International Chamber of Commerce (“ICC”) arbitral tribunal and it was not required or expected to apply or follow the ICSID, ICC or UNCITRAL Arbitration Rules.<sup>28</sup> On the contrary, the ABC was a specialized, *sui generis* boundary commission of experts that, despite its adjudicative nature and role, differed in a substantial number of vital respects from an investment or commercial arbitral tribunal.

126. One can perhaps see how counsel familiar in their own practice with arbitral procedures would mistakenly attempt to compare the *sui generis* ABC to an ICSID arbitral tribunal. A carpenter whose primary tool is a hammer tends to see most problems as nails. Nonetheless, while the reasons for the Government’s mistake can be identified, its analysis is fundamentally misconceived, leading to the application of inappropriate procedural and substantive principles and to the disregard of those procedural and substantive agreements that the parties actually consented to.

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<sup>21</sup> See J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* ¶550 (2d ed. 2002) (in general, arbitrators must refrain from “conducting personal investigations into the facts of the case without referring to the parties, and basing their judgment on information which has not been put to contradictory debate.”), **Exhibit-LE 23/1**; E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1262 (1999) (“When evidence is presented to the arbitral tribunal, it must also be communicated to the other party.”), **Exhibit-LE 23/2**.

<sup>22</sup> See ABC RoP, Art. 8, **Appendix F to SPLM/A Memorial**; see also SPLM/A Memorial, at paras. 626-630; ABC Report, Part II, App. 4, at pp. 41-42, 46, 52-53, 58, 67, 74, 79, 107-108, 129-130, 141-142, 145-146, **Exhibit-FE 15/1**.

<sup>23</sup> ABC RoP, Art. 7, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>24</sup> ABC RoP, Art. 2, **Appendix F to SPLM/A Memorial**.

<sup>25</sup> ABC ToR, Preamble, **Appendix E to SPLM/A Memorial**.

<sup>26</sup> ABC RoP, Art. 2, **Appendix F to SPLM/A Memorial**.

<sup>27</sup> The parties could have agreed to incorporate any number of sets of institutional arbitrations rules (e.g., PCA, UNCITRAL, LCIA), but chose not to.

<sup>28</sup> GoS Memorial, at para. 132.



Abyei Boundaries Commission Members, April 2005 (Experts in bold)

Front row (left to right): IGAD Secretariat Representative; **Dr. Douglas Johnson**; **Professor Godfrey Muriuki**; **Ambassador Petterson**; Mr. Ahmed Assalih Soloha; Mr Victor Akok.

Back row (left to right): [Non-ABC Member]; Mr. Ahmed Abdalla Adam; Mr. James Ajing Path; Mr. Abdul Rasoul El-Nur; [Non-ABC Member]; **Professor Kassahun Berhanu**; Mr. James Lual Deng; Mr Deng Alor; Ambassador El-Dirdeiry Mohammed Ahmed.

127. The same conceptual flaws attend the Government’s effort to characterize this Tribunal as something that “closely resembles” an ICSID annulment tribunal.<sup>29</sup> Again, the GoS ignores the fact that an ICSID annulment tribunal is constituted and performs its functions pursuant to very specific rules, that define its mandate and procedures.<sup>30</sup> Those rules were not adopted with regard to this Tribunal, and do not apply to this Tribunal; rather, this Tribunal was instead granted the competence – and only the competence – specified in the Abyei Arbitration Agreement.

128. As discussed in greater detail below, the Government’s attempted assimilation of the ABC to an ICSID or ICC arbitral tribunal, and of this Tribunal to an ICSID annulment panel, infects much of the analysis in its Memorial. In most respects, the Government’s effort to demonstrate an excess of mandate rests on the premise that the ABC Experts were an investment or commercial arbitral tribunal and should have behaved as such. As we will see, the ABC Experts’ actions and decisions fully satisfied even the standards that the Government constructs out of “general principles” of international investment and commercial arbitration law. The more fundamental point, however, is that the Government’s standards are inappropriate and inapposite: they are efforts to treat the ABC as if it had been a very different creature from what the parties agreed it would be.

3. The Government Ignores the Presumptive Finality and Validity of Adjudicative Decisions, Particularly Concerning Boundary Determinations

129. At the same time as it relies on inapposite ICSID and ICC authorities, the Government ignores the well-settled body of general principles of law that apply to the decisions of consensually constituted adjudicatory bodies such as the ABC. Having acknowledged the adjudicatory character of the ABC Experts (as discussed above<sup>31</sup>), the Government then proceeds to ignore the consequences of that acknowledgement and, in particular, the generally-applicable presumptions of finality and validity that accompany all adjudicative decisions (particularly where the parties have expressly agreed that such decisions will be final and binding).

130. Entirely absent from the Government’s Memorial is recognition of any authority or provision of law that addresses the final and binding character of an adjudicative decision. Rather, the Government repeatedly cites the grounds for annulment of an ICSID award (in Article 52 of the ICSID Convention),<sup>32</sup> the grounds for annulment or non-recognition of a commercial arbitral award (in the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration 1985 (“UNCITRAL Model Law”)),<sup>33</sup> the formal and procedural requirements applicable to arbitral awards under selected institutional arbitration rules,<sup>34</sup> and miscellaneous authority regarding grounds for challenging arbitral awards.<sup>35</sup>

131. Nowhere, however, does the Government refer to the more important and frequently invoked general principles of law providing that *adjudicatory decisions are presumptively final and binding and that only in rare, exceptional cases will such decisions be*

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<sup>29</sup> GoS Memorial, at para. 132.

<sup>30</sup> See ICSID Convention, Arts. 41-47, **Exhibit-LE 23/3**; ICSID Rules, Arts. 19-45, 52-53, **Exhibit-LE 23/3**; see also below at paras. 234-237.

<sup>31</sup> See above at paras. 118-121.

<sup>32</sup> See GoS Memorial, at paras. 131, 148-149, 158-159, 162-164, 172-173, 183.

<sup>33</sup> See GoS Memorial, at paras. 156, 171, 182, 184, 185.

<sup>34</sup> See GoS Memorial, at paras. 156, 174, 175.

<sup>35</sup> See GoS Memorial, at paras. 136-144, 147-150, 169.

*invalidated*. Thus, the Government does not refer to Article III of the New York Convention prescribing the obligation to recognize arbitral awards, to Article 53 of the ICSID Convention prescribing the binding character of ICSID awards, to Articles 34(1) and 35 of the UNCITRAL Model Law prescribing the obligation to recognize and enforce arbitral awards, or to the provisions of institutional arbitration rules providing that awards made under those rules are final.<sup>36</sup>

132. Likewise, the Government does not acknowledge the extensive body of authority and commentary emphasizing the presumptive finality of adjudicative decisions, particularly in the context of boundary determinations. That authority is set out in detail in the SPLM/A's Memorial and is not repeated here; the Tribunal is respectfully referred to the SPLM/A's Memorial (at paragraphs 700-745). For present purposes, it is sufficient to note that it is fundamental to all developed international and national legal systems, and to the rule of law itself, that:

- a. adjudicatory decisions made pursuant to international dispute resolution agreements are presumptively final and binding, subject to invalidation only in rare and exceptional cases;<sup>37</sup> and
- b. the presumptive finality and validity of international adjudicatory decisions is particularly powerful where boundary determinations are at issue.<sup>38</sup>

133. Indeed, the Government's own legal authorities expressly recognize this fundamental principle – albeit in passages not mentioned in the GoS Memorial. While the *ad hoc* Committee in the *Klöckner* case (relied on by the Government) has been rightly criticized on a number of grounds, the Committee nevertheless recognized as a matter of principle the presumptive finality of adjudicative decisions:

“It is possible to have different opinions on these delicate questions, or even, as do the Application for Annulment or the Dissenting Opinion, to consider the Tribunal's answers to them not very convincing or inadequate. But since the answers seem tenable and not arbitrary, they do not constitute the manifest excess of powers which alone would justify annulment under Art. 52(1)(b). ***In any case, the doubt or uncertainty that may have persisted in this regard throughout the long preceding analysis should be resolved in 'favorem validitatis sententiae'***.”<sup>39</sup>

134. This principle as it applies generally to ICSID proceedings has been confirmed in authoritative commentary:

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<sup>36</sup> See e.g., UNCITRAL Arbitration Rules, Art. 32(2), **Exhibit-LE 23/4**; ICC Rules, Art. 28(6), **Exhibit-LE 23/5**; LCIA Rules, Art. 26.99, **Exhibit-LE 23/6**.

<sup>37</sup> See SPLM/A Memorial, at paras. 700-715.

<sup>38</sup> See SPLM/A Memorial, at paras. 716-725.

Judgment of 3 May 1985 of the Ad Hoc Committee On the Application for Annulment Submitted by *Klöckner* Against the Arbitral Award Rendered on 21 October 1983 in the *Klöckner v. Cameroon Case*, (ARB/81/2) ICSID Review – Foreign Investment Law Journal 90, 108 (1986), **Exhibit-LE 23/7** (emphasis added); see also *Judgment of the Ad Hoc Committee of 16 May 1986 on the Application for Annulment Submitted by the Republic of Indonesia Against the Arbitral Award Rendered on 20 November 1984 in Amco Asia v. Indonesia*, 1 ICSID Rep. 509, 515 (1993) (“The law applied by the Tribunal will be examined by the *Ad Hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of the applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. ***Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not***”), **Exhibit-LE 23/8** (emphasis added); M. Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* 69 (1992) (“By implication, the AMCO committee confirmed the presumption in *favorem validitate sententiae*.”), **Exhibit-LE 23/9**.

“The annulment mechanism under the Washington Convention *seeks to achieve finality, efficiency, uniformity and consistency*, and has been successful in achieving those goals. The annulment mechanism has been crucial to maintain the binding force and finality of ICSID awards. *The drafters viewed annulment as an ‘exceptional remedy’ that should be ‘permitted within rigidly fixed limits.’*”<sup>40</sup>

135. Similarly, another author explains:

“The alternative, that the award does not enjoy such a presumption, would, in effect, transform the procedure ... into a de novo arbitration. *If the award did not enjoy a presumption of validity and the burden of proof was not on the challenging party, the procedure would be re-arbitration.*”<sup>41</sup>

136. It bears emphasis that these principles of finality serve public policies of the most fundamental character. It is essential to the rule of law and to the security of contemporary life that adjudicative decisions be respected and that boundary determinations be honored. “*Suffice it to say that legal systems, municipal and international, would be in considerable chaos if this rule [of presumptive finality of adjudicative decisions] did not exist,*”<sup>42</sup> and “*the re-opening of the legal status of the boundaries of a State may give rise to very grave consequences, which may endanger the life of the State itself.*”<sup>43</sup> The Government’s Memorial – like the Government’s conduct over the past three years – proceeds with singular disregard for these bedrock rules of international law.

4. The Government Ignores Generally Applicable Principles Regarding the Allocation and Nature of the Burden of Invalidating Adjudicative Decisions

137. The Government also ignores the equally well-settled principles of law that limit the grounds for overcoming the presumptive finality and validity of adjudicatory decisions rendered pursuant to international dispute resolution agreements. In particular, while paying occasional lip service to the limitations on the grounds for challenging an adjudicatory decision, the GoS essentially asks this Tribunal to relitigate, *de novo*, the substantive issues and procedural judgments of the ABC Experts. That is a fundamentally misconceived approach to this Tribunal’s mandate that the very authorities on which the Government relies confirm.

138. The GoS makes a number of grudging concessions regarding the limited nature of this Tribunal’s mandate. These include the Government’s acknowledgments, under the general principles of law applicable to adjudicative decisions, that:

a. “This is not to say that minor deviations from the Rules of Procedure would amount to an excess of mandate.”<sup>44</sup>

b. “This does not mean that an award can be annulled simply because a party disagrees with the reasoning of a tribunal on a point of fact or law, even if the

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<sup>40</sup> Petrova, *The ICSID Grounds for Annulment in a Comparative Perspective: Analysis and Recommendations for the Future*, 10 Vind. J. Int’l Comm. L. & Arb. 287, 298 (2006), **Exhibit-LE 23/10** (emphasis added).

<sup>41</sup> M. Reisman, *Systems of Control in International Adjudication and Arbitration* 57 (1992), **Exhibit-LE 23/9** (emphasis added).

<sup>42</sup> K. Kaikobad, *Interpretation and Revision of International Boundary Decisions* 330 (2007), **Exhibit-LE 4/7**.

<sup>43</sup> *Award of 19 October 1981, Dubai v. Sharjah*, 91 I.L.R. 543, 578 (1981), **Exhibit-LE 11/1**.

<sup>44</sup> GoS Memorial, at para. 120.

Tribunal was in error in its reasoning on a point of fact or law. Annulment is to be distinguished from appeal.”<sup>45</sup>

c. “It is not the case that a mere disagreement, however justified, with the Experts’ appreciation of the facts is sufficient to indicate an excess of mandate.”<sup>46</sup>

139. Despite the foregoing concessions, the Government’s Memorial goes on to ignore even these limitations. Instead, the Government requests this Tribunal to decide *de novo* the definition of the Abyei Area (*see* paragraphs 571 to 621 below), to reassess the ABC Experts’ procedural decisions based on the wholly-inapposite application of “general principles and practice” in international commercial and investment arbitration (*see* paragraphs 229 to 484 below) and to review the ABC Report’s factual findings and legal analysis under the guise of determining whether it stated reasons or complied with “mandatory criteria” (*see* paragraphs 676 to 859 below).

140. The Government’s attempt to relitigate the ABC Experts’ substantive and procedural rulings ignores the well-settled and extensive general principles of law that forbid precisely such efforts. These bodies of authority are detailed in the SPLM/A’s Memorial (at paragraphs 746-791), and need not be repeated here. For present purposes, it is sufficient to note that it is fundamental to developed international and national legal systems, and to the rule of law, that:

a. Finding an excess of mandate is an exceptional conclusion, as to which the party refusing to comply with an adjudicative decision bears a heavy burden of proof. This characterization of an excess of mandate and allocation of the burden of proof is well-recognized in all developed legal systems: “[T]he party *impugning the award is at all times under the burden of proving that sufficiently weighty circumstances exist to support its contention that the award is invalid.*”<sup>47</sup>

b. Equally well-settled international and national authorities hold that any excess of authority must be “*manifest*,” “*glaring*,” “*flagrant*,” “*substantial*” and unambiguous.<sup>48</sup> An excess of authority only arises in extreme and clear cut cases, not in vague, debatable or complex circumstances.

c. Errors of law, treaty contract interpretation or fact are not grounds for holding that a tribunal has exceeded its mandate. These are errors of substance, and not an

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<sup>45</sup> GoS Memorial, at para. 160.

<sup>46</sup> GoS Memorial, at para. 161.

<sup>47</sup> *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (Weeramantry, J., dissenting), [1991] I.C.J. Rep. 53, 152, **Exhibit-LE 11/11**.

<sup>48</sup> *See, e.g.,* S. Stoykovitch, *De l'autorité de la sentence arbitrale en droit international public* 193-194 (1924), **Exhibit-LE 13/8**; D. Guermanoff, *L'excès de pouvoir de l'arbitre* 73 (1929), **Exhibit-LE 13/9**; de Lapradelle, *L'excès de pouvoir de l'arbitre*, 2 Rev. de Droit Int'l 14 (1928), **Exhibit-LE 13/10**; *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 108, available at [www.un.org](http://www.un.org), **Exhibit-LE 1/1**; Memorandum on Arbitral Procedure, prepared by the Secretariat, UN Doc. A/CN.4/35, *Yearbook of the International Law Commission*, Vol. II, 168, at ¶56 (1950) (“...nullity should not be claimed unless departure [from the terms of the compromis] is clear and substantial.”), **Exhibit-LE 23/11**. *See* SPLM/A Memorial, at paras. 762-770.



excess of the decision-maker's mandate: "***An excess of power must not be confused with an essential error.***"<sup>49</sup>

141. These authorities reflect the vital public importance, and basic requirements of good faith and fairness, that attach to the presumptive finality and validity of adjudicative decisions. Despite the presumptive finality of such decisions, parties not infrequently attempt to relitigate disputes where they have not prevailed – like the GoS in this case – under the guise of jurisdictional, procedural, public policy and similar challenges. It is precisely to restrain such efforts, and to preserve the finality of adjudicative decisions, that the foregoing general principles are recognized and assiduously applied.

142. These principles exist precisely to prevent parties from attempting to reargue the law (in the guise of a jurisdictional, public policy or similar challenge), to relitigate the decision-maker's procedural rulings (in the guise of complaints about unfairness or compliance with the parties' agreement) or to nit-pick the decision-maker's statement of its reasons. This is put well in one recent authority:

"As a matter of general approach, ***the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavoring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration.*** Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."<sup>50</sup>

143. Or, as the European Court of Justice declared in the context of annulment of an arbitral award: "[I]t is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that ***annulment of or refusal to recognise an award should be possible only in exceptional circumstances.***"<sup>51</sup>

144. The Government's Memorial and its litigation tactics ignore these principles. In so doing, the Government's thereafter the peace and stability of the Abyei Area and, more broadly, at fundamental principles of the contemporary international legal system and the rule of law.

145. The GoS and SPLM/A consensually designed and implemented a specialized, highly constructive dispute resolution mechanism for the purpose of settling a long-standing and bitter conflict. The parties did so because of their explicit commitment that a speedy and final resolution of their dispute was an essential part of the broader Comprehensive Peace Agreement and was required to ensure not just peace in the Abyei Area but also the durability of the CPA itself.

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<sup>49</sup> D. Guermanoff, *L'excès de pouvoir de l'arbitre* 63 (1929), **Exhibit-LE 13/9**; see also *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 106, available at [www.un.org](http://www.un.org), **Exhibit-LE 1/1**, referring to J. Bluntschli, *Le droit international codifié*, Sect. 495, at p. 289 (1886), **Exhibit-LE 14/5**; K. Carlston, *The Process of International Arbitration* 190 (1946, reprinted 1972) ("No one would gainsay that merely a mistake or a questionable application of the law would not give rise to nullity."), **Exhibit-LE 1/3**.

<sup>50</sup> *ABB AG v. Hochtief Airport GmbH* [2006] 2 Lloyd's Rep. 1, 16 (Q.B.), **Exhibit-LE 23/12**, (quoting *Zermalt Holdings v. Nu-Life Upholstery-Repairs* [1985] 2 EGLR 14 (Comm.) (Q.B.)) (emphasis added).

<sup>51</sup> *Judgment of 1 June 1999, Eco Swiss China Time Ltd v. Benetton International NV*, Case C-126/97, reported at [1999] ECR I-3055, ¶35 *European Court of Justice*, **Exhibit-LE 23/13** (emphasis added); see also Mayer & Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) *Arb. Int'l* 249, 250 (2003), **Exhibit-LE 23/14**.

146. In these circumstances, permitting the GoS to relitigate the ABC Experts' substantive and procedural rulings in a new proceeding would gravely undermine the efficacy and legitimacy of these (and other) parties' commitments to consensual mechanisms for resolving their disputes. Allowing the Government's tactics to succeed would make a mockery of the presumptive finality of adjudicative decisions (particularly those relating to boundaries) and produce profound unfairness – in direct contradiction to the principles of *pacta sunt servanda* and *res judicata*.

*B. The Government Distorts and Improperly Expands the Grounds on which the ABC Experts' Report May be Challenged*

147. This Tribunal's authority under Articles 2(a) and 2(b) of the Abyei Arbitration Agreement is limited to a simple and straightforward issue. Article 2(a) of the Arbitration Agreement provides that the only basis for challenging the ABC Report in these proceedings is subsumed by the question "[w]hether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, ***exceeded their mandate which is 'to define (i.e., delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.'***"<sup>52</sup>

148. Under Article 2 of the Arbitration Agreement, the sole basis for this Tribunal to disregard the ABC Report is narrowly defined as an excess of the ABC Expert's mandate. No other ground for alleging nullity of, or refusing to comply with, the ABC Report is permitted by the Arbitration Agreement. In particular, the Arbitration Agreement does not permit review or appeal of alleged errors of law or fact by the ABC Experts, objections to the ABC Experts' procedures, the composition of the ABC, the impartiality of the ABC Experts, or any of the other grounds sometimes suggested historically as bases for findings of nullity of adjudicative decisions.

149. Notwithstanding the limitations on this Tribunal's jurisdiction, the GoS has raised a diverse and scatter-shot collection of eleven different complaints about the ABC Experts' alleged actions that range well beyond the scope of Article 2(a) of the Arbitration Agreement. In particular, the GoS Memorial advances a laundry list of three purported violations of "procedural conditions," four supposed "substantive" excesses of mandate and four alleged breaches of "mandatory criteria."<sup>53</sup>

150. The GoS's laundry list of complaints are after-the-fact constructions, designed to relitigate the substance of the parties' dispute. In so doing, the Government has sought to raise as many legal and factual claims as possible, and to sow the maximum amount of confusion. That tactic is aggravated by the Government's unfortunate mischaracterizations and misquotations of both the ABC Report (and the record of the ABC proceedings) and the legal authorities on which it relies. Correcting these various mischaracterizations requires a lengthy discussion, but that results from the Government's litigation tactics, and not the substance of its objections.

151. As detailed in Parts II(C) through II(F), there is no substantive basis for any of the GoS's eleven purported complaints. More fundamentally, however, the bulk of the GoS's laundry list of complaints do not fall within this Tribunal's authority under Article 2 of the Abyei Arbitration Agreement: in most instances, the GoS's complaints cannot be categorized

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<sup>52</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial** (emphasis added).

<sup>53</sup> See GoS Memorial, at paras. 192-276.

as excesses of mandate under Article 2 of the Agreement and, as such, are not admissible grounds for this Tribunal to disregard the ABC Report.

1. The Government Ignores the Definition of Excess of Mandate in the Abyei Arbitration Agreement

152. The GoS Memorial repeatedly invokes the “*primary role of the consent of the parties*”<sup>54</sup> and declares that “[w]hen two Parties submit a dispute to third-party settlement, the mandate or power of the adjudicating body to decide the dispute rests, above all, on the scope of the consent given by the Parties to the decision-maker to resolve the dispute.”<sup>55</sup> That basic principle of party autonomy is universally affirmed in international and national legal regimes.<sup>56</sup> It is undisputed between the parties.

153. Having theoretically acknowledged the importance of the parties’ consent in defining a tribunal’s jurisdiction, however, the Government then proceeds to ignore that principle in its Memorial. In particular, the GoS’s Memorial repeatedly requests this Tribunal to exceed its authority by considering alleged violations of “procedural conditions” or “mandatory criteria.” Neither of those categories of objections falls within the definition of an “excess of mandate” under Article 2(a) of the Abyei Arbitration Agreement or, consequently, within this Tribunal’s authority.

154. As noted above, Article 2(a) of the Arbitration Agreement provides that the sole issue presented to this Tribunal is “[w]hether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is “to define (i.e., delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”<sup>57</sup> Article 2(a) establishes a single, specifically defined basis for this Tribunal’s authority to disregard or invalidate the ABC Report. It is this consensually prescribed formula that defines the scope and limits of this Tribunal’s authority.

155. It bears emphasis that Article 2(a) must be read together with Article 2(b) of the Arbitration Agreement. Article 2(b) provides that, “*if the Tribunal determines ... that the ABC experts did not exceed their mandate, it shall* make a declaration to that effect and

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<sup>54</sup> GoS Memorial, at p. 50, Heading (i).

<sup>55</sup> GoS Memorial, at para. 134.

<sup>56</sup> See, e.g., A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* ¶6-03 (2004) (“Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations.”), **Exhibit-LE 23/15**; Veeder, *Whose Arbitration Is It Anyway: The Parties or the Arbitration Tribunal – An Interesting Question?*, in L. Newman & R. Hill (eds.), *The Leading Arbitrators’ Guide to International Arbitration* 347 (2004) (“To the simple question whether the arbitration tribunal or the parties are the masters now, there can be only one answer. It is the parties’ dispute; and the parties can settle their dispute at any time, in whatever manner and on whatever terms of their own choosing. It is therefore the parties’ arbitration ...”), **Exhibit-LE 23/16**; E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶46, 52 (1999) (“The contract between the parties is the fundamental constituent of international commercial arbitration. It is the parties’ common intention which confers powers upon the arbitrators. ... This emphasis on party autonomy, which thus frees the parties from all strictly national constraints, is certainly the most important of recent developments in international arbitration.”), **Exhibit-LE 23/2**; J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶17-08 (2003) (“All modern arbitration laws recognise party autonomy, i.e. parties are free to determine the substantive law or rules applicable to the merits of the dispute to be resolved by arbitration.”), **Exhibit-LE 23/17**; P. Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* ¶630 (2d ed. 1989) (“[The arbitral process] rests on the parties’ autonomous decision to resolve their dispute in front of an arbitral tribunal. It corresponds to this that the parties may not only ... define the subject matter of the particular proceedings, but must also have decisive influence on its course.”), **Exhibit-LE 23/18**.

<sup>57</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial**.

issue an award for the full and immediate implementation of the ABC Report.”<sup>58</sup> Article 2(b) confirms, in express terms, that the sole and exclusive basis for disregarding the ABC Report is an “excess of mandate;” if the ABC Experts did not “exceed their mandate,” then this Tribunal “shall” issue an award for the full and immediate implementation of the ABC Report.

156. Remarkably, the GoS’s lengthy Memorial never discusses, quotes or even refers to Article 2(b) of the Arbitration Agreement. Rather, the GoS treats Article 2(a) of the Arbitration Agreement as an invitation for this Tribunal to act “*in a manner similar to that of an annulment panel*”<sup>59</sup> under “Article 53” (presumably, Article 52) of the ICSID Convention.<sup>60</sup> Consistent with that approach, the GoS Memorial embarks on a lengthy exposition of different bases for annulment under Article 52 of the ICSID Convention,<sup>61</sup> for non-recognition under Article V of the New York Convention,<sup>62</sup> for annulment and non-recognition under the UNCITRAL Model Law<sup>63</sup> and sundry provisions of selected institutional arbitration rules.<sup>64</sup>

157. As discussed below, the GoS’s methodology is selectively to pick and choose a variety of bases for annulment or non-recognition of arbitral awards from a hodge podge of international instruments, with a view towards fashioning some general principle of nullity or invalidity, and then to apply that construction to the ABC Report. That methodology not only ignores the particular characteristics of the ABC and the ABC Report (discussed above),<sup>65</sup> and the particular attributes and rules of different arbitral regimes, but also ignores and distorts the terms of the parties’ consent in the Abyei Arbitration Agreement. Instead of addressing the issue specified by Articles 2(a) and 2(b) of the Arbitration Agreement, as it agreed to do, the GoS embarks on a wide-ranging scavenger hunt through numerous other international arbitration instruments, in search of some ground on which it can try and base an attack on the ABC’s work.

158. The GoS’s methodology is fundamentally illegitimate and invites this Tribunal to exceed the scope of its authority. This Tribunal was not constituted as an annulment panel under the ICSID Convention or the ICSID Rules, nor an annulment or recognition court under the New York Convention, nor a national court considering an ICC or UNCITRAL arbitral award. This Tribunal was instead granted a very specifically defined authority under Articles 2(a) and 2(b) of the Abyei Arbitration Agreement.

159. It is not surprising that the GoS endeavors to expand this Tribunal’s authority, and effectively to relitigate the merits of the parties’ dispute. When one considers what real “excess of mandate” claims the Government might bring, they are hopeless. While understandable, however, the Government’s effort to expand this Tribunal’s authority to other claims is illegitimate given the terms of the parties’ Arbitration Agreement. Under that Agreement, it is only if the ABC Experts committed a defined “excess of mandate” that this Tribunal may disregard the ABC Report under Article 2(a); in all other cases, Article 2(b)

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<sup>58</sup> Abyei Arbitration Agreement, Art. 2(b), **Appendix A to SPLM/A Memorial** (emphasis added).

<sup>59</sup> GoS Memorial, at para. 131.

<sup>60</sup> GoS Memorial, at para. 131.

<sup>61</sup> See GoS Memorial, at paras. 143-145, 148-149, 158-164, 172-173, 183.

<sup>62</sup> See GoS Memorial, at para. 182.

<sup>63</sup> See GoS Memorial, at paras. 184-185.

<sup>64</sup> See GoS Memorial, at paras. 156 (UNCITRAL Arbitration Rules; PCA Rules), 171 (UNCITRAL Arbitration Rules; PCA Rules), 175 (LCIA Rules).

<sup>65</sup> See above at paras. 122-128.

directs this Tribunal to uphold the ABC Report and order its full and immediate implementation.

2. The Purported Violations of “Procedural Conditions” Alleged by the Government Do Not Fall Within the Definition of An Excess of Mandate

160. The GoS Memorial alleges three purported violations of “procedural conditions” by the ABC Experts which supposedly constitute excesses of mandate.<sup>66</sup> These three alleged procedural violations are: (a) the interview of several witnesses in Khartoum; (b) an email exchange with a third party (Mr. Millington); and (c) the ABC Experts’ purported failure to act through the Commission.<sup>67</sup> The Government asserts that, through these alleged violations, “the ABC Experts breached material procedural requirements which were express conditions for the exercise of their mandate.”<sup>68</sup>

161. The Government’s effort to transmute alleged procedural defects in the ABC proceedings into an excess of mandate is groundless. As discussed below, none of these purported procedural violations violated the terms of the Abyei Protocol, the Abyei Appendix, the Terms of Reference or the Rules of Procedure. On the contrary, each of the actions the GoS challenges fell fully within the scope of the ABC Experts’ procedural authority.<sup>69</sup> Additionally, however, none of the Government’s procedural objections is even admissible in these proceedings, because none of them falls within the definition of an “excess of mandate;” as a consequence, these procedural objections do not serve as grounds to disregard the ABC Report.

a) The Government Ignores the Parties’ Definition of “Excess of Mandate” in Article 2(a) of the Abyei Arbitration Agreement

162. The Government studiously avoids any effort to address the specific wording of Article 2(a) of the Abyei Arbitration Agreement. As noted above, Article 2(a) provides that the sole issue presented to this Tribunal is “[w]hether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is ‘to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.’”<sup>70</sup>

163. Article 2(a) does not refer to “procedural conditions,” to violations of procedural rights, or to denial of an opportunity to be heard. Nor does Article 2(a) refer more generally to concepts of nullity or invalidity of arbitral awards. Likewise, Article 2(a) does not incorporate the (well-known) lists of grounds of invalidity or nullity included in instruments such as the New York Convention, the ICSID Convention or the International Law Commission’s (“ILC”) Draft Convention on Arbitral Procedure (“Draft ILC Convention on Arbitral Procedural”)/ILC Model Rules on Arbitral Procedure 1958 (“ILC Model Rules”). Any of these approaches could have been adopted, but none was.

164. Instead, Article 2(a) identified only a single ground upon which the ABC Report may be invalidated – whether the ABC Experts “*exceeded their mandate.*” There is no basis for

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<sup>66</sup> See GoS Memorial, at paras. 177-186, 196-226.

<sup>67</sup> See GoS Memorial, at paras. 196-226.

<sup>68</sup> GoS Memorial, at para. 196.

<sup>69</sup> See below at paras. 311-484.

<sup>70</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial.**

expanding this single ground of invalidity to include other grounds of invalidity that were not specified. Doing so would violate the fundamental rule of party autonomy which, as discussed above, both parties agree defines this Tribunal's authority.<sup>71</sup>

165. An "excess of mandate" is a specific, identifiable type of defect. By its plain terms, an "excess of mandate" under Article 2(a) is a decision by the ABC Experts that was *ultra petita*, purporting to decide matters outside the scope of the disputes submitted by the parties.<sup>72</sup> That is evident from the parties' use of the words "*excess of* mandate," which referred to situations where the ABC Experts might have gone beyond or outside ("*exceeded*") the scope of the issues submitted to them.

166. Notably, Article 2(a) did not provide for disregarding the ABC Experts' decision on the grounds that "the procedure was not in accordance with the agreement of the parties" (New York Convention, Article V(1)(d)); UNCITRAL Model Law, Arts. 34(2)(a)(iv) and 36(1)(a)(iv); or that a party "was unable to present his case" (New York Convention, Article V(1)(b); UNCITRAL Model Law, Arts. 34(2)(a)(ii) and 36(1)(a)(ii)); or that there was a "serious departure from a fundamental rule of procedure" (ICSID Convention, Art. 52(1)(d)); Draft ILC Convention on Arbitral Procedure, Art. 30(c)). All of these formulae, which either expressly or impliedly connote violations of procedural requirements, were readily available and could have been adopted by the parties. Instead, they chose a formula that referred specifically to the ABC Experts' "*exceeding*" their mandate – that is, going beyond the dispute that they had been assigned to decide; that formula simply does not encompass a violation of the procedures that supposedly governed the manner in which the ABC Experts resolved the dispute submitted to them.

167. Other aspects of the language the parties used in Article 2(a) of the Arbitration Agreement confirm that conclusion. For example, Article 2(a) addresses an "excess of mandate" by reference to the category of disputes that the ABC Experts were charged with resolving under the parties' agreements, namely "[w]hether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, *exceeded their mandate WHICH IS 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.'*"<sup>73</sup>

168. As provided in Article 2(a), an "excess of mandate" is to be defined by reference to that category of disputes which the parties submitted to the ABC ("*their mandate WHICH IS...*"). In contrast, Article 2(a) did not define this Tribunal's authority by reference to the ABC Experts having "exceeded their mandate *which is* set forth in the Rules of Procedure" or having "exceeded their mandate *which is* to apply the arbitration procedures known in common law jurisdictions or investment arbitrations." Rather, Article 2(a) defined the concept of "excess of mandate" by reference to the ABC Experts' substantive task, which is to "define ... and demarcate" the Abyei Area. The only relevant issue falling within the terms of Article 2(a) is whether the ABC Experts decided matters falling outside the scope of ("exceeding") that category of disputes.

169. The reference in Article 2(a) to the Comprehensive Peace Agreement ("*as per CPA*") further confirms this conclusion. As discussed in the SPLM/A's Memorial, the Comprehensive Peace Agreement included, as integral parts, the Abyei Protocol and the

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<sup>71</sup> See above at para. 152.

<sup>72</sup> See SPLM/A Memorial, at paras. 674-691.

<sup>73</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial** (emphasis added).

Abyei Appendix.<sup>74</sup> The Comprehensive Peace Agreement does *not* include as one of its parts the Terms of Reference or Rules of Procedure, which set forth procedural provisions regarding the ABC.

170. The reference in Article 2(a) to the Comprehensive Peace Agreement, including the Abyei Protocol and Appendix, makes perfect sense in light of the parties' understanding of "excess of mandate." The Abyei Protocol set forth the ABC's mandate (in Article 5), but did not prescribe rules of procedure for the ABC; accordingly, in referring to the Abyei Protocol's formulation of the ABC Experts' mandate to define and delimit the Abyei Area, Article 2(a) of the Arbitration Agreement referred again to decisions exceeding the substantive scope of the issues submitted to the ABC. Conversely, because Article 2(a) did not refer to the Rules of Procedure (or Terms of Reference), it plainly was not intended to refer to violations of those procedural rules.<sup>75</sup>

171. Similarly, the parties' agreements concerning the ABC make clear precisely what "mandate" was understood to mean. Article 1 of the Terms of Reference is entitled "**Mandate**" and provides that "[t]he ABC shall demarcate the area, specified above [as the Abyei Area] on map and on land."<sup>76</sup> In contrast, the "**Functioning of the ABC**" is separately addressed in Articles 3 and 4 of the Terms of Reference, while the ABC's "**Program of work**" similarly appears under separate headings. As with the terms of their other agreements, the parties did not include procedural matters within an "excess of *mandate*," which instead referred to the scope of the substantive issues submitted to the ABC Experts' decision.

- b) The Government Misuses and Confuses the Provisions of International and National Arbitration Instruments Relating to An "Excess of Mandate"

172. The GoS Memorial ignores all of these aspects of the parties' chosen language of the Arbitration Agreement. Instead, the Government first pretends to find Article 2(a) mysterious or obscure, next attempts to construct a wholly artificial meaning derived from inapposite international arbitration authorities, and then finally purports to apply that artificial construction to the ABC Report. This exercise is both unnecessary (because Article 2(a) is clear) and illegitimate (because the Government's contrived interpretation of Article 2(a) contradicts both the language of the parties' agreements and the very legal regimes upon which the Government purports to rely).

173. The Government begins its analysis by suggesting, in passing, that an "'excess of mandate' may not be a technical term that is frequently referred to in the jurisprudence and doctrine."<sup>77</sup> As already discussed, however, the phrase "excess of mandate" is not used in a vacuum: it must be interpreted in the context of the remainder of Article 2(a) and the Abyei Arbitration Agreement. When that is done, and as discussed above, Article 2(a) permits a

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<sup>74</sup> See SPLM/A Memorial, at paras. 445-494.

<sup>75</sup> Article 2(a) does refer to the Terms of Reference and Rules of Procedure, but only insofar as those agreements "**reiterated**" the ABC Experts' mandate as defined in the Abyei Protocol. See Abyei Arbitration Agreement, Art. 2(a) ("Whether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is "to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" **as stated** in the Abyei Protocol, **and reiterated** in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure."), **Appendix A to SPLM/A Memorial** (emphasis added).

<sup>76</sup> ABC ToR, Art. 1.2, **Appendix E to SPLM/A Memorial**.

<sup>77</sup> GoS Memorial, at para. 135.

clear and straightforward understanding of the term “excess of mandate.” That is a short, but complete, answer to the Government’s entire analysis.

174. In any event, the term “excess of mandate” does have a recognizable meaning in international and national legal doctrine. Not surprisingly, that meaning is congruent with the remainder of the text of Article 2(a). Authorities from a range of sources treat, with reasonable consistency, the concept of an “excess of mandate” as referring to a tribunal going beyond the scope of the disputes submitted to it:

a. **“An arbitral tribunal may only validly determine those disputes that the parties have agreed that it should determine.** This rule is an inevitable and proper consequence of the voluntary nature of arbitration. In consensual arbitration, the authority or competence of the arbitral tribunal comes from the agreement of the parties.... It is the parties who give to a private tribunal the authority to decide disputes between them; and the arbitral tribunal must take care to stay within the terms of its mandate.”<sup>78</sup>

b. “[A]n excess of jurisdiction occurs when the arbitrators *exceed the mission given them.*”<sup>79</sup>

c. An excess of mandate may only be alleged where “the tribunal *delimits, in whole or in part, a boundary in areas not covered by the terms of reference and thus exceeds the territorial scope of its jurisdictional powers.*”<sup>80</sup>

d. An excess of mandate occurs where a tribunal “*decides upon that which was not in fact submitted to them.* ... The question of excess of power or jurisdiction is, in essence, a question of treaty interpretation. It is a question which is to be answered by a careful comparison of the award or other contested action by the tribunal with the relevant provisions of the *compromis.*”<sup>81</sup>

e. “[A]n arbitral award must be set aside, if it either concerns a dispute that has not been mentioned in the arbitration agreement (first alternative), or if it exceeds the scope defined in the arbitration agreement (second alternative), i.e. *ultra petita.* ... [T]his corresponds in content to Art. IX(1)(c) European Convention and Art. V(1)(c) New York Convention, as well as the old version of Section 595 (1) lit. 5 of the

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<sup>78</sup> A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* ¶5-30 (2004), **Exhibit-LE 4/2** (emphasis added).

<sup>79</sup> K. Carlston, *The Process of International Arbitration* 83 (1946, reprinted 1972), **Exhibit-LE 1/3** (emphasis added).

<sup>80</sup> Kaikobad, *The Quality of Justice: ‘Excès de Pouvoir’ in the adjudication and arbitration or territorial and boundary disputes* in G. Goodwin-Gill & S. Talmon (eds.), *Reality of International Law* 293, 302 (1999), **Exhibit-LE 1/2** (emphasis added).

<sup>81</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 107-108, available at [www.un.org](http://www.un.org), **Exhibit-LE 1/1** referring to E. de Vattel, *Le droit des gens*, 1758 ed. Vol. 1, sect. 329, p. 520 (1916), **Exhibit-LE 3/11** (emphasis added); *see also The Laguna del Desierto Award*, 113 I.L.R. 1, 45 (1999) (“**The jurisdiction of international tribunals is limited by the powers which the Parties in the case grant to them** and by the maximum claims of the Parties in the course of the proceedings. If they exceed either limitation, their decision will be *ultra vires* and vitiated on grounds of nullity for *excès de pouvoir.*”), **Exhibit-LE 3/12** (emphasis added).



[Austrian] Code of Civil Procedure, that simply put, provided for the case *where the arbitral tribunal has exceeded its task*.<sup>82</sup>

175. Similarly, Article V(1)(c) of the New York Convention provides for non-recognition of an award if it “deals with a difference *not contemplated by or not falling within the terms* of the submission to arbitration, or it contains decisions on matters *beyond the scope* of the submission to arbitration.”<sup>83</sup> Article 34(2)(a)(iii) of the UNCITRAL Model Law is virtually identical in its effect<sup>84</sup> and is paralleled by other leading national arbitration statutes.<sup>85</sup>

176. The Government ignores the commonly accepted usages of an “excess of mandate” (outlined above at paragraphs 174(a) to 174(e)), as well as the language used by the parties in their own agreements. Instead, it adopts the peculiar reasoning that: “[u]nder general principles of law and practice, a serious departure from a fundamental rule of procedure *also constitutes a ground for annulment* of an award *and, as such, a ground for finding an excess of mandate*.”<sup>86</sup>

177. In support of this proposition, the Government cites: (a) Article V(1)(d) of the New York Convention; (b) a U.S. commentary addressing Articles V(1)(b) and V(1)(d) of the New York Convention; (c) “Article 52(d)” (presumably intended to be Article 52(1)(d)) of the ICSID Convention; and (d) Article 36(1)(a)(iv) of the UNCITRAL Model Law. The Government’s analysis is confused, as is its presentation of the authorities it seeks to rely upon. Properly analyzed, the Government’s authorities demonstrate clearly the illegitimacy of its efforts to turn a supposed procedural violation into an excess of mandate.

178. Preliminarily, it is useful to pay close attention to the Government’s line of argument (quoted in paragraph 176 above). According to the Government, because “a serious departure from a fundamental rule of procedure” constitutes “a ground for annulment of an

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<sup>82</sup> Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozeßgesetzen*, Vol. 4 Part 2, §611, ¶¶141 *et seq.* (2d ed. 2007), **Exhibit-LE 23/19** (emphasis added); *see also Nordell Int’l Res. Ltd. v. Triton Indonesia, Inc.*, 1993 WL 280169, at \*8 (9th Cir. July 23, 1993) (“*An arbitration panel exceeds its authority ... if it decides issues other than those submitted to it by the parties.*”), **Exhibit-LE 3/13**; Black’s Law Dictionary (excess of jurisdiction) 604 (8th ed. 2004) (“A court’s acting beyond the limits of its power, usu. in one of three ways: (1) when the court has no power to deal with the kind of matter at issue, (2) when the court has no power to deal with the particular person concerned, or (3) *when the judgment or order issued is of a kind that the court has no power to issue.*”), **Exhibit-LE 4/1**.

<sup>83</sup> New York Convention, Art. V(1)(c), **Exhibit-LE 5/1** (emphasis added); *see also* Inter-American Convention on International Commercial Arbitration 1975, Art. 5(1)(c), **Exhibit-LE 5/10**; European Convention on International Commercial Arbitration, Art. IX(1)(c), **Exhibit-LE 38/18**.

<sup>84</sup> *See* UNCITRAL Model Law, Art. 34(2)(a)(iii) (“providing that an award may be annulled if it “deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.”), **Exhibit-LE 23/20**.

<sup>85</sup> *See, e.g.*, English Arbitration Act, §103(2)(d) (non-recognition if “the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration”), **Exhibit-LE 24/1**; U.S. FAA, 9 U.S.C. §10(a)(4) (award may be set aside “[w]here the arbitrators exceeded their powers, or so imperfectly executed them that *a mutual, final, and definite award upon the subject matter submitted was not made.*”), **Exhibit-LE 24/2**; French Code of Civil Procedure, Arts. 1484(3), 1502(3) (award may be set aside if “the arbitrator has made a ruling that is not in accordance with the task conferred upon him”), **Exhibit-LE 24/3**; Swiss Law on Private International Law, Art. 190(2)(c) (award may be set aside, “[I]f the arbitral’s decision went beyond the claims...”), **Exhibit-LE 3/7**; Italian Code of Civil Procedure, Art. 829(4) (award may be set aside where “the award exceeds the limits of the arbitration agreement, . . . , or has decided the merits of the dispute in all other cases in which the merits could not be decided.”), **Exhibit-LE 24/4**; Japanese Arbitration Law, Art. 44(1)(v) (“the arbitral award contains decisions on matters beyond the scope of the arbitration agreement or the claims in the arbitral proceedings”), **Exhibit-LE 24/5**.

<sup>86</sup> GoS Memorial, at para. 177 (emphasis added).

award” under “general principles of law and practice,” it is “*as such*” a “ground for finding *an excess of mandate*.”<sup>87</sup>

179. The argument is manifestly wrong. The Government argues that because, under “general principles of law and practice,” a violation of procedural norms provides a basis for annulling an award, then such a violation is “a ground for finding an excess of mandate.” That approach would permit precisely what the parties did not agree to in their Arbitration Agreement: it would convert this Tribunal into a free ranging annulment panel, with authority to nullify the ABC Report on any ground permitted under “general principles of law and practice.” That is exactly not what the parties agreed.

180. On the contrary, as discussed above, the parties agreed that this Tribunal could disregard the ABC Report if – and *only* if – the ABC Experts committed an “excess of mandate,” as specifically and clearly defined in the Arbitration Agreement. It turns the parties’ agreement, and the basic treatment of arbitral awards under international and national legal regimes, on its head to argue as the Government does that since ‘general principles’ provide for annulment of awards in various circumstances, those circumstances constitute an ‘excess of mandate.’<sup>88</sup> Again, that is simply not what the parties agreed.

181. The parties did not assign this Tribunal the task of applying unspecified “general principles of law and practice” to entertain any number of creative bases for challenging arbitral awards. Instead, they agreed in Article 2(a) of the Arbitration Agreement to a single, specifically defined basis for reviewing the ABC Report. The Government’s analysis ignores the specific terms of the Abyei Arbitration Agreement, and instead seeks to substitute a catch-all reference to “general principles of law and practice” for the parties’ carefully negotiated agreement.

182. Almost exactly this issue arose for consideration before the Permanent Court of International Justice in the *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pàzmány University v. The State of Czechoslovakia)*. Article X of the Paris Agreement No. II dated April 28, 1930 provided for an appeal to the PCIJ from “all judgments on *questions of jurisdiction or merits* which may be given henceforth by the Mixed Arbitral Tribunals.”<sup>89</sup> (This provision was substantially broader, in obvious ways, than the mandate the Arbitration Agreement confers on this Tribunal, but the PCIJ’s decision nonetheless illustrates the basic principle.)

183. The PCIJ accepted that the foregoing provision of the Paris Agreement was sufficient to confer on it jurisdiction to act as a court of appeal.<sup>90</sup> In a dispute between Hungary and Czechoslovakia regarding the restitution of certain property situated in Slovakia to the Peter Pazmany University, Czechoslovakia argued before the PCIJ that the Mixed Arbitral Tribunal had wrongly declared itself competent to adjudicate upon the claim and that consequently, the

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<sup>87</sup> GoS Memorial, at para. 177 (emphasis added).

<sup>88</sup> See e.g., GoS Memorial, at paras. 176, 177.

<sup>89</sup> *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pàzmány University v. Czechoslovakia)* Ser. A/B 61, 208, 220 (P.C.I.J. 1933), **Exhibit-LE 24/6** (emphasis added).

<sup>90</sup> *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pàzmány University v. Czechoslovakia)* Ser. A/B 61, 208, 221 (P.C.I.J. 1933) (“As has been seen, Article X, paragraph I, of Agreement No. II of Paris confers on the Court jurisdiction as a court of appeal.”), **Exhibit-LE 24/6**.

decision of that tribunal did not bind it.<sup>91</sup> Czechoslovakia also made complaints about the procedure before the Mixed Claims Tribunal.<sup>92</sup>

184. In response to these procedural claims, the PCIJ held that:

“According to the terms of Article X of the Paris Agreement No. II, the Parties agree to submit to the Court ‘questions of jurisdiction or merits.’ *In view of the fact that its jurisdiction is limited by the clear terms of this provision, the Court has no power to control the way in which the Mixed Arbitral Tribunal has exercised its functions as regards procedure.*”<sup>93</sup>

Given the substantially narrower terms of Article 2 of the Abyei Arbitration Agreement, that same conclusion applies *a fortiori* to the procedural complaints that the Government seeks to advance in this proceeding as purported excesses of mandate.

185. Similarly, in the *India v. Pakistan* case, the Court was mandated to determine “whether the Council [ICAO] *has jurisdiction in this case.*”<sup>94</sup> The Court expressly noted that it had “nothing whatever to do in the present proceedings, *except in so far as these elements may relate to the purely jurisdictional issue which alone has been referred to it*, namely the competence of the Council to hear and determine the case submitted by Pakistan.”<sup>95</sup> When faced with objections raised by India in relation to the procedural integrity of the proceedings before the Council, the Court dismissed the claims, noting that “[t]he Court’s task in the present proceedings is to give a ruling as to whether the Council has jurisdiction in the case. This is an objective question of law, *the answer to which cannot depend on what occurred before the Council.*”<sup>96</sup> Judge Dillard in his Separate Opinion further noted that “[the procedural irregularity] *does not go to the jurisdictional issue itself since this issue is clearly focussed on the reach of the Council’s competence to deal with the subject-matter of the disagreement.*”<sup>97</sup> Again, the same conclusion applies to the Government’s effort to shoe-horn its various procedural and other complaints into an “excess of mandate” claim.

186. The Government’s analysis also contradicts the very authorities on which it relies (that is, the New York Convention, ICSID Convention and UNCITRAL Model Law). As discussed in the SPLM/A’s Memorial, the grounds for non-recognition of arbitral awards (in the New York and Inter-American Conventions), the grounds for annulment of arbitral awards (in the ICSID Convention) and the grounds for annulment and non-recognition of arbitral awards (in the UNCITRAL Model Law and similar national arbitration statutes) are specifically defined exceptions to the presumptive finality and validity of such awards.<sup>98</sup>

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<sup>91</sup> *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pàzmány University v. Czechoslovakia)* Ser. A/B 61, 208, 221 (P.C.I.J. 1933), **Exhibit-LE 24/6**.

<sup>92</sup> *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pàzmány University v. Czechoslovakia)* Ser. A/B 61, 208, 221-222 (P.C.I.J. 1933), **Exhibit-LE 24/6**.

<sup>93</sup> *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pàzmány University v. Czechoslovakia)* Ser. A/B 61, 208, 222 (P.C.I.J. 1933), **Exhibit-LE 24/6** (emphasis added).

<sup>94</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, [1972] I.C.J. Rep. 46, 70 *et seq.* (I.C.J.), **Exhibit-LE 24/7** (emphasis added).

<sup>95</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, [1972] I.C.J. Rep. 46, 51 *et seq.* (I.C.J.), **Exhibit-LE 24/7** (emphasis added).

<sup>96</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, [1972] I.C.J. Rep. 46, 69 *et seq.* (I.C.J.), **Exhibit-LE 24/7** (emphasis added).

<sup>97</sup> *Separate Opinion of Judge Dillard in Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, [1972] I.C.J. Rep. 46, 99 (I.C.J.), **Exhibit-LE 24/7** (emphasis added).

<sup>98</sup> See SPLM/A Memorial, at paras. 701-709.

187. The various exceptions in Article V(1) of the New York Convention, Article 52 of the ICSID Convention, and Articles 34 and 36 of the UNCITRAL Model Law are not a formless muddle of “general principles,” which can be interchangeably invoked, as the Government’s Memorial implies. On the contrary, these exceptions are specifically and carefully defined to identify a number of separate, independent grounds for challenging arbitral awards. That is clear from the text of the relevant conventions and legislative instruments, and from all serious commentary on the subject:

- a. “A party challenging an award must prove *one* of the *exclusively listed grounds* in the arbitration laws or international conventions.”<sup>99</sup> The same author goes on to note that “[t]here are *several grounds* on which a challenge of an award may be based.”<sup>100</sup>
- b. “[T]he New York Convention sets out *five separate grounds* on which recognition and enforcement of a Convention award may be refused at the request of the party against whom it is invoked.”<sup>101</sup>
- c. “Section 103(2)(d) [of the English Arbitration Act] is concerned with substantive rather than procedural matters, so that *an objection to procedure falls within section 103(2)(c) or the general public policy rules rather than this provision*.”<sup>102</sup>
- d. “Article 52(1) of the ICSID Convention contains an exhaustive list of grounds for the annulment of the award ... A request for annulment must allege the existence of one or more of the grounds listed in that provision.”<sup>103</sup>

188. The same analysis is clear from the well-known decision in *Inter-Arab Investment Guarantee Corporation v Banque Arabe et Internationale d’Investissements*.<sup>104</sup> There, a party pursued four grounds of challenge to the award including that:

- a. the award had not yet become binding on the parties (Article V(1)(e));
- b. the award constituted an “excess of mandate” (Article V(1)(c));
- c. the challenging party did not have the opportunity to present its argument (Article V(1)(b)); and

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<sup>99</sup> J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶25-31 (2003), **Exhibit-LE 23/17**.

<sup>100</sup> J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶25-32 (2003), **Exhibit-LE 23/17** (emphasis added); see also *Aloe Vera of Am., Inc v. Asianic Food (S) Pte Ltd et al, Judgment of 10 May 2006*, XXXII Y.B. Comm. Arb. 489, 503 (S. Ct. of Singapore, High Court) (2007) (in relation to a claim that the arbitrators had exceeded their authority because the party resisting enforcement was not a party to the arbitration agreement, the court held as follows: “AVA submitted that Sect. 31(2)(d) dealt with the grounds of excess of power or authority of the arbitrator. ... AVA further submitted that Sect. 31(2)(d) did not overlap with Sect. 31(2)(b) which was the proper section to invoke when a challenge was being made on the basis that a person was not a party to the arbitration agreement. ... Having considered AVA’s arguments, I accept them.”), **Exhibit-LE 24/8** (emphasis added).

<sup>101</sup> A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* ¶10-34 (2004) (emphasis added) and ¶¶9-13–9-29 (2004) (listing separately the various grounds for challenging an award, including the grounds under Article 34 UNCITRAL Model Law), **Exhibit-LE 23/15**.

<sup>102</sup> R. Merkin, *Arbitration Act 1996* 218 (3d ed. 2005), **Exhibit-LE 24/9** (emphasis added).

<sup>103</sup> Schreuer, *Three Generations of ICSID Annulment Proceedings* in E. Gaillard & Y. Banifatemi (eds.), *Annulment of ICSID Awards* 20-21 (2004), **Exhibit-LE 24/10** (emphasis added).

<sup>104</sup> *Inter-Arab Investment Guarantee Corporation v Banque Arabe et Internationale d’Investissements*, XXII Y.B. Comm. Arb. 643 (Brussels Cour d’appel) (1997), **Exhibit-LE 24/11**.

d. the arbitral procedure was not in accordance with the agreement of the parties (Article V(1)(d)).<sup>105</sup>

These four separate grounds were pursued, and dealt with, in the reasoning of both the court of first instance, and the appeal court, separately, distinctly and with no suggestion that any one ground could, should or did overlap into any other ground.<sup>106</sup>

189. Again, the Government's own authorities confirm this. The GoS Memorial cites the annulment Committee's decision in *Lucchetti v. Peru*, which provides that:

“According to Article 52(1) of the ICSID Convention, a party may request annulment of an award on one or more of five specific grounds. Three of these grounds are at issue in the present case, i.e. ‘(b) that the Tribunal has manifestly exceeded its powers,’ ‘(d) that there has been a serious departure from a fundamental rule of procedure,’ and ‘(e) that the award has failed to state the reasons on which it is based.’ ***These three grounds deal with different aspects of the award. While ground (b), in so far as the present case is concerned, concerns the extent of the powers conferred on the tribunal under the BIT, ground (d) is aimed to ensure that the parties enjoy their right to be heard in a fair manner. Ground (e) differs from the other two grounds in that it does not concern the tribunal's powers or the conduct of the proceedings but the manner in which its award is drafted. The Ad hoc Committee notes that the three grounds are set out as separate in the ICSID Convention and considers that the facts of a case should in principle be examined separately in relation to each of these grounds.*** However, this is not to say that the grounds are entirely unrelated to each other. It may be that, in appropriate circumstances, one of those grounds could properly be seen *as reinforcing* another of them. For instance, a procedural defect, which is primarily to be examined under (d), might in some cases also be relevant as an element in the consideration of whether a tribunal has exceeded its powers under (b).”<sup>107</sup>

190. The Government unhelpfully cites from this case in support of its general assumptions on what constitutes an “excess of mandate,”<sup>108</sup> but omits any reference to the passage set forth above – thus, obscuring the fact that the annulment panel proceeds from the premise that issues going to an excess of powers (not to mention the narrower formula of an “excess of mandate”) are separate from issues of procedural violations: in the annulment panel's words, ***“the three grounds are set out as separate in the ICSID Convention and considers that the facts of a case should in principle be examined separately in relation to each of these grounds.”*** That conclusion applies *a fortiori* here, where the parties' Arbitration Agreement

<sup>105</sup> *Inter-Arab Investment Guarantee Corporation v Banque Arabe et Internationale d'Investissements*, XXII Y.B. Comm. Arb. 643, 655 *et seq.*, 658-668 (Brussels Cour d'appel) (1997), **Exhibit-LE 24/11**.

<sup>106</sup> *Inter-Arab Investment Guarantee Corporation v Banque Arabe et Internationale d'Investissements*, XXII Y.B. Comm. Arb. 643, 655 *et seq.*, 658-668 (Brussels Cour d'appel) (1997), **Exhibit-LE 24/11**.

<sup>107</sup> *Annulment Decision of the Ad Hoc Committee of 5 September 2007, in Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.*, ICSID Case No. ARB/03/4, at p. 18, ¶71 *et seq.* (2007), **Exhibit-LE 24/12** (emphasis added).

<sup>108</sup> GoS Memorial, at paras. 143 (“Where a tribunal assumes jurisdiction in a manner for which it lacks competence under the relevant BIT, it exceeds its powers. ... The same holds true in the inverse case where a tribunal refuses or fails to exercise jurisdiction in a matter [sic] for which it is competent under the BIT. The *Ad hoc* Committee considers these situations are analogous and should be assessed according to the same legal standards.”) (quoting “*Lucchetti v. Peru (sub nomine: Industria Nacional de Alimentos)*, Decision on Annulment, 5 September 2007, para. 99), 148 (“It is widely accepted that a failure to apply the proper law may amount to an excess of powers by a Tribunal, as referred to in Article 52(1)(b) [of the ICSID Convention].”) (quoting “*Lucchetti v. Peru (sub nomine: Industria Nacional de Alimentos)*, Decision on Annulment, 5 September 2007, para. 98).

refers to an “excess of mandate,” within the specific context of the Abyei Protocol, and not generally to an “excess of powers.”

191. The existence of a ground of annulment or non-recognition under one of the exceptions in the New York Convention, ICSID Convention or UNCITRAL Model Law does not in any way imply that *other* grounds for annulment or non-recognition are applicable. On the contrary, the fact that an award may be denied recognition for procedural violations (Article V(1)(d), New York Convention; ICSID Convention, Article 52(1)(d); UNCITRAL Model Law, Article 36(1)(a)(iv)) does not suggest that the award might be denied recognition based on the absence of a valid arbitration agreement (Article V(1)(a), New York Convention; UNCITRAL Model Law, Article 36(1)(a)(i)) or corrupt/biased arbitrators (Article V(1)(b), New York Convention; Article 52(1)(c), ICSID Convention; UNCITRAL Model Law, Article 36(1)(a)(ii)).

192. Given this, it is noteworthy that the Government’s Memorial nowhere cites those provisions of the New York Convention, ICSID Convention and UNCITRAL Model Law that actually concern claims of “excess of mandate.” Thus, Article V(1)(c) of the New York Convention and Article 36(1)(a)(iii) of the Model Law provide that an award may be denied recognition if it “deals with a *difference not contemplated by or not falling within the terms of the submission to arbitration.*”<sup>109</sup> Similarly, Article 52(1)(b) of the ICSID Convention permits annulment of an award if “*the Tribunal manifestly exceeded its powers.*”<sup>110</sup>

193. Again, the excess of mandate provisions of Article V(1)(c) of the New York Convention and Article 52(1)(b) of the ICSID Convention do not permit annulment or non-recognition for procedural irregularities, which are dealt with separately, as discussed above, under different provisions of those conventions.<sup>111</sup> The same is true under the parallel provisions of the UNCITRAL Model Law (Articles 36(1)(a)(iii) and (iv)).

194. Accordingly, when the Government’s Memorial cites the provisions of Article V(1)(d) of the New York Convention, Article 52(1)(d) of the ICSID Convention and Article 36(1)(a)(iv) of the UNCITRAL Model Law regarding procedural irregularities, it does nothing to advance its case with regard to an excess of mandate. On the contrary, the manifest distinctions between those provisions and the relevant excess of mandate provisions in those instruments underscores the illegitimacy of the Government’s analysis. None of these instruments creates an open-ended category of ‘nullity based on general principles;’ instead, each provides carefully, tightly defined and distinct bases for challenging awards. There is no justification at all for the Government’s effort to muddle these separate bases or to transmute one into another.

195. The same conclusion is evident from Article 30 of the Draft ILC Convention on Arbitral Procedure. Article 30 provides specifically defined exceptions to the general finality of arbitral awards, declaring that “[t]he validity of an award may be challenged by either party on one or more of the following grounds:” (a) the tribunal has exceeded its powers; (b) there was corruption on the part of a member of the tribunal; or (c) there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the

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<sup>109</sup> New York Convention, Art. V(1)(c), **Exhibit-LE 5/1**; UNCITRAL Model Law, Art. 36(1)(a)(iii), **Exhibit-LE 23/20** (emphasis added).

<sup>110</sup> ICSID Convention, Art. 52(1)(b), **Exhibit-LE 23/3**.

<sup>111</sup> See ICSID Convention, Art. 52(1)(d), **Exhibit-LE 23/3**; New York Convention, Art. V(1)(d), **Exhibit-LE 5/1**.

award.<sup>112</sup> Importantly, like all other developed international and national regimes, the Draft ILC Convention on Arbitral Procedure distinguishes between an excess of powers and a serious departure from a fundamental rule of procedure.

196. Thus, the various international and national arbitration instruments relied upon by the Government to argue that an excess of mandate includes a procedural violation or irregularity in fact provide no support for such an argument. On the contrary, these instruments uniformly treat an excess of mandate as something separate from a procedural violation. The two are dealt with by separate and independent provisions. The Government's effort to confuse and combine the very clearly defined lines between these separate provisions contradicts the basic structure and purposes of these arbitration instruments.

c) The Government's Memorial Effectively Acknowledges the Very Limited Character of An "Excess of Mandate"

197. Third, parts of the Government's own Memorial effectively acknowledge that an excess of mandate is properly limited to claims that an adjudicatory body exceeded the scope of the issues submitted to its decision or exercised powers not granted to it. Thus, the GoS Memorial attempts to equate Article 2(a)'s "excess of mandate" with conceptions of "*excès de pouvoir*."<sup>113</sup> Again, the Government's analysis entirely ignores the specific terms of Article 2(a), which are discussed above,<sup>114</sup> while distorting the applicable legal standards governing the annulment and non-recognition of arbitral awards.

198. The Government then goes on to define an "*excès de pouvoir*" as "a lack of jurisdiction,"<sup>115</sup> and to say that "[i]t is well settled that a decision rendered on an issue for which the decision-maker does not have jurisdiction is subject to annulment for lack of jurisdiction."<sup>116</sup> Likewise, the Government's discussion of an "*excès de pouvoir*" cites principally authorities holding that an "*excès de pouvoir*" arises from a tribunal "deciding **questions not submitted to it** or refusing to decide questions properly before it;"<sup>117</sup> or "**assum[ing] jurisdiction** in a manner [sic: notably, the actual decision refers to a "**matter**"<sup>118</sup> and not a "**manner**" as incorrectly quoted by the GoS Memorial] for which it lacks competence under the relevant BIT;"<sup>119</sup> or "**decid[ing] on a point not raised**,"<sup>120</sup> or "**deciding in excess of**, or ... failing to exercise, **its jurisdiction**."<sup>121</sup>

199. In so doing, the Government repeatedly and explicitly equates the concept of an "*excès de pouvoir*" with the questions "whether the Experts **decided any issues, and thus**

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<sup>112</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, at p. 105, available at [www.un.org](http://www.un.org), **Exhibit-LE 1/1**.

<sup>113</sup> GoS Memorial, at para. 135; *see also* GoS Memorial, at paras. 136-150.

<sup>114</sup> *See above* at paras. 99-100, 147-156.

<sup>115</sup> GoS Memorial, at para. 141. The GoS Memorial states: "The relation between a decision taken in *exces de pouvoir* and one for which there is a lack of jurisdiction is not clear cut..." *Ibid.* In the same discussion, the GoS Memorial quotes authorities holding that "excess of power and lack of jurisdiction as grounds for annulment can be treated together under the heading of excess of power."

<sup>116</sup> GoS Memorial, at para. 142.

<sup>117</sup> GoS Memorial, at para. 144 (quoting "*CDC Group v. Seychelles* Decision on Annulment dated 29 June 2005, *11 ICSID Rep.* 237, at p. 251, para. 40") (emphasis added).

<sup>118</sup> *Annulment Decision of the Ad Hoc Committee of 5 September 2007, in Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A.*, ICSID Case No. ARB/03/4, at p. 18, ¶71 *et seq.*, **Exhibit-LE 24/12** (emphasis added).

<sup>119</sup> GoS Memorial, at para. 143 (quoting "*Lucchetti v. Peru (sub nom Industria Nacional de Alimentos)*, Decision on Annulment, 5 September 2007, para. 99").

<sup>120</sup> GoS Memorial, at para. 142 (quoting "D.P. O'Connell, *International Law* (2<sup>nd</sup> ed, Stevens & Sons, London, 1970) vol. II, at p. 1110").

<sup>121</sup> GoS Memorial, at para. 138 (quoting "*Arbitral Award of 31 July 1989, Judgment*, I.C.J. Reports 1991, p. 53, at p. 69, para. 47") (emphasis added).

*assumed jurisdiction over any matters, that were not included within their mandate*” and “whether they failed to exercise their jurisdiction to decide the specific question put to them by the Parties.”<sup>122</sup> The only other basis the Government cites for finding an “*excès de pouvoir*” arose from “the failure of the decision-maker to apply the express provisions in the agreement, or agreements, vesting competence in them governing the principles on which the dispute is to be decided,”<sup>123</sup> referring to a complete failure to apply the parties’ chosen legal system.<sup>124</sup>

200. Strikingly absent from the GoS Memorial’s list of grounds for finding an “*excès de pouvoir*” is either a procedural violation or irregularity or violation of so-called “mandatory criteria.” That is unsurprising: as detailed in the SPLM/A’s Memorial, the notion of an “*excès de pouvoir*” does not include allegations of procedural violations or irregularities.<sup>125</sup> There are occasional comments to the contrary in the authorities, but these are broad-brush and unreflective; they do not represent the overwhelming weight of authority on the subject, which, instead, is congruent with the limited scope of an “*excès de pouvoir*.”

### 3. The Purported Violations of “Mandatory Criteria” Alleged by the Government Do Not Fall Within the Definition of An Excess of Mandate

201. The GoS Memorial also alleges four supposed violations of so-called “mandatory criteria” by the ABC Experts. These violations are allegedly: (a) “failure to state reasons capable of supporting the decision;”<sup>126</sup> (b) reaching a decision “on the basis of an equitable division or ... *ex aequo et bono*;”<sup>127</sup> (c) “apply[ing] unspecified ‘legal principles in determining land rights;”<sup>128</sup> and (d) “attempt[ing] to allocate oil resources.”<sup>129</sup> The Government states more generally that “it is a general principle of law, confirmed in practice, that the failure of a panel charged with deciding a dispute to state any reason on the basis of which its decision can be supported constitutes an excess of mandate,” and then recites without explanation the four alleged violations of “mandatory criteria in carrying out the mandate”<sup>130</sup> (most of which have nothing to do with a supposed failure to state reasons).

202. The Government’s effort to construct an excess of mandate claim from these various bases is manifestly illegitimate. As discussed below, none of the actions by the ABC Experts which supposedly violated these “mandatory criteria” contradicted the terms of the Abyei Protocol, the Abyei Appendix, the Terms of Reference or Rules of Procedure or provides

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<sup>122</sup> GoS Memorial, at para. 145; *see also* GoS Memorial, at para. 190 (“It is well settled that the decision maker must not exceed the jurisdiction that has been conferred on it and must also exercise that jurisdiction fully. Failure to do so represents an rendering the decision subject to annulment, and thus tantamount to an excess of mandate.”).

<sup>123</sup> GoS Memorial, at paras. 146, 147, 150.

<sup>124</sup> GoS Memorial, at paras. 146, 147, 150 (quoting, at para. 147, “*The Orinoco Steamship Company* case, 25 October 1910, *R.I.A.A.*, Vol. 41, at p. 239.”). Parenthetically, the Government omits the immediately preceding passage in this decision, which states that “the appreciation of the facts of the case and the interpretation of the documents were within the competence of the Umpire and *his decisions, when based on such interpretation, are not subject to revision by this Tribunal, whose duty it is not to say if the case has been well or ill judged, but whether the award must be annulled.*” *See Arbitral Award of 25 October 1910, Orinoco Steamship Company Case (United States v. Venezuela)*, 11 U.N.R.I.A.A. 227, 239 (1910), **Exhibit-LE 8/3** (emphasis added).

<sup>125</sup> *See* SPLM/A Memorial, at paras. 665-673.

<sup>126</sup> GoS Memorial, at p. 56, Heading (ii).

<sup>127</sup> GoS Memorial, at p. 60, Heading (iii); at p. 88, Heading (ii).

<sup>128</sup> GoS Memorial, at p. 89, Heading (iii).

<sup>129</sup> GoS Memorial, at p. 90, Heading (iv).

<sup>130</sup> GoS Memorial, at para. 254 and p. 85, Heading C.



other grounds for complaint.<sup>131</sup> In addition, however, none of these claims of “mandatory” breaches are even admissible in these proceedings, because none of them fall within the parties’ definition of an excess of mandate in the Abyei Arbitration Agreement. As a consequence, these “mandatory criteria” objections simply do not provide grounds for this Tribunal to disregard the ABC Report.

a) A Failure to State Adequate Reasons Does Not Fall Within the Definition of An Excess of Mandate

203. The Government argues at length that “[a]s a matter of general principles of law and practice, there is ample authority for the proposition that a failure of a panel charged with deciding a dispute to state the reasons on which its decision is based also constitutes an excess of mandate.”<sup>132</sup> The GoS Memorial also contends that the ABC Experts “failed to provide reasons capable of forming the basis of a valid decision,” thereby supposedly entitling this Tribunal to disregard the ABC Report.<sup>133</sup>

204. The Government’s effort to convert complaints about the ABC Experts’ statement of their reasons into an alleged “excess of mandate” is entirely groundless. Even if one assumed that there were a shred of substance to the Government’s allegations (which there is not<sup>134</sup>), they simply do not fall within the definition of an “excess of mandate” under the Arbitration Agreement and are therefore not admissible in these proceedings.

205. There is no basis for arguing that the parties’ agreements defined the ABC Experts’ mandate to include providing a statement of reasons for their determinations (and the Government does not advance such an argument). On the contrary, the parties’ agreements provided that the ABC Experts’ mandate was to “to define (i.e., delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”<sup>135</sup> That mandate did not impose any requirement that the ABC Experts state reasons for their decision – nor does the Government’s Memorial suggest that the parties’ agreed mandate for the ABC Experts included any such statement.

206. The fact that the Abyei Annex and Terms of Reference contemplated that the ABC Experts’ decision would be *based on scientific analysis and research* does not even begin to convert the GoS’s complaint about the ABC Experts’ reasons into an excess of mandate claim.<sup>136</sup> These provisions of the Abyei Annex and Terms of Reference did not impose a requirement for a reasoned decision on the ABC Experts; they instead addressed the *nature of the* ABC Experts’ investigations and decision-making, which were to be based on “scientific analysis” and “research.” The provisions of these agreements did not impose any requirement that this analysis and research be recorded or stated in any particular manner, as would a requirement for a reasoned decision or award. On the contrary, Article 1.2 of the Terms of Reference provides the parties’ only requirement regarding the detail of the ABC Experts’ decision, requiring only that the ABC Experts’ definition of the Abyei Area be demarcated “on map.”<sup>137</sup>

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<sup>131</sup> See below at paras. 704-859.

<sup>132</sup> GoS Memorial, at para. 151; see also GoS Memorial, at para. 254.

<sup>133</sup> GoS Memorial, at para. 255.

<sup>134</sup> See below at paras. 704-785.

<sup>135</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial**.

<sup>136</sup> See GoS Memorial, at para. 254.

<sup>137</sup> ABC ToR, Art. 1.2, **Appendix E to SPLM/A Memorial**.

207. Had the parties wished to impose a requirement on the ABC Experts to render a reasoned decision, there were numerous, very familiar formula for doing so. They could have adopted the wording of Article 48(3) of the ICSID Convention, or Article 29 of the ILC Model Rules, or Article 24(2) of the Draft ILC Convention on Arbitral Procedure or Article 31(2) of the UNCITRAL Model Law – but of course they did not. Or the parties could have adopted the language which they later used in Article 9(2) of the Abyei Arbitration Agreement – which is the text that they employed when they wished to require a reasoned decision;<sup>138</sup> again, they did not.

208. It bears emphasis that the Government’s argument characterizes the requirement for a statement of reasons as a supposed “*mandatory criteria*,” which it purports to construct from “*general principles of law and practice*.”<sup>139</sup> In support of this conclusion, the GoS Memorial cites a variety of provisions of the ICJ Statute (Article 56(1)), the ICSID Convention (Article 48(3)), the ILC Model Rules (Article 29), and miscellaneous institutional arbitration rules (including Article 32(2) of the UNCITRAL Rules, Article 32(3) of the Rules of the Permanent Court of Arbitration (“PCA”) and Article 47(1)(i) of the ICSID Rules).<sup>140</sup> Notably, the Government does not refer to any provision of the parties’ procedural agreements relating to the Abyei Area that required that the ABC Experts provide reasoning, much less reasoning of a particular character or quality.

209. There is no basis for contending that the violation of “mandatory criteria,” imposed on a decision-maker’s statement of its decision by supposed “general principles of law,” can constitute an excess of mandate. Not surprisingly, the ICSID Convention does not treat a failure to state reasons as an excess of mandate (with the Convention instead dealing separately with a failure to state reasons in Articles 48(3) and 52(1)(e) and with an excess of powers in Article 52(1)(b)).<sup>141</sup> Equally, scholarly writing, as well as decisions under the New York Convention (and Inter-American Convention), treat a failure to state reasons as a potential violation of public policy rather than as an excess of mandate.<sup>142</sup>

210. Similarly, the ILC Draft Convention on Arbitral Procedure includes in Article 30(c) the “failure to state reasons” together with “a serious departure from a fundamental rule of procedure.”<sup>143</sup> This provision is quite separate from the “excess of powers” ground contained in Article 30(a).<sup>144</sup> The ILC’s Model Rules, as the GoS Memorial acknowledges, contain the

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<sup>138</sup> See Abyei Arbitration Agreement, Art. 9(2), **Appendix A to SPLM/A Memorial**.

<sup>139</sup> GoS Memorial, at paras. 151-165, 189, 191, 225-262.

<sup>140</sup> GoS Memorial, at paras. 151-159.

<sup>141</sup> Notably, the GoS Memorial cites the Tribunal to Article 48(3), and not to Article 52(1)(e). Article 48(3) provides “The award shall deal with every question submitted to the tribunal, and shall state the reasons upon which it is based,” while Article 52(1)(e) provides “Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: ... (e) that the award has failed to state the reasons on which it is based.” In contrast, as noted above, Article 52(1)(b) provides “(b) that the Tribunal has manifestly exceeded its powers,” **Exhibit-LE 23/3**.

<sup>142</sup> See, e.g., A. van den Berg, *The New York Arbitration Convention of 1958* 380-382 (1981), **Exhibit-LE 24/13**; Schwebel & Lahne, *Public Policy in ICCA Congress Series No. 3*, 205, 207 *et seq.*, 224 *et seq.* (1987), **Exhibit-LE 24/14**. In both cases, the authors deal with the question of enforcement of an unreasoned award *solely* in the context of procedural and public policy exceptions under Article V(2), V(1)(b) and similar provisions. See also *Domotique Secant Inc. v. Smart Sys. Tech. Inc.*, 2005 Can. LII 36874 (Quebec S.Ct.) (2005) (refusing to recognize unreasoned U.S. award for a violation of public policy), ¶¶20-25, **Exhibit-LE 24/15**.

<sup>143</sup> ILC Draft Convention, Art. 30(c), **Exhibit-LE 5/7**.

<sup>144</sup> See ILC Draft Convention, Art. 30(a) (“The validity of an award may be challenged by either party on one or more of the following grounds: (a) [t]hat the tribunal has exceeded its powers.”), **Exhibit-LE 5/7**.

same provision at Article 35(c), and it is once again distinct from the ground of excess of power contained in Article 35(a).<sup>145</sup>

211. Finally, and in any event, even if the parties' agreements had provided for a reasoned decision (which they did not), the failure to render such a decision would not have constituted an "excess of mandate." Instead, and at most, such a failure would have violated a procedural or formal requirement<sup>146</sup> – which does not fall within the scope of Article 2(a) of the Abyei Arbitration Agreement.

b) The ABC Experts' Alleged "Attempt to Allocate Oil Resources" Does Not Fall Within the Definition of An Excess of Mandate

212. The GoS Memorial devotes five paragraphs to an argument that the ABC Experts' "unarticulated" desire to allocate Sudan's oil resources to the Abyei Area motivated their decision.<sup>147</sup> As discussed below, there is no substance whatsoever to the Government's unfortunate accusations.<sup>148</sup>

213. In any case, the Government does not cite a single authority for its apparent claim that an adjudicator's alleged subjective motivations can provide the basis for impugning his or her award on excess of mandate grounds. Nor is it surprising that the Government is unable to cite *any* authority for its claim that this Tribunal should try to ascertain the motivations of the five ABC Experts. These types of inquiries have also been firmly rejected in the very few instances in which they have been requested.<sup>149</sup>

214. Finally, even if an inquiry into an adjudicator's decision-making process turned up some untoward motivation, that would not constitute an excess of mandate. Instead, as the

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<sup>145</sup> See ILC Model Rules, Art. 35(a) and (c), **Exhibit-LE 16/6**; see also GoS Memorial, at para. 153.

<sup>146</sup> See below at paras. 731-733.

<sup>147</sup> See GoS Memorial, at paras. 270-275.

<sup>148</sup> See below at paras. 834-856.

<sup>149</sup> See, e.g., *The Most Noble The Duke of Buccleuch and Queensberry v. The Metropolitan Board of Works*, 5 H.L. 418, 434 (English House of Lords) (1871), 457 *et seq.* ("They [the Defendants] had an undoubted right to know from him whether in his estimate of the compensation he took into consideration any matters not included in the reference, and therefore not within his jurisdiction. ... But this having been ascertained, *the Defendants were not at liberty to go farther, and to ask the umpire what were the elements which entered into his consideration in determining the quantum of compensation. Within the limits of the reference the amount to be awarded was entirely in the discretion and judgment of the umpire. ... To ask the umpire, as the counsel for the Defendants did, what led him to the conclusion as to the proper sum to be awarded, was really to inquire what passed through his mind before he formed his judgment. It would be, in my opinion, contrary to all principle* so to scrutinise the exercise by an arbitrator of a discretionary power to award compensation; and I think that all the questions put with this object were objectionable, and the evidence given upon them ought to be struck out."), **Exhibit-LE 25/1** (emphasis added); *Ward v. Shell Mex and BP Ltd* 1 K.B. 280, 281 (English High Court) (1952) (a person sitting in a judicial, arbitral, or quasi-judicial capacity "cannot be asked questions concerning the grounds for his award ... [and] cannot be called to give evidence which would or might involve him in justifying the grounds for [his] decision."), **Exhibit-LE 25/2**; *Chicago, Burlington, & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 593 (U.S. S.Ct. 1907) ("Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. So, as to arbitrators... . All the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law."), **Exhibit-LE 25/3**; *Rubens v. Mason*, 387 F.3d 183, 191 (2d Cir. 2004) ("[It is] well-settled law that testimony revealing the deliberative thought processes of judges, juries or arbitrators is inadmissible."), **Exhibit-LE 25/4**; *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 67 (2d Cir. 2003) ("While arbitrators may be deposed regarding claims of bias or prejudice, cases are legion in which courts have refused to permit parties to depose arbitrators – or other judicial or quasi-judicial decisionmakers – regarding the thought process underlying their decisions."), **Exhibit-LE 25/5**, *rev'd on other grounds, Hall Street Assocs. v. Mattel, Inc.*, 128 S.Ct. 1396, 1403-04 (U.S. S.Ct. 2008), **Exhibit-LE 5/6**.

Government appears to acknowledge,<sup>150</sup> an improper motivation would give rise to some sort of mandatory rule or public policy objection or lack of partiality claim; it would not give rise to an excess of mandate under Article 2(a) of the Abyei Arbitration Agreement. The short point is that the Government's allegations in this respect amount to nothing more than a tendentious jury point, which does not begin to fall within the definition of an excess of mandate.

c) The ABC Experts' Supposed Application of "Unspecified 'Legal Principles in Determining Land Rights'" Does Not Fall Within the Definition of An Excess of Mandate

215. The Government also argues in passing that the ABC Experts' reference to "unspecified 'legal principles in determining land rights'" constitutes a violation of "mandatory" criteria.<sup>151</sup> Without intended irony, the Government's Memorial specifies no source for this allegedly mandatory prohibition against relying on "unspecified legal principles" (nor does any such authority exist).

216. In any event, it is impossible to see how the ABC Experts' reliance on general principles of land law could ever constitute an excess of mandate. Nothing in the CPA, including the Abyei Protocol, Abyei Annex, Terms of Reference or Rules of Procedure, prescribes either a governing law, a prohibition against applying legal principles or a requirement that the ABC Experts specify the source of the legal rules on which it relies.<sup>152</sup>

217. None of the GoS's criticisms of the ABC Experts' reliance on principles of African land rights can be characterized as an excess of mandate claim. Nothing in the Government's Memorial provides any basis for suggesting that the ABC Experts refused to apply a system of law chosen by the parties or based their decision on forbidden considerations.

218. In reality, the GoS's objections amount to a disagreement about the substantive content (and consequence) of the legal principles the ABC Experts applied – as the Government complains elsewhere, "[t]he position is that the law of Sudan, in 1956 as in 2005 [sic], did not recognize customary land rights...".<sup>153</sup> That substantive disagreement does not begin to constitute the basis for an excess of mandate claim permissible in these proceedings.

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<sup>150</sup> The Government includes its objections to the "attempt to allocate oil resources under the guise of the transferred area" under its heading "Violation of Mandatory Criteria in carrying out the Mandate" and not under the heading "Disregard of Substantive Mandate." See GoS Memorial, at paras. 270-275.

<sup>151</sup> See GoS Memorial, at paras. 266-269.

<sup>152</sup> At the time when Professor Gutto, the only lawyer amongst the experts, joined the other four experts, the GoS explicitly expressed their happiness that a lawyer was to have a role in reaching the determination. Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 1, at p. 1, ("I'd like to take this opportunity to welcome in particular Dr Shadrack to join us here the fifth expert who had in fact thought all of the time somebody is missing and we are really very much happy to see him now joining our team of Experts...we are quite sure that...he will pick up and really be as helpful to this process as his other colleagues. **We really feel also that we are very much privileged to have a lawyer with us here. And the fact that he is a lawyer is definitely going to add very much to the input that the Experts may have especially at this closing part of the ABC**"). Exhibit-FE 19/15 (emphasis added).

<sup>153</sup> GoS Memorial, at para. 269. As discussed below, it is a mystery why the Government considers it relevant to discuss the law of Sudan in 1956. See below at paras. 834-842.

d) *An Ex Aequo Et Bono* Decision by the ABC Experts Would Not Fall Within the Definition of An Excess of Mandate

219. Finally, and contradictorily, the Government also alleges that the ABC Experts exceeded their mandate by making their decision on *ex aequo et bono* grounds.<sup>154</sup> This claim is entirely groundless. As detailed below, the ABC Experts did not render an *ex aequo et bono* decision; moreover, even if one assumed (contrary to fact) that the ABC Experts had rendered an *ex aequo et bono* decision, the Government's claim would fail because there was no prohibition on any such decision in the parties' agreements.<sup>155</sup> More fundamentally, however, the Government's *ex aequo et bono* complaint does not fall within the category of an "excess of mandate," and thus is not admissible in these proceedings.

220. Here, the parties' agreement imposed no prohibition against an *ex aequo et bono* decision. The parties' agreements contained no choice of law or governing law provision,<sup>156</sup> instead providing only that the ABC Experts' decision was to be "based on scientific analysis and research."<sup>157</sup> It is also of significance that the parties chose a body consisting primarily of experts in regional African history, politics, ethnography and culture to resolve their dispute, rather than a traditional arbitral tribunal.<sup>158</sup>

221. Even if the ABC Experts' analysis and research had led them to an *ex aequo et bono* decision – which it did not – there was nothing in the parties' agreements that forbade such an action. Indeed, it is for that reason that the Government characterizes its objection as a purported violation of supposed "mandatory criteria" – that is, criteria imposed on the parties from outside their agreement.

222. Putting aside the complete lack of substance to the Government's claim, however, this complaint simply does not constitute an "excess of mandate." It is instead a poorly articulated appeal to purported principles of mandatory law, external to the parties' agreements, which is another inadmissible challenge to the merits of the ABC Experts' analysis, having no place in these proceedings.

4. The Purported Excess of Substantive Mandate Claims the Government Asserts Do Not Fall Within the Definition of An Excess of Mandate

223. The Government also asserts that the ABC Experts exceeded their "substantive mandate," which the GoS defines as "the scope of the consent given by the Parties to the [ABC Experts] to resolve the dispute" submitted to them.<sup>159</sup> In particular, the Government alleges that the ABC Experts committed four excesses of their substantive mandate: (a) "refusal to decide the question asked;" (b) "answering a different question than that asked;"

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<sup>154</sup> See GoS Memorial, at paras. 166-176, 263-265. The Government does not trouble itself to explain how the ABC Experts supposedly erred by simultaneously rendering a decision based on land rights law and rendering a decision *ex aequo et bono*. The reality is that the Government's litigation posture is that the ABC Experts erred by not accepting the Government's position and that this Tribunal should relitigate the substance of the parties' dispute and accept the Government's claims.

<sup>155</sup> See below at paras. 786-833.

<sup>156</sup> See also GoS Memorial, at para. 150 ("the relevant instruments setting out the Experts' mandate did not provide for an applicable law").

<sup>157</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**.

<sup>158</sup> Indeed, the Government (ironically) acknowledges exactly this point elsewhere, when it complains that there was only one lawyer among the ABC Experts (to whose composition it agreed). See GoS Memorial, at para. 269 ("if a legal decision had been required, rather than a factual one, then this would have been reflected in the composition of the ABC itself").

<sup>159</sup> GoS Memorial, at paras. 227-228.

(c) “ignoring the stipulated date of 1905;” and (d) “allocating grazing rights within and beyond the Abyei Area.”<sup>160</sup>

224. In reality, the first three of these claims of alleged excesses of substantive mandate are nothing of the sort. Rather, they are disagreements by the Government with the ABC Experts’ decision on the merits of the parties’ dispute.

225. As discussed in detail below, the Government’s complaints do not concern the ABC Experts allegedly deciding disputes outside of their mandate, but rather involve the ABC Experts interpreting the Abyei Protocol’s definition of the Abyei Area (“area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905”) in a way contrary to the Government’s position.<sup>161</sup> That disagreement with the merits of the ABC Experts’ decision is not the basis for an excess of mandate claim. Thus, the only claim that even arguably constitutes an admissible – albeit completely baseless – excess of mandate claim concerns traditional grazing rights in the *goz*.

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226. In sum, this Tribunal’s authority under Articles 2(a) and 2(b) of the Abyei Arbitration Agreement is limited to a single base. Article 2(a) provides that the only basis for challenging the ABC Report is “whether or not the ABC experts had, on the basis of the agreement of the Parties, as per the CPA, *exceeded their mandate which is “to define (i.e., delimit) and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.”*<sup>162</sup> The Arbitration Agreement does not provide or authorize any other basis for disregarding the ABC Report.

227. Notwithstanding the limitations on this Tribunal’s jurisdiction, the GoS’s Memorial advances a laundry list of three purported violations of “procedural conditions,” four supposed “substantive” excesses of mandate and four alleged breaches of “mandatory criteria.”<sup>163</sup> Even if there were some substance to the Government’s three procedural complaints and four alleged breaches of mandatory conditions (which plainly there is not), these simply would not and do not constitute “excesses of mandate.” Indeed, all but one of the GoS’s laundry list of complaints fall outside this Tribunal’s authority under Article 2 of the Arbitration Agreement.

228. This Tribunal does not possess a general appellate review authority, or the power of an ICSID annulment panel or a national recognition court. It possesses only the power to consider an “excess of mandate” as defined in Articles 2(a) and 2(b) of the Arbitration Agreement. With one arguable exception involving a purported excess of mandate with regard to traditional grazing rights in the *goz* (although entirely without merit), none of the GoS’s laundry list of complaints falls within this category.

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<sup>160</sup> GoS Memorial, at para. 229.

<sup>161</sup> See below at paras. 485-612.

<sup>162</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial**.

<sup>163</sup> GoS Memorial, at paras. 192-276.

C. *The Three Procedural Breaches Alleged by the Government Were Not Excesses of Mandate and Were Instead Entirely Appropriate Procedural Actions Fully Consistent with the Parties' Agreements*

229. As noted above, the Government alleges three purported violations of “procedural conditions” by the ABC Experts which supposedly constitute excesses of mandate.<sup>164</sup> These alleged violations of the parties’ procedural agreements are: (a) the hearing of several witnesses in Khartoum; (b) an email exchange with a third party (Mr. Millington); and (c) the ABC Experts’ purported failure to act through the Commission.<sup>165</sup>

230. The basis for these purported complaints is that the ABC Experts supposedly failed to comply with “procedural requirements which were express conditions for the exercise of their mandate.”<sup>166</sup> Thus, the Government’s Memorial asserts that “a departure from a fundamental rule of procedure expressly agreed to by the Parties constitutes an excess of mandate”<sup>167</sup> and that the ABC Experts exceeded their mandate by “circumventing the agreed [work program] and breaching the Procedural Rules.”<sup>168</sup>

231. As discussed below, the Government’s procedural complaints are baseless. They are after-the-fact complaints, not previously voiced, which have been constructed for the purpose of these proceedings with cavalier disregard for the terms of the parties’ agreements and the actions of the ABC Experts. Even putting aside the Government’s disregard for the specific terms of the parties’ agreements and the parties’ past actions, its purported procedural complaints also ignore well-settled and important general principles of law that would preclude invalidating the ABC Report on the grounds of the procedural violations alleged by the Government.

1. The Alleged Procedural Breaches Do Not Fall Within the Definition of Excess of Mandate

232. Preliminarily, as discussed in Part II(B) above, none of the procedural breaches alleged by the Government falls within the definition of an excess of mandate.<sup>169</sup> Even if they were fully supported by the facts, those violations would not constitute an “excess of mandate” as defined by Articles 2(a) and 2(b) of the Abyei Arbitration Agreement. Therefore, such violations would not be admissible grounds in these proceedings for disregarding the ABC Report and this is a complete answer to the Government’s complaints in this regard. Even apart from this fundamental jurisdictional defect, however, there is simply no basis in fact, law, or the parties’ agreements for the Government’s procedural complaints.

2. The Government Ignores or Distorts the Terms of the Parties’ Procedural Agreements

233. Although the Government occasionally purports to base its procedural complaints on supposed violations of the parties’ agreements, its Memorial in fact ignores and distorts the terms of those agreements. In their place, the Government attempts to substitute a selective hodge-podge of specific procedural requirements imported from the international investment

<sup>164</sup> GoS Memorial, at paras. 177-186, 196-226.

<sup>165</sup> GoS Memorial, at paras. 196-226.

<sup>166</sup> GoS Memorial, at para. 196.

<sup>167</sup> GoS Memorial, at para. 186.

<sup>168</sup> GoS Memorial, at para. 208.

<sup>169</sup> See above at paras. 160-200.

and commercial arbitration context, with virtually no regard for the parties' agreements and expectations regarding the ABC or the Government's own conduct during the ABC proceedings.

234. First, the Government studiously ignores the fact (discussed above) that the ABC was *not* an international arbitral tribunal and that the ABC proceedings were not international arbitral proceedings.<sup>170</sup> The ABC did not conduct an ICSID arbitration, an ICC arbitration or an UNCITRAL arbitration and they did not apply the ICSID, ICC or UNCITRAL Arbitration Rules. Nor did the parties expect or want the ABC Experts to do so: rather, they adopted a specialized and *sui generis* set of procedures that were intended to give the ABC Experts the freedom to conduct the proceedings as they thought fit, and irrespective of how an institutional investment or commercial arbitration might be conducted.

235. Among other things, the parties' agreements relating to the ABC did not incorporate a detailed set of procedural rules (like the UNCITRAL, ICSID, ICC or PCA Rules), with the various procedural requirements that characterize those rules. *Those institutional arbitration rules did not, and do not, apply to the ABC proceedings.* Rather, the Abyei Protocol, Abyei Annex and Terms of Reference imposed very few procedural requirements or conditions on the ABC, leaving virtually all procedural decisions to the ABC Experts and specifying only the rudiments of procedures for party presentations, a series of visits in and near the Abyei Area and further research.<sup>171</sup> In all, these various provisions comprised barely four sides of paper, much of which consisted of a timetable of visits around the Abyei Area.

236. Equally, the parties' agreements provided for the ABC Experts to be expert in "history, geography and any other relevant expertise,"<sup>172</sup> and to make their decision "based on scientific analysis and research,"<sup>173</sup> including through independent research not involving the parties in "the British Archives and other relevant sources on Sudan."<sup>174</sup> The parties also agreed specifically for the IGAD – not ICSID, the PCA or the ICC – to select three of the five ABC Experts; it did so, choosing from among leading African experts in history, geography, culture and African law (to whom the Government raised no objection), rather than from international arbitration practitioners.<sup>175</sup>

237. Instead of incorporating institutional arbitration rules, or providing for a tribunal of international arbitration experts, the parties deliberately selected a body of historical, geographical, ethnographical and cultural experts, from or deeply experienced with the African continent and selected by a regional African institution. Those experts were to apply the procedures of "scientific analysis and research" in a *sui generis* investigatory manner. Again, these aspects of the parties' agreements reflected a materially different approach to procedure and the identities of decision-makers than an ICSID or ICC arbitration, or an ICJ proceeding.

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<sup>170</sup> See above at paras. 122-128.

<sup>171</sup> Abyei Protocol, Arts. 5.2-5.3, **Appendix C to SPLM/A Memorial**; Abyei Annex, Arts. 3-4, **Appendix D to SPLM/A Memorial**; ABC ToR, Arts. 3-4, **Appendix E to SPLM/A Memorial**.

<sup>172</sup> Abyei Annex, Art. 2.2, **Appendix D to SPLM/A Memorial**.

<sup>173</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**.

<sup>174</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**.

<sup>175</sup> Consultancy Agreement between IGAD Secretariat on Peace in Southern Sudan and Professor Godfrey Muriuki, dated 7 April 2005, **Exhibit-LE 13/21**; Consultancy Agreement between IGAD Secretariat on Peace in Southern Sudan and Dr. Kassahun Berhanu, dated 7 April 2005, **Exhibit-LE 13/22**; Consultancy Agreement between IGAD Secretariat on Peace in Southern Sudan and Professor Shadrack Billy Otworu Gutto, **Exhibit-LE 14/14**.



238. Second, the parties' agreement imposed very few mandatory procedural obligations on the ABC Experts. That is hardly surprising, given the rudimentary character of the parties' agreement regarding the ABC procedures and the parties' expectations that the ABC Experts would enjoy broad discretion to pursue their "scientific analysis and research."

239. A review of the actual procedural terms of the parties' agreements, which the Government chooses to omit, demonstrates the very limited character of the mandatory procedural restrictions on the ABC Experts, including only:

- a. Abyei Protocol: "The Commission shall include, *inter alia*, experts, representatives of the local communities and the local administration."<sup>176</sup>
- b. Abyei Protocol: "The Commission shall finish its work within the first two years of the Interim Period."<sup>177</sup>
- c. Abyei Protocol: "The Abyei Boundaries Commission (ABC) shall present its final report to the Presidency as soon as it is ready."<sup>178</sup>
- d. Abyei Annex: "The ABC shall be composed as follows: 2.1 One representative from each Party; 2.2 The Parties shall ask the US, UK and the IGAD to nominate five impartial experts knowledgeable in history, geography and any other relevant expertise..."<sup>179</sup>
- e. Abyei Annex: "The ABC shall listen to representatives of the people of Abyei Area and the neighbours, and shall also listen to presentations of the two Parties."<sup>180</sup>
- f. Abyei Annex: "[T]he Experts in the Commission shall consult the British Archives and other relevant sources on Sudan wherever they may be available, with a view to arriving at a decision that shall be based on scientific analysis and research."<sup>181</sup>
- g. Abyei Annex: "The ABC shall present its final report to the Presidency before the end of the Pre-Interim Period."<sup>182</sup>
- h. Terms of Reference: "The parties shall select their members to the ABC according to criteria stated in article 2 of the Abyei Appendix."<sup>183</sup>
- i. Terms of Reference: "The two parties shall submit their presentations to the ABC at its seat in Nairobi."<sup>184</sup>
- j. Terms of Reference: "The ABC shall thereafter travel to the Sudan to listen to representatives of the people of Abyei Area and the neighbours as indicated hereunder [setting out several specified meetings]."<sup>185</sup>

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<sup>176</sup> Abyei Protocol, Art. 5.2, **Appendix C to SPLM/A Memorial.**

<sup>177</sup> Abyei Protocol, Art. 5.2, **Appendix C to SPLM/A Memorial.**

<sup>178</sup> Abyei Protocol, Art. 5.3, **Appendix C to SPLM/A Memorial.**

<sup>179</sup> Abyei Annex, Art. 2, **Appendix D to SPLM/A Memorial.**

<sup>180</sup> Abyei Annex, Art. 3, **Appendix D to SPLM/A Memorial.**

<sup>181</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial.**

<sup>182</sup> Abyei Annex, Art. 5, **Appendix D to SPLM/A Memorial.**

<sup>183</sup> ABC ToR, Art. 2.1, **Appendix E to SPLM/A Memorial.**

<sup>184</sup> ABC ToR, Art. 3.1, **Appendix E to SPLM/A Memorial.**

k. Terms of Reference: “The ABC while in Abyei area shall identify, examine[ ] and visit some sites of historical significance...”<sup>186</sup>

l. Terms of Reference: “The experts shall consult the British [A]rchives and other relevant sources on the Sudan wherever they may be available, with a view to arriving at a decision that shall be based on research and scientific analysis.”<sup>187</sup>

m. Terms of Reference: “The ABC shall thereafter reconvene in Nairobi to listen to the final presentations of the two parties, examine and evaluate evidence received; and prepare their final report...”<sup>188</sup>

240. The foregoing provisions of the parties’ agreements imposed very few, and very limited, constraints on the ABC Experts’ procedural discretion. In particular, the parties’ procedural agreements provide only for: (a) the constitution of a tribunal of experts with specified expertises; (b) a time limit for submission of the ABC’s final report; (c) presentations by the parties of their respective positions; (d) hearing representatives of the people of the Abyei Area; and (e) consultation of the British Archives and other relevant sources wherever available. There is no dispute that all of these terms of the parties’ procedural agreements were fully satisfied. In any event, as detailed on the attached fold-out Chart, all of these procedural terms were undeniably satisfied.

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<sup>185</sup> ABC ToR, Art. 3.2, **Appendix E to SPLM/A Memorial.**

<sup>186</sup> ABC ToR, Art. 3.3, **Appendix E to SPLM/A Memorial.**

<sup>187</sup> ABC ToR, Art. 3.4, **Appendix E to SPLM/A Memorial.**

<sup>188</sup> ABC ToR, Art. 3.5, **Appendix E to SPLM/A Memorial.**

	<i>Event contemplated in Program of Work</i>	<i>Date for event proposed in Program of Work</i>	<i>What actually transpired</i>
1	"Experts meet in Nairobi and develop rules of procedure."	Last week of March 2005	<b>Three</b> experts met in Nairobi and began discussing rules of procedure on <b>10 April 2005</b> . <sup>1</sup> <b>Fourth</b> expert (Johnson) joined other three experts in Nairobi and experts continued to develop the Rules of Procedure on <b>11 April 2005</b> . <sup>2</sup>
2	"ABC convenes with its full membership in Nairobi."	1 April 2005	The ABC convened in Nairobi with its full membership of <b>party appointed delegates</b> and four experts (on <b>11 April 2005</b> ). <sup>3</sup>
3	"The experts present the rules of procedure."	1 April 2005	<b>Four</b> Experts presented the Rules of Procedure on <b>11 April 2005</b> . <sup>4</sup>
4	"Presentations of the two parties."	2 April 2005	Parties made presentations to the ABC on <b>11 and 12 April 2005</b> . <sup>5</sup>
5	"ABC travels to Abyei and listen to the Abyei meeting."	4-7 April 2005	The ABC traveled to Abyei on <b>14 April 2005</b> <sup>6</sup> and attended 3 meetings over the course of <b>14 – 15 April 2005</b> . <sup>7</sup> At the meetings the <b>ABC Chairperson (Mr. Petterson)</b> spoke to explain the Commission's objectives, formal testimony was heard, and time was made available for <b>questions by members of the ABC to be asked</b> . <sup>8</sup> The proceedings of the meeting were to some extent <b>directed by the Chairperson</b> . <sup>9</sup>
6	"Visits to sites in the Abyei Area"	8-9 April 2005	The ABC visited 7 sites around Abyei and along the Bahr-el Arab, including Goleh/Langar, Pawol, Dembloya/Dak Jur, Lau, Umm Bilael/Tordach, Chigei/Thigei, Lukji/Kil Yith, and Mathiang <sup>10</sup> between <b>16 and 17 April 2005</b> , and held meetings at the <b>first 6 of these locations</b> . <sup>11</sup> Meetings at Goleh/Langar, Pawol, Dembloya/Dak Jur, and Lau occurred on <b>16 April 2005</b> , <sup>12</sup> and meetings at Umm Bilael/Tordach, Chigei/Thigei, Lukji/Kil Yith occurred on <b>17 April 2005</b> . <sup>13</sup> At these meetings the <b>ABC Chairperson (Mr. Petterson)</b> spoke to explain the Commission's objectives, and formal testimony was heard. <sup>14</sup> The proceedings of the meeting were to some extent <b>directed by the Chairperson</b> . <sup>15</sup>
7	"The ABC travels and listens to the Agok meeting"	10-11 April 2005	The ABC traveled to Agok on <b>18 April 2005</b> , and held a meeting that same day. <sup>16</sup> At the Agok meetings the <b>ABC Chairperson (Mr. Petterson)</b> spoke to explain the Commission's objectives, formal testimony was heard, and time was made available for <b>questions by members of the ABC to be asked</b> . <sup>17</sup> The proceedings of the meeting were to some extent <b>directed by the Chairperson</b> . <sup>18</sup>
8	"ABC travels to Muglad"	12 April 2005	The ABC traveled to Muglad on <b>19 April 2005</b> . <sup>19</sup>
9	"ABC listens to the Muglad meeting"	13-14 April 2005	The ABC held a meeting in Muglad the <b>same day that in had traveled there, on 19 April 2005</b> . <sup>20</sup> At the Muglad meetings the <b>ABC Chairperson (Mr. Petterson)</b> spoke to explain the Commission's objectives, formal testimony was heard, and time was made available for <b>questions by members of the ABC to be asked</b> . <sup>21</sup> The proceedings of the meeting were to some extent <b>directed by the Chairperson</b> . <sup>22</sup>
10	"ABC experts return to Nairobi and party members return to Nairobi or their respective"	15 April 2005	On <b>20 April 2005</b> , the ABC traveled to <b>Khartoum</b> . <sup>23</sup>

<sup>1</sup> ABC Report, Part I, at pp. 9 - 10, **Appendix B**; see also Letter from Ambassador Dirdeiry to Joseph McCarten, JMC, dated 11 April 2005, and attachments, **Exhibit FE 14/3**.

<sup>2</sup> Email Johnson to IGAD Kenya, dated 8 April 2005, **Exhibit FE 13/24**; see also ABC Report, Part I, at p. 3, **Appendix B**.

<sup>3</sup> Letter from F. Keiru to Ambassador Dirdeiry and the SPLM, dated 8 April 2005, and attachments, **Exhibit FE 13/25**; Email Johnson to IGAD Kenya, dated 8 April 2005, **Exhibit FE 13/24**.

<sup>4</sup> ABC Report, Part I, at p. 3, **Appendix B**; see also Letter from F. Keiru to Ambassador Dirdeiry and the SPLM, dated 8 April 2005, and attachments, **Exhibit FE 13/25**.

<sup>5</sup> ABC Report, Part I, at p. 3, **Appendix B**; ABC Report, Part II, App. 3, at p.27, **Exhibit-FE 15/1**.

<sup>6</sup> Letter from Ambassador Dirdeiry to Joseph McCarten, JMC, dated 11 April 2005, and attachments, **Exhibit FE 14/3**; see also ABC Report, Part I, at p. 3, **Appendix B**.

<sup>7</sup> Letter from Ambassador Dirdeiry to Joseph McCarten, JMC, dated 11 April 2005, and attachments, **Exhibit FE 14/3**.

<sup>8</sup> ABC Report, Part I, at p. 10, **Appendix B**; ABC Report, Part II, App. 4, at p.30, **Exhibit-FE 15/1**.

<sup>9</sup> See for example ABC Report, Part II, App. 3, at pp. 76 to 78, 99, 101, **Exhibit-FE 15/1**.

<sup>10</sup> ABC Report, Part I, at pp. 9 - 10, **Appendix B**; see also Letter from Ambassador Dirdeiry to Joseph McCarten, JMC, dated 11 April 2005, and attachments, **Exhibit FE 14/3**.

<sup>11</sup> ABC Report, Part I, at p. 10, **Appendix B**.

<sup>12</sup> ABC Report, Part II, App. 4, at p.36, 39, 41, 44, **Exhibit-FE 15/1**.

<sup>13</sup> ABC Report, Part II, App. 4, at p.47, 53, 55, **Exhibit-FE 15/1**.

<sup>14</sup> ABC Report, Part I, at p. 10, **Appendix B**; ABC Report, Part II, App. 4, at p.30, **Exhibit-FE 15/1**.

<sup>15</sup> See for example ABC Report, Part II, App. 3, at pp. 76 to 78, 99, 101, **Exhibit-FE 15/1**.

<sup>16</sup> Letter from Ambassador Dirdeiry to Joseph McCarten, JMC, dated 11 April 2005, and attachments, **Exhibit FE 14/3**; see also ABC Report, Part II, App. 4, at p.57, **Exhibit-FE 15/1**.

<sup>17</sup> ABC Report, Part I, at p. 10, **Appendix B**; ABC Report, Part II, App. 4, at p.30, **Exhibit-FE 15/1**.

<sup>18</sup> See for example ABC Report, Part II, App. 3, at pp. 76 to 78, 99, 101, **Exhibit-FE 15/1**.

<sup>19</sup> Letter from Ambassador Dirdeiry to Joseph McCarten, JMC, dated 11 April 2005, and attachments, **Exhibit FE 14/3**.

<sup>20</sup> Letter from Ambassador Dirdeiry to Joseph McCarten, JMC, dated 11 April 2005, and attachments, **Exhibit FE 14/3**.

<sup>21</sup> ABC Report, Part I, at p. 10, **Appendix B**; ABC Report, Part II, App. 4, at p.30, **Exhibit-FE 15/1**.

<sup>22</sup> See for example ABC Report, Part II, App. 3, at pp. 76 to 78, 99, 101, **Exhibit-FE 15/1**.

<sup>23</sup> Letter from Ambassador Dirdeiry to Joseph McCarten, JMC, dated 11 April 2005, and attachments, **Exhibit FE 14/3**.

	<i>Event contemplated in Program of Work</i>	<i>Date for event proposed in Program of Work</i>	<i>What actually transpired</i>
	locations"		<b>Three further meetings</b> were held in <b>Khartoum</b> on <b>21 April</b> and <b>6 and 8 May 2005</b> . <sup>24</sup> The <b>four</b> experts flew to <b>Nairobi</b> on <b>26 April 2005</b> , where they <b>reviewed their notes on the testimony heard and consulted with IGAD, returning to Khartoum on 27 April 2005</b> . <sup>25</sup>
11	"Experts consult archives and other documents as they deem appropriate".	16 April to 16 May 2005	<b>Four</b> experts spent an <b>estimated two weeks</b> in Khartoum, examining historical documents at the Sudan National records Office, maps at the Sudan National Survey Authority and additional documents at the University of Khartoum library, from <b>27 April – 11 May 2005</b> . <sup>26</sup> <b>Four</b> experts met with <b>General Sumbeiywo</b> to report their progress and request the services of a professional cartographer on <b>12 May 2005</b> . <sup>27</sup> Experts spent <b>11 to 16 May 2005</b> in <b>Nairobi</b> . <sup>28</sup> <b>Four</b> experts convene at IGAD office to <b>meet with fifth expert</b> , Professor Gutto on <b>16 May 2005</b> . <sup>29</sup> <b>Three</b> of the Experts traveled to England from <b>17 May to 27 May 2005</b> , examining documents at Rhodes House Library and Bodleian Library, and Sudan Archives in Durham. <sup>30</sup> They <b>met with and interviewed</b> Anne and Michael Tibbs on <b>21 May 2005</b> <sup>31</sup> and Ian Cunnison on <b>22 May 2005</b> . <sup>32</sup> Professors Berhanu and Gutto "undertook additional research in Addis Ababa and Pretoria, respectively". <sup>33</sup> Professor Berhanu spent three weeks in Addis Ababa, and there conducted library research at the AU (African Union), Economic Commission for Africa, and the Organization for Social Science Research in Eastern and Southern Africa. <sup>34</sup> Experts <b>reconvened</b> in Nairobi on <b>14 and 15 June 2005</b> . <sup>35</sup>
12	"ABC reconvenes in Nairobi and the parties make their final presentations"	19 May 2005	ABC reconvened and parties made their final presentations on <b>16 June 2005</b> . <sup>36</sup> On <b>17 June 2005</b> , GoS made a <b>third</b> presentation. <sup>37</sup>
13	"The experts examine and evaluate the evidence received and prepare the final report"	20-26 May 2005	Experts continued their deliberations from <b>17 – 20 June 2005</b> . <sup>38</sup> Experts met with General Sumbeiywo on <b>20 June 2005</b> . <sup>39</sup>
14	"The ABC travels to Khartoum for the presentation of the final report"	28 May 2005	Date of 14 July 2005 for presentation of report confirmed to experts on <b>11 July 2005</b> . <sup>40</sup> Experts arrived in Khartoum <b>13 July 2005</b> to prepare presentation. <sup>41</sup>
15	"The experts present in the presence of the whole membership of the ABC their final report to the Presidency"	29 May 2005	Report presented in Khartoum, <b>14 July 2005</b> . <sup>42</sup>
16	"The experts and the relevant technical personnel that the experts chose shall conduct demarcation on land (subject to experts' opinion)"	30 May to 30 June 2005	Contract with Tourist Maps (K) Ltd (Kenya) was entered into by IGAD on <b>11 July 2005</b> , <sup>43</sup> however, the GoS did not accept the ABC report and the demarcation did not proceed.

<sup>24</sup> ABC Report, Part II, App. 4, at pp. 148, 149, 156, **Exhibit-FE 15/1**.

<sup>25</sup> ABC Report, Part I, at p. 4, **Appendix B**.

<sup>26</sup> ABC Report, Part I, at p. 4, **Appendix B**.

<sup>27</sup> ABC Report, Part I, at p. 4, **Appendix B**.

<sup>28</sup> ABC Report, Part I, at p. 4, **Appendix B**.

<sup>29</sup> ABC Report, Part I, at p. 4, **Appendix B**.

<sup>30</sup> ABC Report, Part I, at p. 4, **Appendix B**.

<sup>31</sup> ABC Report, Part II, App. 4, at p.159, **Exhibit-FE 15/1**, see also ABC Report, Part I, at p. 4, **Appendix B**.

<sup>32</sup> ABC Report, Part II, App. 4, at p.160, **Exhibit-FE 15/1**, see also ABC Report, Part I, at p. 4, **Appendix B**.

<sup>33</sup> ABC Report, Part I, at p. 5, **Appendix B**.

<sup>34</sup> Email from Prof. Berhanu to F. Keiru IGAD Secretariat, dated 6 May 2005, **Exhibit FE 14/10**; Email from Prof. Berhanu to F. Keiru, dated 24 May 2005, **Exhibit FE 14/15**.

<sup>35</sup> ABC Report, Part I, at p. 5, **Appendix B**.

<sup>36</sup> Witness statement of Minister Deng Alor Kuol, at para. 144; Witness statement of James Lual Deng, at paras. 83 and 87; see also ABC Report, Part I, at p. 5, **Appendix B**; ABC Report, Part II, App. 3, at p.27, **Exhibit-FE 15/1**.

<sup>37</sup> Witness statement of Minister Deng Alor Kuol, at para. 148; Witness statement of James Lual Deng, at para. 93; see also ABC Report, Part I, at p. 5, **Appendix B**; ABC Report, Part II, App. 3, at p.27, **Exhibit-FE 15/1**.

<sup>38</sup> ABC Report, Part I, at p. 5, **Appendix B**.

<sup>39</sup> ABC Report, Part I, at p. 5, **Appendix B**.

<sup>40</sup> Various Emails from ABC Experts regarding final presentation, **Exhibit FE 14/23**.

<sup>41</sup> Various Emails from ABC Experts regarding final presentation, **Exhibit FE 14/23**.

<sup>42</sup> Various Emails from ABC Experts regarding final presentation, **Exhibit FE 14/23**.

<sup>43</sup> Contract Between IGAD Secretariat and Tourist Maps Ltd, dated 11 July 2005 for map drawing services, **Exhibit-FE 14/23a**.

241. The ABC Experts also prepared the Rules of Procedure, to which the parties agreed. These Rules of Procedure set out a limited number of additional, more specific procedural provisions, principally of a logistical nature:

- a. Rules of Procedure: “[T]he Commission will fly to Khartoum on 13<sup>th</sup> April, stopping overnight and then proceed on 14<sup>th</sup> April to Abyei Town. ... The schedule of the Commission’s meetings in Abyei and its surroundings, in Agok, and in Muglad will be completed within a maximum of five days in each area, as stipulated in the Terms of Reference and as indicated in the attached schedule. ... At each meeting with the public, the Chairman will explain the purposes of the Commission ... The Commission will, of course, pay deference to the members of the public and not try to sharply limit the topics brought up by the public.”<sup>189</sup>
- b. Rules of Procedure: “[T]he two sides and IGAD will make recordings of all oral testimonies heard. Verbatim transcripts that are translated into English, will after approval by the two sides, be provided to all members of the Commission.”<sup>190</sup>
- c. Rules of Procedure: “In addition to talking with the public, the Commission shall visit sites in the field based on the recommendations of the two sides and any other information that becomes available to the Commission.”<sup>191</sup>
- d. Rules of Procedure: “The Commission will reconvene in Nairobi at a date in May to be determined. Parties will make their final presentation at that time. After that, the experts will examine and evaluate all the material they have gathered and will prepare the final report. The Commission will endeavour to reach a decision by consensus. If, however, an agreed position by the two sides is not achieved, the experts will have the final say.”<sup>192</sup>

242. Again, there can be no dispute that each of these various provisions was fully satisfied.<sup>193</sup> The ABC and the ABC Experts undertook the travels contemplated by the Rules of Procedure (with various adjustments), attended the meetings contemplated by the Rules of Procedures (again, with various adjustments), applied the stated procedures at those meetings (again, with adjustments), visited various sites and inspected various documentation and archival materials. As detailed in the SPLM/A Memorial, it is clear that the ABC Experts’ fact-finding efforts not only satisfied, but well-exceeded the parties’ expectations and the terms of the Rules of Procedure.

243. Importantly, none of the foregoing provisions of the parties’ agreements or the Rules of Procedure imposed prohibitions or limitations on the ABC Experts’ procedural, investigatory or fact-finding actions. Although these instruments set forth a variety of provisions to grant the ABC Experts affirmative access to different types of information – people, sites, documents, archives – *nothing in any of the instruments forbade the ABC Experts from taking further or additional actions.*

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<sup>189</sup> ABC RoP, Arts. 5, 6, 7, 8, **Appendix F to SPLM/A Memorial.**

<sup>190</sup> ABC RoP, Art. 9, **Appendix F to SPLM/A Memorial.**

<sup>191</sup> ABC RoP, Art. 10, **Appendix F to SPLM/A Memorial.**

<sup>192</sup> ABC RoP, Arts. 12, 13, 14, **Appendix F to SPLM/A Memorial.**

<sup>193</sup> In addition, the provisions regarding consensus, which the Government challenges separately, were also satisfied. *See below* at paras. 421-484.

244. Nothing in these instruments provided that “[t]he ABC Experts may not interview additional witnesses” or that “[t]he ABC Experts shall not consider documents not provided by the parties” or that “[t]he ABC Experts shall not consider evidence without providing it to the parties first [or thereafter].” Indeed, while conspicuously omitted from the Government’s selective description of the parties’ procedural arrangements, there is not a single procedural or fact-finding prohibition or constraint in any of the parties’ agreements or the Rules of Procedure.

245. Third, the Government also studiously ignores the fact that the parties’ agreements granted the ABC Experts – both explicitly and impliedly – broad discretion with regard to procedural matters. That broad discretion is, of course, consistent with general principles of procedural discretion in the context of international arbitration and expert determinations (as discussed below).<sup>194</sup> In addition, however, the parties’ agreements went well beyond generally applicable principles of arbitrators’ procedural discretion in recognizing the broad and independent procedural and investigative fact-finding authority of the ABC Experts.

246. The ABC Experts’ procedural discretion is recognized expressly in a number of separate provisions of the parties’ agreements and the Rules of Procedure:

a. Abyei Annex: “*[T]he Experts in the Commission shall consult the British Archives and other relevant sources on Sudan wherever they may be available*, with a view to arriving at a decision that shall be based on scientific analysis and research.”<sup>195</sup>

b. Abyei Annex: “*The EXPERTS shall also determine the rules of procedure of THE ABC.*”<sup>196</sup>

c. Terms of Reference: “*The experts shall consult the British Archives and other relevant sources on the Sudan wherever they may be available*, with a view to arriving at a decision that shall be based on research and scientific analysis.”<sup>197</sup>

d. Rules of Procedure: “As occasions warrant, *Commission members should have free access to members of the public other than those in the official delegations* at the locations to be visited. The Commission *will accept written submissions.*”<sup>198</sup>

e. Rules of Procedure: “In addition to talking with the public, the Commission shall visit sites in the field based on the recommendations of the two sides *and any other information that becomes available to the Commission.*”<sup>199</sup>

f. Rules of Procedure: “Upon completion of the visits to the field, Commission members will return via Khartoum to Nairobi or their respective locations. *The experts will determine what additional documentation and/or archival material will need to be consulted.*”<sup>200</sup>

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<sup>194</sup> See below at paras. 270-307.

<sup>195</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial** (emphasis added).

<sup>196</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**.

<sup>197</sup> ABC ToR, Art. 3.4, **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>198</sup> ABC RoP, Art. 7, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>199</sup> ABC RoP, Art. 10, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>200</sup> ABC RoP, Art. 11, **Appendix F to SPLM/A Memorial**.

g. Rules of Procedure: “[T]he experts will examine and evaluate all the material *they have gathered* and will prepare the final report.”<sup>201</sup>

247. Virtually none of the foregoing provisions are addressed in the Government’s discussion of the ABC Experts’ procedural decisions. That is remarkable, because these provisions are central to the character of the ABC and its procedures. If one ignores these provisions, as the Government does, then it is not surprising that one ends up confusing the ABC Experts with an ICSID or ICC arbitral tribunal, leading to a wholly artificial view of the ABC Experts’ fact-finding powers.

248. The provisions set out above also explicitly and repeatedly grant the ABC Experts both broad procedural discretion and an independent investigative fact-finding authority to engage in scientific analysis and research without the involvement of the parties. In comparison to generally-applicable arbitral procedures, these provisions are remarkable and of central importance to the character of the ABC Experts and the nature of their procedural and fact-finding functions.

249. With regard to procedural discretion, the Abyei Annex grants the ABC Experts the authority to “*determine the rules of procedure of the ABC*,”<sup>202</sup> under the chairmanship of one of the ABC Experts (Ambassador Petterson).<sup>203</sup> This affirmative provision of procedural authority must also be read in light of the almost complete absence of negative prohibitions on the ABC Experts’ actions (discussed above).<sup>204</sup> Together, these provisions provided the ABC Experts with broad procedural discretion to structure the ABC proceedings and fact-finding in the manner it considered most likely to produce a decision based on scientific analysis and research.

250. With regard to the ABC Experts’ investigative authority, the provisions set out above granted the Experts the power to engage in independent factual and scientific inquiries in contrast to what is customary under “general principles of law and practice” in international arbitration. In particular, the Abyei Annex and Terms of Reference specifically provided for the ABC Experts independently to visit and conduct research into “*the British Archives and other relevant sources on Sudan wherever they may be available*.”<sup>205</sup> The same approach was affirmatively prescribed with regard to meetings with residents of the Abyei Area: “*Commission members should have free access to members of the public other than those in the official delegations* at the locations to be visited.”<sup>206</sup> In both instances, the parties’ agreements and the Rules of Procedure not only did not prohibit, but to the contrary affirmatively acknowledged, the ABC Experts’ investigative authority to conduct their research and fact-finding in the manner they deemed most appropriate.

251. The same approach to the ABC Experts’ broad fact-finding and investigative authority was reflected in the Rules of Procedure, which provided that “the Commission shall visit sites in the field based on the recommendations of the two sides *and any other information that becomes available to the Commission*.”<sup>207</sup> This grant of authority proceeds

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<sup>201</sup> ABC RoP, Art 13, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>202</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**.

<sup>203</sup> Abyei Annex, Art. 2.2, **Appendix D to SPLM/A Memorial**.

<sup>204</sup> See above at paras. 238-240.

<sup>205</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**; ABC ToR, Art. 3.4, **Appendix E to SPLM/A Memorial**.

<sup>206</sup> ABC RoP, Art. 7, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>207</sup> ABC RoP, Art. 10, **Appendix F to SPLM/A Memorial** (emphasis added).

expressly on the premise that the ABC Experts would be receiving information that did not come from the parties, but instead arose from their own actions and investigations.

252. Equally, the Rules of Procedure provide that “[t]he experts will determine what **additional documentation and/or archival materials will need to be consulted**”<sup>208</sup> and that “the experts will examine and evaluate all the material **they have gathered** and will prepare the final report.”<sup>209</sup> Again, both of these provisions proceed expressly on the basis that the ABC Experts would be – and were expected by the parties to be – independently gathering documentation and other information on their own (“material they have gathered”).

253. It is not surprising that the parties adopted this approach. The parties agreed that they wanted a decision made “with a view to arriving at a decision that shall be **based on scientific analysis and research**”<sup>210</sup> and they selected a panel of five leading African historical, cultural and scientific experts to reach that decision. Given that, it would have made little sense for the parties to prescribe what scientific methods and investigations the experts should adopt, much less require (as the Government argues) that the experts behave like ICSID or ICC arbitrators.

254. Similarly, the parties to the Abyei Protocol were mutually committed to obtaining a rapid and final resolution of their disputes, so that the CPA could be implemented and decades of civil war finally stopped.<sup>211</sup> They did not agree to a three or four year ICSID or ICC arbitration, but to a four month long procedure characterized by broad procedural and fact-finding discretion and informal, non-technical procedures handled by historical and scientific experts, not arbitration specialists. Again, in these circumstances, it hardly would have made sense for the parties to require (as the Government argues) the ABC Experts to adopt ICSID or ICC arbitral procedures.

255. The Government’s Memorial also omits any recognition of the exceptional character of the ABC and its work – where two warring parties laid down their arms, mutually selected a specialized and neutral body of experts to resolve their dispute, and constructively participated in a remarkable three month long proceeding. Equally absent from the GoS’s analysis is any acknowledgment of the extraordinary diligence and care of the ABC Experts (and the entire ABC), who labored under formidable time constraints, logistical challenges and security issues to produce an exhaustive and well-reasoned Report.

256. The Government’s procedural complaints instead demonstrate a shabby effort to identify purported procedural irregularities in the ABC Experts’ actions. In so doing, the Government’s procedural criticisms proceed from the entirely erroneous premise, outlined above, that the ABC Experts should be treated as if they were an ICSID or ICC arbitral tribunal, rather than a boundary commission applying *sui generis* and tailor-made procedures, possessing, in particular, broad and independent, investigative authority. Considered in the context of the parties’ actual agreements and actions regarding the ABC and the ABC procedures, the Government’s current procedural complaints are groundless (and, often, disingenuous).

257. Fourth, the Government mischaracterizes the nature of the parties’ “Program of work,” attached to the Terms of Reference. The Program of work sets out a schedule for the

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<sup>208</sup> ABC RoP, Art. 11, **Appendix F to SPLM/A Memorial**.

<sup>209</sup> ABC RoP, Art. 13, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>210</sup> Abyei Annex, Art. 4, **Appendix D of the SPLM/A Memorial** (emphasis added).

<sup>211</sup> SPLM/A Memorial, at paras. 740-741, 821.

ABC's work, together with a timetable for various meetings and other activities, as well as details regarding funding, travel logistics and similar matters.<sup>212</sup> As discussed above, nothing in the Program of work, or the other terms of the parties' agreements, purported to forbid or exclude particular meetings, research or other investigations by the ABC Experts.<sup>213</sup> In particular, nothing in the Program of work forbade the Khartoum interviews or other independent investigations by the ABC Experts wherever these took place.

258. The Program of work instead reflected the parties' joint efforts to plan major events in the work of the Commission over a two month period in order that they could be completed smoothly and on time. This was both necessary and appropriate, not least because of the logistical difficulties in travelling to a high security conflict area with very rudimentary transport, communications and other facilities.

259. The Program of work thus scheduled the initial meetings of the ABC Experts, the initial meeting of the entire ABC, the parties' preliminary presentations, the visits to the Abyei Area, the parties' final presentations and the presentation of the ABC Experts' final report to the Presidency. The Program of work set out, in skeletal and summary terms, the timing and general character of these activities, as well as the funding sources for the activities. The parties provided for this schedule because the program was ambitious and, in order to make it happen as a logistical matter, planning, funding and scheduling needed to occur earlier, rather than later.

260. The summary of activities in the Program of work did not, however, purport to be an exclusive or all inclusive list of events that would occur over the pending months. To the contrary, as discussed above, the parties' agreements expressly granted the ABC Experts broad fact-finding, investigatory and procedural discretion.<sup>214</sup> In that context, it is artificial and contrived to impute, as the Government seeks to do, some sort of prohibitory exclusivity into the skeletal time schedule contained in the Program of work.

261. In fact, virtually every aspect of the Program of work was altered during the course of the ABC proceedings, both with respect to the content and character of the activities and the timing of events. This is illustrated in the attached fold-out chart which compares what was set forth in the Program of work with what the ABC actually did.

262. Indeed, following the completion of the Terms of Reference, subsequent programs of work were generated and circulated between IGAD and the parties, which superseded large sections of the original "Program of work" contained in the Terms of Reference.<sup>215</sup> It appears that at this time, the parties contemplated that the "Program of work" would be (as it necessarily had to be) fluid: the first program of work which superseded that contained in the Terms of Reference was described as "tentative," and indeed provided for an entire day during the first session in Nairobi for "harmonization of the Programme of [W]ork."<sup>216</sup>

263. The point is not, as the Government suggests, that the parties consented to each of the changes to the Program of work and, impliedly, that the parties' consent was therefore

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<sup>212</sup> ABC ToR, at pp. 2-3 ("Program of work"), **Appendix E to SPLM/A Memorial**.

<sup>213</sup> See above at paras. 243-244.

<sup>214</sup> See above at paras. 245-256.

<sup>215</sup> See, e.g., Letter from F.W. Keiru (IGAD) to Ambassador Dirdeiry, dated 8 April 2005, appending a "Tentative Programme of Work," **Exhibit-FE 13/25**.

<sup>216</sup> Letter from F.W. Keiru (IGAD) to Ambassador Dirdeiry, dated 8 April 2005, appending a "Tentative Programme of Work," **Exhibit-FE 13/25**.



required to every alteration.<sup>217</sup> Rather, the relevant point is that the Program of work was seen as an interim and skeletal plan – not an exclusive and/or exhaustive set of requirements. Indeed, it is wholly artificial to attempt to transmute the Program of work’s summary, logistical schedule of planned events and trips, recorded in a chart, into some sort of exclusive, prohibitory agreement.

264. Hence, when the Government hints in its Memorial at the ABC Experts’ “*circumvention*” of the Program of work,<sup>218</sup> it engages in empty rhetoric. The ABC Experts would only have “circumvented” the Program of work if the Program had mandatorily limited the Experts’ activities to a specific set of defined things, which it simply did not.

265. With the exception of demarcating the boundary on land, which the ABC Experts were precluded from doing by the GoS’s refusal to accept their findings on delimitation, the ABC Experts did everything envisaged by the Program of work (and a good deal more); nothing in the Program of work forbade the ABC Experts from pursuing their own investigations. On the contrary, the parties’ procedural agreements specifically and explicitly provided for the experts to engage in such fact-finding. To suggest that the ABC Experts “circumvented” the Program of work by doing these things is nonsense.

266. Finally, the Government’s analysis would also impose a peculiarly distasteful form of legal and cultural bias on both the ABC Experts and other cognate forms of dispute resolution. The procedures of an ICSID or ICC arbitration are not the only way of resolving disputes. These procedures are alien to many users of traditional dispute resolution systems in Africa and elsewhere, and they were not adopted by the two African parties to this dispute or by the five historical and ethnographic experts who comprised the ABC Experts.

267. At bottom, the Government’s argument that the ABC Experts committed some gross procedural violation rests on little more than an ethnocentric predisposition about what that procedure should have been. Ignoring entirely the parties, their interests, the terms of their agreements, the character and composition of the ABC and the parties’ procedural expectations, the Government criticizes the ABC Experts for failing to behave like an ICSID or ICC arbitral tribunal. That is not only wrong as a matter of law, but demeaning to both of the parties and the ABC Experts. It presumes to elevate the procedural predispositions of some international arbitration practitioners to universal requirements, without regard for regional practice or the parties’ agreements. There is no reason that this argument should be followed and many reasons that it should be dismissed out of hand.

### 3. The Government Ignores or Distorts the Legal Standards Applicable to Claims of Procedural Unfairness

268. Even if one were to look only to the selectively cited sources of procedural authority that the Government considers relevant, its analysis of the ABC Experts’ procedural authority is still fundamentally flawed. In particular, the Government fails to consider: (a) the broad procedural discretion of international arbitral tribunals and similar adjudicative bodies under general principles of law; (b) the elevated burden of proof applicable to attempts to invalidate adjudicatory decisions based on claims of procedural unfairness; and (c) the presumptive adequacy of procedural decisions by international arbitrators and similar adjudicative bodies under general principles of law.

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<sup>217</sup> GoS Memorial, at para. 200-201.

<sup>218</sup> GoS Memorial, at para. 205.

269. While citing the ICSID Convention, New York Convention, UNCITRAL Model Law and similar authorities for notions of procedural regularity in international arbitration, the Government ignores the well-established principles reflected in those sources that limit challenges to adjudicators' procedural decisions. Taken together, these principles prohibit efforts, such as those of the Government here, to relitigate an arbitral tribunal's procedural judgments. Even under the Government's chosen standards, there would be no basis whatsoever for disregarding the ABC Report on the grounds of a procedural violation.

a) The Government Ignores the Broad Procedural Discretion Recognized under Generally Applicable Principles of Law

270. First, it is well-established under leading international and national arbitration regimes that arbitral tribunals possess very broad procedural discretion. This is a fundamental aspect of the international arbitral process, repeatedly recognized in a wide range of contexts. This principle applies *a fortiori* and with particular force to the more informal and *sui generis* procedures anticipated in the ABC proceedings.

271. International conventions are uniform in granting broad discretion to arbitral tribunals and similar adjudicatory bodies to determine their own procedures and make procedural decisions. This authority is particularly extensive in the context of evidentiary decisions and procedures.

272. Article 49 of the Hague Convention on the Pacific Settlement of International Disputes of 1899 and Article 74 of the Hague Convention on the Pacific Settlement of International Disputes of 1907 both grant an arbitral tribunal wide procedural discretion. Article 49 provides: "The Tribunal has the right to issue Rules of Procedure for the conduct of the case, to decide the forms and periods within which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence."<sup>219</sup>

273. Similarly, Article 15 of the Institut de Droit International's 1875 *Projet de Règlement pour la procédure arbitrale internationale* acknowledges the arbitral tribunal's broad procedural discretion, providing, in the absence of contrary agreement, that "the arbitral tribunal has the power to determine the form and time for the presentation of the parties' arguments, to determine the weight to be attached to documents produced in evidence, and to issue orders of procedure on the conduct of the case."<sup>220</sup>

274. Likewise, Article 13(2) of the Draft ILC Convention on Arbitral Procedures provides that, in the absence of agreement between the parties on the procedure of the arbitration, "the tribunal shall be competent to formulate its rules of procedure."<sup>221</sup> The commentary to the provision notes that "[this] paragraph is declaratory of the inherent power of arbitral tribunals to formulate their own rules of procedure, *even in the absence of any express authorization*

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<sup>219</sup> Hague Convention on the Pacific Settlement of International Disputes of 1899, Art. 49, **Exhibit-LE 4/9**; *see also* Hague Convention on the Pacific Settlement of International Disputes of 1907, Art. 74 ("The Tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence."), **Exhibit-LE 4/9**.

<sup>220</sup> *Projet de règlement pour la procédure arbitrale, session de la Haye du 28, 30 et 31 Août 1875*, 7 Rev. de Droit Int'l et de Législation Comparée 276, 280 (Art. 15) (1875), **Exhibit-LE 25/6**.

<sup>221</sup> Draft ILC Convention on Arbitral Procedure, Art. 13(2), **Exhibit-LE 5/7**.

*in the compromis*. The existence of such a power is recognized in prior codes of arbitral procedure and by jurists.”<sup>222</sup>

275. The ILC Model Rules, which followed the form of the Draft ILC Convention on Arbitral Procedure, similarly provide at Article 12:

“In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules laid down by them are insufficient, *the tribunal shall be competent to formulate or complete the rules of procedure*.”<sup>223</sup>

276. A leading author on evidence before international tribunals similarly notes the “[b]road powers”<sup>224</sup> contained in Article 18 of the ILC Model Rules, which provides that:

“The tribunal shall decide as to the admissibility of the evidence that may be adduced, and shall be the judge of its probative value. It shall have the power, at any stage of the proceedings, to call upon experts and to require the appearance of witnesses. It may also, if necessary, decide to visit the scene connected with the case before it.”<sup>225</sup>

277. The ICSID Convention grants a similarly broad procedural discretion to the arbitral tribunal. Article 44 provides that “[i]f any questions of procedure arises which is not covered by this Section [3 of Chapter IV] or the Arbitration Rules or any rules agreed by the parties, *the Tribunal shall decide the question*.”<sup>226</sup> Further, Article 43 grants the tribunal the power to require the production of documents or other evidence, and to “visit the scene connected with the dispute, *and conduct such inquiries there as it may deem appropriate*.”<sup>227</sup> Similarly, Article 27 of the ICSID Additional Facility Rules provides that the tribunal “shall make the orders required for the conduct of the proceeding.”<sup>228</sup>

278. Commentators concur that international arbitral tribunals and other adjudicatory bodies have very wide procedural authority. A leading commentator has explained that, even in the absence of any agreement granting such authority,<sup>229</sup> tribunals in international proceedings have the broadest possible procedural discretion. He notes that “it has been assumed that *international tribunals have a power analogous to that of municipal courts to determine their own rules of procedure*, subject to any limitations upon their authority in the instrument of their creation”<sup>230</sup> and that “there can be no doubt that *the power is well established by customary practice*.”<sup>231</sup>

279. Similarly, a leading authority on the New York Convention states: “the agreement on arbitral procedure ... is usually embodied in Arbitration Rules of a specific arbitral institution, [which] generally affords *wide discretionary powers to arbitrators as to the*

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<sup>222</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, at p. 55, available at [www.un.org](http://www.un.org), **Exhibit-LE 25/7** (emphasis added).

<sup>223</sup> ILC Model Rules, Art. 12, **Exhibit-LE 16/6** (emphasis added).

<sup>224</sup> D. Sandifer, *Evidence Before International Tribunals* 41 at fn. 106 (1975 Revised Edition), **Exhibit-LE 25/8**.

<sup>225</sup> ILC Model Rules on Arbitral Procedure, Art. 18, **Exhibit-LE 16/6**.

<sup>226</sup> ICSID Convention, Art. 44, **Exhibit-LE 23/3** (emphasis added).

<sup>227</sup> ICSID Convention, Art. 43, **Exhibit-LE 23/3** (emphasis added).

<sup>228</sup> ICSID Additional Facility Rules, Art. 27, **Exhibit-LE 25/9**.

<sup>229</sup> D. Sandifer, *Evidence Before International Tribunals* 40 (1975 Revised Edition), **Exhibit-LE 25/8**.

<sup>230</sup> D. Sandifer, *Evidence Before International Tribunals* 40-41 (1975 Revised Edition), **Exhibit-LE 25/8** (emphasis added).

<sup>231</sup> D. Sandifer, *Evidence Before International Tribunals* 41 (1975 Revised Edition), **Exhibit-LE 25/8** (emphasis added).

*conduct of the arbitral procedure.*<sup>232</sup> The same author also notes that “arbitration laws too, as a rule, offer freedom to the arbitrators in conducting their arbitration.”<sup>233</sup>

280. National laws on international arbitration are similar. Article 19(2) of the UNCITRAL Model Law provides that the tribunal may, in the absence of agreement between the parties on the procedure to be adopted, “*conduct the arbitration in such manner as it considers appropriate.*”<sup>234</sup> National arbitration laws in most jurisdictions contain corresponding provisions.<sup>235</sup> As a leading commentator notes, under the English Arbitration Act, arbitrators have “*unfettered*” discretion in the exercise of their procedural powers.<sup>236</sup>

281. Under U.S. law applicable to both domestic and international arbitrations, “[a]n arbitrator enjoys *wide latitude* in conducting an arbitration hearing,”<sup>237</sup> and “procedural questions which grow out of the dispute and bear on its final disposition are to *be left to the arbitrator.*”<sup>238</sup> Arbitrators have almost unlimited discretion in deciding whether to admit or

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<sup>232</sup> A. van den Berg, *The New York Arbitration Convention* 323 (1981), **Exhibit-LE 24/13** (emphasis added).

<sup>233</sup> A. van den Berg, *The New York Arbitration Convention* 325 (1981), **Exhibit-LE 24/13**.

<sup>234</sup> UNCITRAL Arbitration Rules, Art. 19(2), **Exhibit-LE 23/4**.

<sup>235</sup> See, e.g., Swiss Code on International Private Law, Art. 182(2) (“Where the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules.”), **Exhibit-LE 26/1**; French Code of Civil Procedure, Arts. 1460 and 1494 (“*The arbitrators shall determine the arbitration procedure*; they shall not be bound by any rules applicable in court proceedings unless the parties have provided otherwise in the arbitration agreement.”), **Exhibit-LE 24/3** (emphasis added); Pinsolle & Kreindler, *Les limites du rôle de la volonté des parties dans la conduite de l’instance arbitrale*, 1 Rev. arb. 63 (2003) (“[A]s regards the French law of international arbitration, for purposes of investigation, arbitrators have a discretion which allows them not to take into account opposing views of the parties, without necessarily risking annulment of the award.”), **Exhibit-LE 26/2**; German Code of Civil Procedure, §1047 (“Subject to agreement by the parties, *the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials.* Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.”), **Exhibit-LE 26/3** (emphasis added); Austrian Code of Civil Procedure, Art. 594 (1) (“Subject to the mandatory provisions of this title, the parties are free to determine the rules of procedure. The parties may thereby refer to other rules of procedure. Failing such agreement, *the arbitral tribunal shall, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.*”), **Exhibit-LE 26/4** (emphasis added); *Judgment of 25 June 1992, 7 Ob 545/92*, XXII Y.B. Comm. Arb. 619, 625 (Austrian Oberster Gerichtshof) (1997) (“The parties may determine the arbitral procedure in the arbitration agreement or in a separate written agreement. Lacking such agreement, *the arbitrators decide on the procedure.*”), **Exhibit-LE 26/5** (emphasis added); Netherlands Code of Civil Procedure, Art. 1036 (“Subject to the provisions of this Title, *the arbitral proceedings shall be conducted in such manner as agreed between the parties or, to the extent that the parties have not agreed, as determined by the arbitral tribunal.*”), **Exhibit-LE 26/6** (emphasis added).

<sup>236</sup> R. Merkin, *Arbitration Law* ¶14.11 (update 2008), **Exhibit-LE 26/7**.

<sup>237</sup> *Hoteles Condado Beach, La Concha and Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985) (applying FAA), **Exhibit-LE 26/8** (emphasis added); see also *Amalgamated Meat Cutters v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817, 820 (5th Cir. 1973) (“[T]he arbitrator has *great flexibility* and the courts should not review the legal adequacy of his evidentiary rulings.”), **Exhibit-LE 26/9** (emphasis added); H. Holtzmann & D. Donovan, in J. Paulsson, Suppl. 44, 38 (2005), *International Handbook on Commercial Arbitration* (“[A]rbitrators have *virtually unlimited discretion* to handle procedural issues as they deem fit, subject only to the provisions of any applicable rules, the agreement of the parties, and the fundamental right to be heard.”), **Exhibit-LE 26/10** (emphasis added).

<sup>238</sup> *John Wiley & Sons v. David Livingston*, 376 U.S.543, 557 (U.S. S.Ct. 1964), **Exhibit-LE 26/11** (emphasis added); *Industrial Risk Ins. v. MAN Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1443 (11th Cir. 1998) (applying New York Convention), **Exhibit-LE 26/12**; *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (U.S. S. Ct. 1956) (“Arbitrators are not bound by the rules of evidence.”), **Exhibit-LE 26/13**.

exclude evidence.<sup>239</sup> Absent explicit limitations, it is for the arbitrators to fill in the procedural interstices of the arbitral agreement.<sup>240</sup> As one U.S. court explained:

“[A]rbitration resolves disputes *without confinement to many of the procedural and evidentiary strictures that protect the integrity of formal trials.*”<sup>241</sup>

282. In Switzerland, a distinguished commentator explains:

“The arbitrator’s discretion is not limited to the adoption of *ad hoc* or pre-existent procedural frameworks. To the contrary, in accordance with current practice of international arbitration, *the arbitrator is free to adopt the necessary regulations, either in advance, or in the course and in view of the ongoing proceedings.*”<sup>242</sup>

Wide procedural discretion applies equally to the entire arbitral procedure: “[t]he modus and the extension of fact finding fall within the tribunal’s discretion.”<sup>243</sup>

283. Leading commentators have similarly affirmed that, once the parties have entrusted an adjudicative body with procedural discretion:

“[t]he question how the arbitral tribunal finds the factual bases for its award beyond the parties submissions, no longer concerns the right to be heard, but the procedure.

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<sup>239</sup> See, e.g. *United Mine Workers v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000), **Exhibit-LE 26/14**; *Hoteles Condado Beach, La Concha And Convention Center v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985) (“The arbitrator is the judge of the admissibility and relevancy of evidence submitted in an arbitration proceedings.”), **Exhibit-LE 26/8**; *Hayne, Miller & Farni, Inc., v. Flume*, 888 F.Supp. 949, 952 (E.D. Wisc. 1995) (even the “improper admission of evidence does not warrant vacation of the arbitration award”), **Exhibit-LE 26/15** (emphasis added).

<sup>240</sup> See, e.g., *In re U.S. Turnkey Exploration, Inc. v. PSI, Inc.*, 577 So.2d 1131, 1135 (La. Ct. App. 1991) (“Unless a mode of conducting the proceedings *has been prescribed* by the arbitration agreement or submission, or regulated by statute, arbitrators have a general discretion as to the mode of conducting the proceedings....”), **Exhibit-LE 26/16** (emphasis added).

<sup>241</sup> *Forsythe Int’l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990) (“[s]ubmission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial ... [but] [p]arties to voluntary arbitration may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations.”), **Exhibit-LE 26/17**; see also *Johnson Controls, Inc. v. Int’l Union of Operating Engineers, Local 877*, 2004 WL 238714, at \*2 (D. Mass. 2004) (“In the absence of any controlling principles established under the parties’ agreement, it was within the scope of the arbitrator’s authority to determine these [procedural] issues.”), **Exhibit-LE 26/18**.

<sup>242</sup> P. Lalive, J. Poudret & C. Reymond, *Le Droit de l’Arbitrage Interne et International en Suisse*, Art. 182, ¶3 (1989), **Exhibit-LE 26/19** (emphasis added); see also Schneider, in H. Honsell, N. Vogt, A. K. Schnyder & S. Berti (eds.), *Basler Kommentar, Internationales Privatrecht* Art. 182, ¶37 *et seq.* (2d ed. 2006) (“The arbitrator may regulate the procedure in detail or he may only regulate particular points ... When doing so, an overregulation should be avoided. Many questions can be provided for better and in a more appropriate way, when the particular circumstances are known. ... Also with respect to the point in time, in which he [the arbitrator] issues a rule, *the arbitrator is free. He can set comprehensive rules in the beginning of the procedures, or only decide in the course [of the procedures] when particular questions occur.*”), **Exhibit-LE 26/20** (emphasis added).

<sup>243</sup> Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozeßgesetzen*, Vol. 4 Part 2, §611, ¶109 (2d ed. 2007), **Exhibit-LE 23/19**.

***The arbitral award is therefore only challengeable and invalid if the claiming party has been granted no right to be heard whatsoever.***<sup>244</sup>

284. The foregoing principles apply with particular force to the ABC proceedings. As discussed above, the parties' procedural arrangements with regard to the ABC proceedings affirmatively granted the ABC Experts very broad procedural authority, which was particularly appropriate given their scientific and fact-finding investigative powers, constrained by only limited negative prohibitions.<sup>245</sup> In this context, the broad procedural discretion of adjudicatory bodies recognized by general principles of law is particularly extensive.

b) The Government Ignores the Presumptive Adequacy and Correctness of An Adjudicatory Body's Procedural Decisions under Generally Applicable Principles of Law

285. Second, it is equally well-settled that the procedural decisions of an international arbitral tribunal or similar adjudicatory body are presumptively proper and not subject to challenge. This reflects the importance attached to the finality of arbitral awards and the extreme reluctance with which arbitrators' procedural, fact-finding and evidentiary rulings are reviewed.<sup>246</sup>

286. Specifically addressing the case of an adjudicative body that had determined its own rules of procedure, the International Court of Justice has stated that

***“the interpretation given by it of those Rules in the exercise of its functions (facta concludentia) ranks as an authoritative interpretation. There is thus a strong presumption that the decision taken by the [adjudicative body] is in conformity with the true meaning of the Rules.”***<sup>247</sup>

287. Even in respect of ICSID annulment proceedings, Article 52(1)(d) provides that an award may only be annulled on the grounds of “a *serious* departure from a *fundamental* rule of procedure.”<sup>248</sup> In the *MINE* annulment decision (relied on by the Government), the *ad hoc* Committee referred to the two-prong test in Article 52(1)(d) and held that both must be met for an award to be annulled. The *ad hoc* Committee stated:

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<sup>244</sup> Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozeßgesetzen*, Vol. 4 Part 2, §611, ¶109 *et seq.* (2d ed. 2007), **Exhibit-LE 23/19** (emphasis added); *see also Judgment of 20 September 1961*, 6Ob305/61, pp. 2 *et seq.* of 3 (Austrian Oberster Gerichtshof) (“It corresponds to the constant holdings of the Supreme Court that if – as in the present case – both parties submissions have been admitted, one may not speak of a violation of the right to be heard, even if there has been no oral hearing. The Court of Appeal rightly points out that ***the question how the arbitral tribunal has obtained the factual bases for its award does not concern the right to be heard but the procedure which remains unregulated in absence of a parties’ agreement.***”), **Exhibit-LE 26/21** (emphasis added); W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* 235 (2000) (“***While a number of challenges have been made based on the arbitrators’ procedural conduct of the hearings, very few have succeeded, because the taking of procedural decisions is precisely within the discretionary powers of the tribunal.*** It is only in a flagrant case of due process violation causing real prejudice to a party that a challenge based on due process grounds can succeed.”), **Exhibit-LE 26/22** (emphasis added).

<sup>245</sup> *See above* at paras. 245-256.

<sup>246</sup> *See above* at paras. 129-136, 137-146, 285-310.

<sup>247</sup> *Separate Opinion of Judge de Castro in the Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, [1972] I.C.J. Rep. 46, 138 (I.C.J.), **Exhibit-LE 24/7** (emphasis added).

<sup>248</sup> ICSID Convention, Art. 52(1)(d), **Exhibit-LE 23/3**; (emphasis added); *see also* Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, Duke L.J. 739, 792 (1989) (“The procedural rule violated, whether found in the Convention or not, must be fundamental. The mere fact that there has been a violation is not determinative. The violation must be serious.”), **Exhibit-LE 26/23**.

“the text of Article 52(1)(d) makes [it] clear that not every departure from a rule of procedure justifies annulment; it requires that the departure be a *serious* one and that the rule of procedure be *fundamental* in order to constitute a ground for annulment.”<sup>249</sup>

288. The decision goes on to discuss these two requirements:

“A first comment on this provision concerns the term ‘serious.’ In order to constitute a ground for annulment the departure from a ‘fundamental rule of procedure’ must be serious. *The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.* A second comment concerns the term ‘fundamental’; *even a serious departure from a rule of procedure will not give rise to annulment, unless that rule is ‘fundamental’.* ... The term ‘fundamental rule of procedure’ is not to be understood as necessarily including all the Arbitration Rules adopted by the Centre.”<sup>250</sup>

289. Article V(1)(b) of the New York Convention (paralleled by Article 5(1)(b) of the Inter-American Convention) provides for the non-recognition of arbitral awards where a party was “unable to present its case.”<sup>251</sup> It is clear that Article V(1)(b) is reserved for grave violations of fundamental procedural protections. Commentary confirms that the cases where enforcement will be refused under Article V(1)(b) of the New York Convention (and national implementing legislation) will be “*exceptional.*”<sup>252</sup>

290. In applying Article V(1)(b), courts have held that a violation of a procedural requirement must involve “a violation of *fundamental principles ... which hurts in an*

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Judgment of 22 December 1989 of the Ad Hoc Committee On the Application for Annulment Submitted by Guinea Against the Arbitral Award Rendered on 6 January 1988 in the *MINE v. Government of Guinea Case* (ARB/84/4), 95, 102 (1988), **Exhibit-LE 26/24** (emphasis in original).

<sup>250</sup> Judgment of 22 December 1989 of the Ad Hoc Committee On the Application for Annulment Submitted by Guinea Against the Arbitral Award Rendered on 6 January 1988 in the *MINE v. Government of Guinea Case* (ARB/84/4), 95, 104 (1988), **Exhibit-LE 26/24** (emphasis added).

<sup>251</sup> New York Convention 1958, Art. V(1)(b) (“Recognition and enforcement may be refused, at the request of that party against whom it is invoked, only if that party furnishes ... proof that: ... (b) The party against whom the award was invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”), **Exhibit-LE 5/1**; Inter-American Convention on International Commercial Arbitration 1975, Art. 5(1)(a) (“The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove... (b) That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense...”), **Exhibit-LE 5/10**.

<sup>252</sup> R. Merkin, *Arbitration Law* ¶19.53 (2008 update), **Exhibit-LE 26/7**; see also A. van den Berg, *The New York Arbitration Convention of 1958* 297 (1981) (“Despite the broad wording of Article V(1)(b), the courts appear to accept a violation of due process in very serious cases only, thereby *applying the general rule of interpretation of Article V that the grounds for refusal of enforcement are to be construed narrowly.*”), **Exhibit-LE 24/13** (emphasis added); D. Di Pietro & M. Platte, *Enforcement of International Arbitration Awards, The New York Convention of 1958* 149 (2001) (“It follows that *claims grounded on due process issues are seldom successful due to the restricted view taken by the international jurisprudence on the point.*”), **Exhibit-LE 27/1** (emphasis added); Wheelless, *Article V(1)(b) of the New York Convention*, 7 *Emory Int’l L. Rev.* 805, 816 (1993) (“The case law involving Article V(1)(b) arguments demonstrates that courts follow the legislative history of the Convention by adopting a *limited interpretation of this defense* . . . . [T]he protection should be reserved for serious abnormalities in arbitral proceedings.”), **Exhibit-LE 27/2** (emphasis added); Paulsson, *The New York Convention in International Practice – Problems of Assimilation in New York Convention of 1958*, ASA Special Series No. 9, 100, 108 (1996) (“*In addition to being exhaustive, the grounds for refusal are meant to be interpreted narrowly.* This means that the existence of the grounds in Article V (1) should be accepted in serious cases only and the public policy violation required by Article V (2) should only be asserted by courts in extreme cases.”), **Exhibit-LE 13/15** (emphasis added).

*intolerable manner the notion of justice*,<sup>253</sup> or a “material, concrete and real” violation that does not involve “merely ... formal” procedural violations.<sup>254</sup> (Parenthetically, there is of course no suggestion in any of these cases that the procedural irregularities complained of could or should have been pursued as an excess of jurisdiction or otherwise under Article V(1)(c) of the Convention.)

291. Similarly, national courts have emphasized the very broad procedural discretion afforded to arbitrators and have set their faces firmly against extensive or probing review of arbitrators’ compliance with parties’ procedural agreements. Rather, courts have permitted non-recognition only where there has been a serious violation of a fundamental procedural protection.<sup>255</sup>

292. As one commentator observes with regard to Article V(1)(b), courts in developed jurisdictions “accept a violation of due process *in very serious cases only*.”<sup>256</sup> Another commentator emphasizes that “enforcement of awards is denied ... *only for egregious departure from the due process of law*.”<sup>257</sup> In the words of one U.S. court, any judicial review must accord “*profound deference*” to arbitrators’ procedural decisions.<sup>258</sup> In the words of another U.S. court, “procedural decisions by arbitrators are *solely within their discretion* and *not subject to second guessing* by the courts.”<sup>259</sup>

293. Likewise, the Swiss Federal Tribunal has held that an award can be annulled on procedural grounds only if:

“there is a *violation of fundamental and commonly acknowledged procedural principles, whose non-observance contradicts sense of justice beyond all bearing, and in a way that the decision appears to be by all means incompatible with the*

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<sup>253</sup> *Judgment of 8 February 1978, Chrome Resources SA v. Léopold Lazarus Ltd*, XI Y.B. Comm. Arb. 538, 540 (Swiss Federal Tribunal) (1986) (“[I]nsofar as the procedure is concerned, not every irregularity will automatically entail refusal of enforcement of a foreign award, even if such irregularity would entail the annulment of an award rendered in Switzerland. *It should rather involve a violation of fundamental principles of the Swiss legal order which hurts in an intolerable manner the notion of justice*.”), **Exhibit-LE 27/3** (emphasis added).

<sup>254</sup> *Judgment of 31 July 2000, Ionian Shipping Line Co. Ltd. (Greece) v. Transshipping, SA (Spain)*, XXXII Y.B. Comm. Arb. 532, 538 (2007) (Spanish Tribunal Supremo), **Exhibit-LE 27/4**.

<sup>255</sup> *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 296 (5th Cir. 2004) (“*Courts are reluctant to set aside arbitral awards under the New York Convention based on procedural violations ...*”), **Exhibit-LE 12/3**; *Indus. Risk Insurers v. MAN Gutehoffnungshütte GmbH* 141 F.3d 1434, 1442-1444 (11th Cir. 1998) (noting procedural discretion protected by Article V(1)(d)), **Exhibit-LE 26/12**.

<sup>256</sup> A. van den Berg, *The New York Arbitration Convention of 1958* 297 (1981), **Exhibit-LE 24/13** (emphasis added).

<sup>257</sup> Schwebel & Lahne, *Public Policy* in ICCA Congress Series No. 3, 205, 217 (1987), **Exhibit-LE 24/14** (emphasis added).

<sup>258</sup> *ALS & Assoc. v. AGM Marine Constructors, Inc.*, 557 F.Supp.2d 180, 182 (D. Mass. 2008) (emphasis added), **Exhibit-LE 27/5**; see also *Halliburton Energy Sers., Inc. v. NL Indus.*, 553 F.Supp.2d 733, 752 (S.D. Tex. 2008) (“Judicial review of an arbitration award is *exceedingly deferential*. Vacatur is available only on very narrow grounds, and federal courts must defer to the arbitrator’s decision when possible.”), **Exhibit-LE 27/6** (emphasis added); see also *id.* at 779 (“[C]ourts must give *particular deference to the procedures used by arbitrators*.”), **Exhibit-LE 27/6** (emphasis added); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 749 (8th Cir. 1986) (courts must “accord *even greater deference to the arbitrator’s decisions on procedural matters* than those bearing on substantive grounds.”), **Exhibit-LE 27/7** (emphasis added); *Indus. Risk Insurers v. MAN Gutehoffnungshütte GmbH* 141 F.3d 1434, 1442-1444 (11th Cir. 1998) (noting procedural discretion protected by Article V(1)(d)), **Exhibit-LE 26/12**; *Checkrite of San Jose, Inc. v. Checkrite Ltd.*, 640 F.Supp. 234, 236 (D. Colo. 1986) (“*Federal courts are to give great deference to an arbitrators’ decision on matters of procedure* which arise from the dispute and bear on its final disposition. Basically, matters of procedure lie within the discretion of the arbitrators.”), **Exhibit-LE 27/8** (emphasis added).

<sup>259</sup> *Teamsters Local 312 v. Matlack, Inc.*, 916 F.Supp. 482, 486 (E.D. Pa. 1996) **Exhibit-LE 27/9** (emphasis added).



**legal and moral order applying in civilized nations.** For that, the *erroneous or even arbitrary application of the arbitral tribunal’s procedural regulations alone is not sufficient.*<sup>260</sup>

294. Similarly, under the English Arbitration Act, “substantial injustice” must be established in order for any kind of appeal under Section 68 of the Act to be successful (and the phrase is expressly included in the wording of the Act). Commentators agree that “[i]n practice [challenges on procedural grounds] will be of little significance, as *the arbitrators are free to determine the procedure in the absence of any agreement to the contrary*, and there is rarely any such agreement.”<sup>261</sup> The legislative history of the English Arbitration Act explains cogently that a challenge to an award based on a serious procedural irregularity “is really designed as a long stop, *only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.*”<sup>262</sup>

295. The German Supreme Court has likewise held that an arbitral award may “only be denied recognition ... if the arbitral procedure suffers from *a severe flaw striking upon the fundamentals of public and economic life.*”<sup>263</sup> Similarly, the Austrian Supreme Court has held:

“There is a fundamental difference between state courts on one side, that are bound by strict procedural regulations ..., and arbitral tribunals on the other side, ... that may proceed with *significantly more freedom as to the handling of the proceedings.* Therefore, challenges are only possible in case of *absolutely gross violations of fundamental principles of due process.*”<sup>264</sup>

296. In the same vein, another commentary observes that:

“While a number of challenges have been made based on the arbitrators’ procedural conduct of the hearings, very few have succeeded, because the taking of procedural

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<sup>260</sup> *Judgment of 28 April 2000*, DFT 126 III 249, 253 (Swiss Federal Tribunal), **Exhibit-LE 27/10** (internal citations omitted) (emphasis added); *see also Judgment of 3 April 2002*, DFT 128 III 191, 194 (Swiss Federal Tribunal) (“[T]he procedural public policy is violated if fundamental and generally acknowledged principles have been violated, which results in a contradiction of the sense of justice beyond all bearing, and in a way that the decision appears to be incompatible with the values recognized in a state governed by the rule of law.”), **Exhibit-LE 27/11** (emphasis added); *Judgment of 27 March 2006*, 4P.23/2006, cons. 4.2. (Swiss Federal Tribunal) (“There is a violation of procedural public policy if there is a violation of fundamental and commonly acknowledged procedural principles, whose non-observance contradicts sense of justice beyond all bearing, and in a way that the decision appears to be by all means incompatible with the legal and moral order applying in civilized nations. For that, the erroneous or even arbitrary application of the arbitral tribunal’s procedural regulations alone is not sufficient.”), **Exhibit-LE 27/12** (internal citations omitted) (emphasis added); *Judgment of 25 January 1967*, DFT 93 I 49, 58 (Swiss Federal Tribunal) (“It is certain that an arbitral award can be incompatible with public policy not only because of its content, but also for procedural reasons. It is however required that [the award] violates sense of justice to extent that is intolerable, or that it violates the fundamentals of the legal order.”), **Exhibit-LE 27/13**.

<sup>261</sup> R. Merkin, *Arbitration Act 1996* 171 (2005), **Exhibit-LE 24/9** (emphasis added).

<sup>262</sup> Report of the Departmental Advisory Committee on Arbitration Law (“DAC Report”), 381 in Merkin, *Arbitration Act 1996* Appendix 8 (2005), **Exhibit-LE 24/9** (emphasis added), referred to with approval in *Lesotho Highlands Development Authority v. Impreglia SpA* [2006] 1 AC 221, 234-235, **Exhibit-LE 14/1**; *see also*, R. Merkin, *Arbitration Law* ¶19.55 (2008 update) (“The English courts will have regard only to material breaches”), **Exhibit-LE 26/7**.

<sup>263</sup> *Judgment of 15 May 1986*, BGHZ 98, 70, 74 (German Bundesgerichtshof) (1986), **Exhibit-LE 27/14** (emphasis added).

<sup>264</sup> *Judgment of 6 September 1990*, 6Ob572/90, p. 3 of 3 (Austrian Oberster Gerichtshof), **Exhibit-LE 27/15** (emphasis added); *Judgment of 1 September 1999*, 6Ob120/99h, p. 2 of 2 (Austrian Oberster Gerichtshof) (“[A]n arbitral award is only challengeable if a party has not been granted its right to be heard at all. An incomplete fact finding or the insufficient consideration of relevant facts does not give sufficient grounds for a setting aside claim. Therefore, challenges are only possible in case of *absolutely gross violations of fundamental principles of due process*”), **Exhibit-LE 27/16** (emphasis added).

decisions is precisely within the discretionary powers of the tribunal. *It is only in a flagrant case of due process violation causing real prejudice to a party that a challenge based on due process grounds can succeed.*<sup>265</sup>

297. These principles apply with full force to the ABC proceedings. As discussed above, the parties granted the ABC Experts broad procedural and investigative authority, that was intended to facilitate their independent scientific analysis and research, in the context of informal proceedings conducted by historical and scientific experts, and that was constrained only by the most limited procedural restrictions.<sup>266</sup> In this context, the generally applicable deference to the procedural decisions of adjudicatory bodies applies with special force.

c) The Government Fails to Give Effect to the Requirement of Demonstrating Serious Prejudice Applicable to Attempts to Invalidate Adjudicatory Decisions Based on Procedural Complaints

298. Third, it is clear that a party seeking to invalidate an arbitral award for procedural reasons must demonstrate that it incurred serious prejudice from the purported procedural irregularities. Leading authors explain that: *“The prevailing view is that a procedural irregularity or defect alone will not invalidate an award. The test is that of a significant injustice so that the tribunal would have decided otherwise had the tribunal not made a mistake.”*<sup>267</sup>

299. National courts have repeatedly held that recognition will only be denied under Article V(1)(b) of the New York Convention for grave procedural violations that are shown to cause real and material injustice.<sup>268</sup> According to one decision, recognition of an award could be denied only where failure to follow the parties’ agreed procedural rules “worked

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<sup>265</sup> W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* ¶13.05 (2000), **Exhibit-LE 26/22** (emphasis added); see also E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1633 (1999) (“Under French international arbitration law, not all procedural irregularities constitute grounds on which to set an award aside. *The only procedural irregularities which will have that effect are those which violate due process and the requirements of international public policy.*”), **Exhibit-LE 23/2** (emphasis added).

<sup>266</sup> See above at paras. 245-256.

<sup>267</sup> J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶25-37 (2003), **Exhibit-LE 23/17** (emphasis added); see also C. Schreuer, *The ICSID Convention: A Commentary* Art. 52 ¶231 (2001) (“In order to be serious, the departure must be more than minimal. It must be substantial. In addition, this departure must have had a material effect on the affected party. It must have deprived that party of the benefit of the rule in question. ... if it is clear from the circumstances that the party had not intended to exercise the right [said to be breached], *there would be no material effect and the departure would not be “serious”* under this analysis.”), **Exhibit-LE 27/17** (emphasis added); D. Sutton, J. Gill & M. Gearing (eds.), *Russell on Arbitration* ¶8.106 (2007) (“If ... correcting or avoiding the serious irregularity would make *no difference to the outcome*, substantial injustice will not be shown.”), **Exhibit-LE 27/8** (emphasis added); R. Merkin, *Arbitration Law* ¶20.8 (update 2008) (“there is substantial injustice if it can be shown that the irregularity in the procedure caused the arbitrators *to reach a conclusion which, but for the irregularity, they might not have reached ...*”), **Exhibit-LE 26/7** (emphasis added).

<sup>268</sup> *Judgment of 15 November 1979*, 1980 Rev. arb. 513, 516 (Paris Cour d’appel), (“[A]nnulment ... will only be awarded if the invoked irregularity, namely exceeding the deadline for the submission of documents, *causes harm to the party invoking it.*”) **Exhibit-LE 27/19** (emphasis added); *Egmatra AG v. Marco Trading Corp.* [1999] 1 Lloyd’s Rep. 862 (Q.B.) (1991), **Exhibit-LE 27/20**; *Judgment of 8 February 1978, Chrome Resources SA v. Léopold Lazarus Ltd*, XI Y.B. Comm. Arb. 538, 539 (Swiss Federal Tribunal) (1986), **Exhibit-LE 27/3**; *Tongyuan (US) International Trading Group v. Uni-Clan Ltd*, 2001 WL 98036 p. 3 of 6 (High Court of Justice) (2001) (“The contract in the present case does not, in my judgment, point to the conclusion that to hold the proceedings in Shenzhen or Shanghai was *necessarily critical in all cases.*”), **Exhibit-LE 27/21** (emphasis added); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F.Supp.2d 813, 822 (S.D. Tex. 2001), *aff’d*, 364 F.3d 274 (5th Cir. 2004) (may only deny enforcement if the complaining party can show that the procedural violation “*actually caused [the party] substantial prejudice.*”), **Exhibit-LE 12/3**.

*substantial prejudice to the complaining party.*<sup>269</sup> Another court rejected a challenge to recognition on the grounds that “there was not sufficient prejudice to justify refusal to enforce what is a Convention award.”<sup>270</sup>

300. As a leading commentator on the subject notes:

“[n]ot all failures to observe procedural stipulations contained in the *compromis* will lead to a nullity of the award. The legal effect of such a failure is not to be judged upon the purely abstract basis of whether it constitutes a departure from terms of submission. The question is rather: Does the departure constitute a deprivation of a fundamental right so as to cause the arbitration and resulting award to lose its judicial character? *Unless its effect is to prejudice materially the interests of a party, the charge of nullity should not be open to a party.*”<sup>271</sup>

301. The English House of Lords also embraces this view, referring to “the *exceptional* remedy under section 68”<sup>272</sup> and noting “the *precondition of substantial injustice,*”<sup>273</sup> stating that:

“[p]lainly a high threshold must be satisfied. ... it must be established that the irregularity caused or will cause *substantial injustice* to the applicant. This is designed to eliminate technical and unmeritorious challenges. ... [Case law] points to a narrow interpretation of section 68(2)(b). The policy underlying section 68(2)(b) as set out in the DAC report similarly points to *a restrictive interpretation.*”<sup>274</sup>

302. U.S. courts routinely confirm arbitral awards despite procedural errors by the arbitrators where the complaining party did not establish “*substantial prejudice,*”

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<sup>269</sup> *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, 1992 WL 122712, at \*5 (D.D.C. May 29, 1992) (dicta), **Exhibit-LE 27/22** (emphasis added).

<sup>270</sup> *China Agribusiness Development Corporation v. Balli Trading* [1998] 2 Lloyd’s Rep 76, 80, **Exhibit-LE 27/23**.

<sup>271</sup> K. Carlston, *The Process of International Arbitration* 38-39 (1946, reprint 1972) **Exhibit-LE 27/24** (emphasis added). Professor Carlston’s formulation was also cited with approval during the drafting of the ILC Draft Convention (ultimately adopted as the ILC Model Rules). See *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, at pp. 109-110, available at www.un.org, **Exhibit-LE 25/7**.

It has also been noted that Article 52(1)(d) of the ICSID Convention is “closely modeled after the International Law Commission’s 1958 Model Rules on Arbitral Procedure...” See C. Schreuer, *The ICSID Convention: A Commentary* Art. 52, ¶226 (2001), **Exhibit-LE 27/17**; see also Judgment of 22 December 1989 of the Ad Hoc Committee On the Application for Annulment Submitted by Guinea Against the Arbitral Award Rendered on 6 January 1988 in the *MINE v. Government of Guinea Case* (ARB/84/4), 95, 104 (1988) (“*The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.*”), **Exhibit-LE 26/24**.

<sup>272</sup> *Lesotho Highlands Development Authority v. Impreglia SpA* [2006] 1 AC 221, 238 (2006), **Exhibit-LE 14/1** (emphasis added).

<sup>273</sup> *Lesotho Highlands Development Authority v. Impreglia SpA* [2006] 1 AC 221, 238 (2006), **Exhibit-LE 14/1** (emphasis added).

<sup>274</sup> *Lesotho Highlands Development Authority v. Impreglia SpA* [2006] 1 AC 221, 235-236 (2006), **Exhibit-LE 14/1** (emphasis added).

“*substantial harm*” or “*substantial injustice*.”<sup>275</sup> Prejudice will not be assumed simply because an arbitrator committed an evidentiary error,<sup>276</sup> viewed “a potentially prejudicial document,”<sup>277</sup> or engaged in *ex parte* communications.<sup>278</sup> In reality, substantial prejudice is exceedingly difficult to establish and U.S. courts require a specific and detailed showing of causation.<sup>279</sup>

303. Moreover, in relation to the requirement for substantial prejudice,<sup>280</sup> civil law courts have held:

“to do so [proving a violation of the right to due process], it would namely be necessary that the complaining party *specify what it would have stated – a statement which could have influenced the [arbitrator’s] decision – if it had not allegedly been denied due process*.”<sup>281</sup>

304. Leading German commentators adopt similar views, stating in relation to violation of the right to be heard that:

“the violation of the right to be heard *must have affected the arbitral award* in order to give grounds for its setting aside. For that reason, it is for example not sufficient that the arbitral tribunal did not hear a party on evidence, it did not rely on in its arbitral award, or that the arbitral award relies on several, yet each of them sufficient considerations, whereas only with respect to one of those the party was not properly heard. The concerned party *has to show substantiated doubts as to the fact that the arbitral award would have been the same* also if it had been sufficiently heard.”<sup>282</sup>

305. The German Supreme Court has long taken the same position, opining that:

“[t]he provision providing for the parties’ right to be heard is a procedural rule. Those have not been created for the sake of their own existence; it is rather that they only

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<sup>275</sup> *Halliburton Energy Servs., Inc., v. NL Indus.*, 553 F.Supp.2d 733, 783 (S.D. Tex. 2008) (requiring “*substantial injustice*”), **Exhibit-LE 27/6**; *Rintin Corp. v. Domar Ltd.*, 374 F.Supp.2d 1165, 1170 (S.D. Fla. 2005), *aff’d*, 476 F.3d 1254 (11th Cir. 2007) (applying “*stringent burden of proof*” to party’s required demonstration of “*substantial prejudice*”), **Exhibit-LE 28/1** (emphasis added); *Smith, Breslin & Assoc. v. Meridian Mortgage Corp.*, 1997 WL 158119, at \*6 (E.D. Pa. Apr. 7, 1997), *aff’d*, 135 F.3d 766 (3d Cir. 1997) (“Even where the arbitrator has failed to hear some relevant evidence, that failure will not warrant vacatur absent *substantial harm*.”), **Exhibit-LE 28/2** (emphasis added); *Sungard Energy Sys., Inc., v. Gas Transmission Nw. Corp.*, 551 F.Supp.2d 608, 613-614 (S.D. Tex. 2008) (“[M]ere disadvantage, without more, does not equate to prejudice.”), **Exhibit-LE 28/3**.

<sup>276</sup> *Smith, Breslin & Associates v. Meridian Mortg. Corp.*, 1997 WL 158119, at \*6 (E.D. Pa. Apr. 7, 1997), **Exhibit-LE 28/2**.

<sup>277</sup> *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 732 (N.D. Tex. 1997), **Exhibit-LE 28/4**.

<sup>278</sup> *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reins. Co.*, 868 F.2d 52, 57 (3d Cir. 1989), **Exhibit-LE 28/5**; *Bemis Co. v. Graphic Comm’n Union Local No. 735-S*, 2008 WL 4279881, at \*5 (M.D. Pa. 2008), **Exhibit-LE 28/6**; *M & A Elec. Power Coop. v. Local Union No. 702 IBEW*, 773 F.Supp. 1259, 1263 (E.D. Mo. 1991), *aff’d*, 977 F.App’x 1235 (8th Cir. 1992), **Exhibit-LE 28/7**.

<sup>279</sup> *Weinberg v. Silber*, 140 F.Supp.2d 712, 722 (N.D. Tex. 2001), *aff’d*, 57 F.App’x 211 (5th Cir. 2003), **Exhibit-LE 28/8**; *Mantle v. Upper Deck Co.*, 956 F.Supp. 719, 732 (N.D. Tex. 1997), **Exhibit-LE 28/4**.

<sup>280</sup> See above at paras. 298-310.

<sup>281</sup> *Judgment of 24 June 1999*, XXIX Y.B. Comm. Arb. 687, 695 (Oberlandesgericht Schleswig) (2004), **Exhibit-LE 28/9** (emphasis added).

<sup>282</sup> R. Kreindler, J. Schäfer & R. Wolff, *Schiedsgerichtsbarkeit Kompendium für die Praxis*, Chapter 13 ¶1106 (2006), **Exhibit-LE 28/10** (emphasis added); see also *Judgment of 3 April 1975*, MDR 1975, 940 (Hanseatisches Oberlandesgericht Hamburg) (holding that if it is clear that the arbitral decision could not have been different, had the irregularity in the procedure not occurred, it would seem to make no sense to refuse enforcement.), **Exhibit-LE 28/11**; *Judgment of 19 February 2004*, OLGR Celle 2004, 396 (Oberlandesgericht Celle) (2004) (“If one of the parties’ right to be heard is denied, *this only represents a ground for a setting aside under section 1059(2) lit.1 (b) of the [German] Code of Civil Procedure if the arbitral decision is founded on that error.*”), **Exhibit-LE 28/12**.

serve to the determination of the substantive law. For this reason, *in case of their violation, one must ask if this has, or at least could have resulted in an erroneous decision. If the question is negated, the violation is generally irrelevant.*<sup>283</sup>

306. French courts take a similar view, annulling awards only where the arbitrators' procedural violation actually caused harm by affecting the outcome of the decision.<sup>284</sup> Likewise, the Swiss Federal Tribunal has declared:

“[S]imple irregularities in the taking of evidence as such do not lead to a violation of the right to be heard. *The appellant has furthermore to establish that these irregularities had a real influence on the outcome of the proceedings, to its detriment.*”<sup>285</sup>

307. The GoS purports to pay lip service to the foregoing principle, acknowledging that a “breach of procedural conditions for a binding decision ... must be material, that is to say significant both in itself *and as to the result reached.*”<sup>286</sup> At the same time, however, the Government makes no effort to address what evidence the ABC Experts supposedly received that might have affected their decision or how a different procedure for taking that evidence would have affected the ABC Experts' decision. In addition, as discussed below, there is no basis whatsoever for any suggestion that the ABC Experts' purported procedural violations had the slightest impact on the ABC proceedings, much less the ABC Experts' decision itself; on the contrary, the purported violations manifestly did not have any such effect.<sup>287</sup>

d) The Government Ignores the Elevated Burden of Proof  
Applicable to Attempts to Invalidate Adjudicatory Decisions  
Based on Procedural Complaints

308. Fourth, it is also well-established that a party seeking to invalidate an arbitral award for procedural violations bears a heavy burden of proof. This elevated burden of proof is analogous to that applicable to an alleged excess of mandate (as discussed above).<sup>288</sup>

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<sup>283</sup> *Judgment of 8 October 1959*, BGHZ 31, 43, 46 *et seq.* (German Bundesgerichtshof) **Exhibit-LE 28/13** (emphasis added).

<sup>284</sup> See M. de Boissésou, *Le droit français de l'arbitrage national et international* ¶455 (1990) (“[O]nly serious [procedural] irregularities which truly cause harm to the party invoking them must be annulled. This is also the position adopted by the French Cour de Cassation in its judgment of 17 June 1981, in which the Court confirms the Court of Appeal’s decision to uphold an award ... because the — arbitral tribunal, in its decision, by no means relied on the procedure objected.”), **Exhibit-LE 28/14**.

<sup>285</sup> *Judgment of 9 June 1998*, 16 ASA Bull. 653, 658 (Swiss Federal Tribunal) (1998), **Exhibit-LE 28/15** (emphasis added); see also *Judgment of 6 September 1996*, 15 ASA Bull. 291, 309 (Swiss Federal Tribunal) (1998) (“The appellant cannot limit itself to allegations that he is the victim of a violation of the right to be heard; *he has to allege and prove in what respect this violation has led the arbitral tribunal to render an award* which is not only debatable, erroneous or even arbitrary but the operative part of which is contrary to public policy.”), **Exhibit-LE 28/16** (emphasis added); C. Müller, *International Arbitration* 161 (2004) (“With regard to the parties’ right to take position on the alleged decisive determinations ... Article 190 para. 2 lit. d, which says the same as the constitutional provision on this issue, give such a right to the parties *only if the said determinations are legally relevant, i.e. such as to have influence on the outcome of the decision* .... This prerequisite is not fulfilled when the alleged violation of the right to be heard concerns only one of the several reasons given for the attached decision and if the decision is based on one or several other alternative reasons which have not been validly challenged. In such a case, the rule has to apply, even in the context of a procedural denial of justice, that the motion for constitutional review does not give the possibility to raise complaints questioning the reasons of a decision which, with respect to its result, remains compatible with the Constitution and the law.”), **Exhibit-LE 28/17** (internal citations omitted).

<sup>286</sup> GoS Memorial, at para. 193 (emphasis added).

<sup>287</sup> See below at paras. 363-389, 408-418, 476-480.

<sup>288</sup> See above at paras. 137-146; SPLM/A Memorial, at paras. 746-770.

309. It has been noted that “*the burden of discharging the presumption resting on the defendant is a heavy one.*”<sup>289</sup> Similarly, the English House of Lords has noted in relation to Section 68 of the English Arbitration Act that “[t]he *burden is squarely on the applicant*, who invokes the *exceptional remedy* under section 68, to secure (if he can) findings of fact which establish the precondition of substantial injustice.”<sup>290</sup> Likewise, U.S. courts have reasoned, under the New York Convention, that the burden of proof applied to a challenge to an award on procedural grounds is a “*heavy one*”<sup>291</sup> and “*very great.*”<sup>292</sup>

310. The same is true in leading civil law jurisdictions. Italian, French, German, Spanish, Austrian, and Swiss courts have consistently held that a party asserting procedural objections bears a heavy burden of proving its allegations.<sup>293</sup> Courts have repeatedly emphasized that this burden of proof may never be reversed, notwithstanding the award debtor’s “considerable difficulty to supply evidence.”<sup>294</sup> Again, there can be no serious question but that, were its claims admissible at all (which they are not), it is the Government that would bear the full and very substantial burden of demonstrating the existence of a grave violation of a fundamental procedural requirement and that this violation caused it substantial prejudice.

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311. Against this background, the Government’s three procedural complaints are entirely without merit. Each ignores the terms of the parties’ agreements, the character of the ABC proceedings, the parties’ actions during and after those proceedings and the general principles that define adjudicatory bodies’ procedural discretion. Moreover, each complaint fails to show any prejudicial impact on either the course of the ABC proceedings or the ultimate decision by the ABC Experts. Quite apart from the very high standards of proof (discussed above), there is simply no merit to any of the Government’s procedural complaints; considered under those standards, the complaints are frivolous.

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<sup>289</sup> *Judgment of 7 July 1989, Sojuznefteexport (SNE) v. Joc Oil Ltd*, XV Y. B. Comm. Arb. 384, 397 (Bermuda Court of Appeal) (1990), **Exhibit-LE 28/18**; see also *Gater Assets Ltd v. Nak Naftogaz Ukrainiy* [2008] 1 C.L.C. 141, 153 (Q.B.) (noting the “heavy burden” placed on a party seeking to resist enforcement or challenge an award), **Exhibit-LE 28/19**.

<sup>290</sup> *Lesotho Highlands Development Authority v. Impreglia SpA* [2006] 1 AC 221, 238 (2006), **Exhibit-LE 14/1**.

<sup>291</sup> *Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005), **Exhibit-LE 28/20**.

<sup>292</sup> *Youngs v. Am. Nutrition*, 537 F.3d 1135, 1141 (10th Cir. 2008) **Exhibit-LE 13/2**; see also *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reins. Co.*, 868 F.2d 52, 57 (3d Cir. 1989) (noting that “[t]he burden of proof rested squarely on the shoulders of appellants to show that prejudicial ex parte communications took place” and refusing to vacate award where appellants “failed to carry their burden” of showing prejudice), **Exhibit-LE 28/5**.

<sup>293</sup> *Judgment of 20 January 1995, No. 637, Conceria G. De Maio & F. snc v. EMAG AG*, XXI Y.B. Comm. Arb. 603, 605 (Italian Corte Di Cassazione) (1996), **Exhibit-LE 28/21**; *Judgment of 21 February 1978*, X Y.B.

Comm. Arb. 418, 421 (Austrian Oberster Gerichtshof) (1985) (the lack of due process may not be considered by a court on its own motion but only at the request of a party against whom the award is invoked), **Exhibit-LE 28/22**; *Judgment of 24 March 1982, Cominco France SA v. Soquiber S L*, VIII Y.B. Comm. Arb. 408 (Spanish Tribunal Supremo) (1983) (burden of proof of the party against whom the award is rendered is clearly affirmed in the introductory sentence of Article V(1) of the Convention), **Exhibit-LE 28/23**; *Judgment of 24 June 1999*, XXIX Y.B. Comm. Arb. 687, 695 (Oberlandesgericht Schleswig) (2004) (confirming that the burden to prove an alleged lack of due process rests on the party invoking it), **Exhibit-LE 28/24**; Guinchard, *L’arbitrage et le respect du principe du contradictoire (à propos de quelques décisions rendues en 1996)*, 2 Rev. Arb. 185, 196 (1997) (“The French Cour de Cassation (civ. 2, 31 January 1996) reminds parties to arbitration that, if they seek annulment of the award for breach of due process, they must produce evidence ...”), **Exhibit-LE 28/25**;

*Judgment of 31 January 1996*, Jurisdata No. 1996-000445 (French Cour de Cassation) (“Annulment of an arbitral award for lack of due process involves producing evidence that the information used by the arbitrators was not subject to adversarial dispute.”), **Exhibit-LE 28/26**.

<sup>294</sup> *Judgment of 17 July 2003*, XXIX Y.B. Comm. Arb. 819, 831 (Court of Appeal of the Canton of Zurich) (2004), **Exhibit-LE 12/15**.

4. The Government's Complaints About the Khartoum Meetings Are Contrived and Frivolous

312. The Government's first complaint is that the "[ABC] Experts took evidence from Ngok Dinka informants, who must be considered Parties in interest, without procedural safeguards and without informing the adverse Party, the GoS."<sup>295</sup> The Government complains that the relevant meetings were not according to "the agreed work program,"<sup>296</sup> that the meetings were "secret,"<sup>297</sup> that the meetings "circumvented the agreed work program [and] deprived the GoS their right to a fair procedure,"<sup>298</sup> and that the meetings "breach[ed] the Procedural Rules."<sup>299</sup> The Government concludes that "[t]he fact that the ABC Experts unilaterally scheduled meetings and kept these secret from the Parties until the presentation of the ABC Report represents a clear departure from the Rules of Procedure, and indeed the purpose of the Abyei Protocol," constituting an excess of mandate.<sup>300</sup>

313. The Government's complaint about the ABC Experts' supposedly secret meetings with the Ngok Dinka in Khartoum is contrived and entirely without merit. That is true for multiple independent reasons, any one of which is sufficient for rejecting the complaint (even assuming, contrary to fact, that it could constitute an excess of mandate<sup>301</sup>).

a) The ABC Experts' Khartoum Meetings Were Fully Consistent With, and Did Not Violate, the Parties' Procedural Agreements

314. First, the Government fails to identify any provision of the parties' agreements or the Rules of Procedure that the Khartoum meetings supposedly violated. Nothing in any of those instruments provided that the ABC Experts were prohibited from meeting with any source of information without the presence of the parties or the entire ABC. Nor does the Government indicate that any such provision exists.

315. The parties' agreements regarding the ABC proceedings imposed no prohibition on meetings between the ABC Experts and additional members of the public. On the contrary, they expressly ensured that the ABC Experts would be able to have such meetings if they chose. The Government's discussion fails to mention the provision in Article 7 of the Rules of Procedure, which explicitly guarantees that "***Commission members should have free access to members of the public other than those in the official delegations at the locations to be visited.***"<sup>302</sup> The GoS's omission of Article 7 is striking – and also fatal to its argument that the ABC Experts committed some "deliberate circumvention" of the parties' agreed procedures by meeting members of the public.

316. It bears emphasis that Article 7 ensured that "Commission members" – and not just the entire Commission – would be guaranteed "free access" to members of the public. It also bears emphasis that, for such meetings with the public, Article 7 did not require notice to be given to the parties, the administration of an oath or anything of the like.

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<sup>295</sup> GoS Memorial, at para. 197.

<sup>296</sup> GoS Memorial, at para. 198.

<sup>297</sup> GoS Memorial, at para. 201.

<sup>298</sup> GoS Memorial, at para. 205.

<sup>299</sup> GoS Memorial, at para. 207.

<sup>300</sup> GoS Memorial, at para. 208.

<sup>301</sup> As discussed above, the Government's purported procedural complaints are not admissible as claims of an excess of mandate in these proceedings. *See above* at paras. 160-200.

<sup>302</sup> ABC RoP, Art. 7, **Appendix F to SPLM/A Memorial**.

317. The Government’s discussion of the Khartoum meetings similarly fails to refer to the parties’ express contemplation that the ABC Experts would conduct their own independent investigations, consulting “other relevant sources on the Sudan wherever they may be available, with a view to arriving at a decision ... based on *scientific analysis and research*,”<sup>303</sup> rather than being dependent on the parties to present testimony or information to them.

318. As discussed in detail above, this was a vital characteristic of the entire ABC process – distinguishing it from most international investment and commercial arbitration proceedings – that was specifically accepted and contemplated by the GoS and SPLM/A in this case.<sup>304</sup> Thus, it was in no way unusual that the ABC Experts should be free to gather relevant information by meeting with members of the public: this was no different from their authority to conduct independent archival research, without notice to or involvement of the parties, in various places around the world.<sup>305</sup>

319. The provisions of the parties’ agreements dealing with meetings and interviews imposed no prohibition on the ABC Experts’ authority to meet with third parties, of their own choosing, without the involvement of the parties. To the contrary, the parties’ agreements specifically recognized and guaranteed the ABC Experts’ freedom to meet with whatever members of the public they wished as part of their broader, and *sui generis*, investigative authority. In the circumstances, even assuming that everything else about the Government’s procedural complaint were true, its complaint concerning the Khartoum meetings is completely baseless.

320. The Government suggests only that the Khartoum meetings “deliberately circumvented the agreed work program.”<sup>306</sup> That pejorative characterization assumes, however, that the “agreed work program” was intended to be exclusive and to prohibit other meetings between the ABC Experts and members of the public (with such meeting therefore supposedly constituting “circumvention”). The Government’s only effort to sustain such an interpretation of the work program rests solely on the alleged “unusually detailed and specific” character of the work program, apparently suggesting that the program was exhaustive and, therefore, any other contact between the ABC Experts and third parties was impliedly excluded.<sup>307</sup>

321. That contention wholly ignores the terms of the parties’ procedural agreements and the Rules of Procedure, which both granted the ABC Experts broad procedural discretion and accorded them investigatory authority. That alone is a complete answer to the suggestion that the Program of work was somehow “circumvented” by the Khartoum meetings.

322. Moreover, as discussed above, the Program of work was *not* meant to be an exclusive or detailed procedural regime for the ABC Experts.<sup>308</sup> On the contrary, it was a skeletal and

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<sup>303</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial** (emphasis added).

<sup>304</sup> See above at paras. 245-256. As noted above, the Rules of Procedure specifically acknowledged the ABC Experts’ independent role in gathering evidence without involvement of the parties: “*The experts will determine what additional documentation and/or archival materials will need to be consulted*” and “[T]he experts will examine and evaluate all the material *they have gathered* and will prepare the final report.” ABC RoP, Arts. 11, 13, **Appendix F to SPLM/A Memorial**.

<sup>305</sup> ABC ToR, Art. 3.4 (“The *experts shall consult the British [A]rchives and other relevant sources on the Sudan wherever they may be available*, with a view to arriving at a decision that shall be *based on research and scientific analysis*.”), **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>306</sup> GoS Memorial, at paras. 205, 207.

<sup>307</sup> GoS Memorial, at para. 199.

<sup>308</sup> See above at paras. 257-265.



incomplete logistical schedule for a series of visits to the Abyei Area, which was in fact frequently revised.<sup>309</sup> The Government's implied suggestion that this skeletal logistical outline, for one limited aspect of the ABC Experts' work, was meant rigidly and exclusively to prescribe the full extent of the ABC Experts' investigative authority is simply not sustainable.

323. The Government also suggests, without squarely arguing the point, that the ABC Experts were required to discuss their desire to meet with members of the public before doing so.<sup>310</sup> Nothing would have prohibited such an approach, but equally nothing required it.

324. The ABC Experts were not required, in the investigations they pursued, to consult with the parties or obtain their permission to investigate other information sources. They were not required to discuss which members of the public they would meet with, what documents they would inspect or what other forms of "scientific analysis and research" they would conduct. To the contrary, the entire premise of the ABC Experts' independent investigative authority was that it was independent of, and therefore would **NOT** involve, the parties.

325. The Government also ignores the fact that the Khartoum meetings were well within the ABC Experts' general procedural and fact-finding discretion. As noted above, Article 4 of the Abyei Annex provides that "[t]he experts shall also determine the rules of procedure of the ABC."<sup>311</sup> Even if the Rules of Procedure had not left the ABC Experts free to meet with members of the public – as they expressly did – the Experts already had been granted the authority to make new procedural determinations that would have catered for such meetings.

326. That procedural authority is entirely consistent with the broad procedural discretion of arbitral tribunals, even absent specific, express authority to that effect. As discussed above,<sup>312</sup> provisions conferring procedural autonomy on the tribunal have been noted as "declaratory of the inherent power of arbitral tribunals to formulate their own rules of procedure, **even in the absence of any express authorization in the compromis**. The existence of such a power is recognized in prior codes of arbitral procedure and by jurists."<sup>313</sup>

327. Given the ABC Experts' broad procedural authority – both express and implied – they were entirely free to conduct additional fact-finding during their investigations. Nothing in the parties' agreements or the Rules of Procedure forbade the ABC Experts from making such procedural determinations. To the contrary, the parties expressly vested the ABC Experts with broad procedural and fact finding authority that readily accommodated such additions.

328. Equally, the parties' agreements also recognized the inevitable public and political component of the ABC process which they sought to address (hence, the public meetings and explanations of the ABC process to the inhabitants of the Abyei Area). The ABC Experts' efforts to ensure that all potentially interested public constituencies (including the Twic

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<sup>309</sup> See above at paras. 261-262.

<sup>310</sup> GoS Memorial, at para. 201.

<sup>311</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**.

<sup>312</sup> See above at paras. 270-284.

<sup>313</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, at p. 55, available at [www.un.org](http://www.un.org), **Exhibit-LE 25/7** (emphasis added).

Dinka and Ngok Dinka internally displaced persons in Khartoum) felt that they had been listened to was perfectly consistent with this purpose and with the parties' agreements.<sup>314</sup>

329. This is a complete and independently sufficient answer to the Government's complaint about the Khartoum meetings. Even if the Khartoum meetings occurred precisely in the manner described by the Government, which (as detailed below) is denied, nothing in the parties' procedural agreements forbade such meetings. On the contrary, the parties' agreements specifically authorized the ABC Experts to have meetings of precisely this nature, if the Experts considered that such meetings would assist them in work. In these circumstances, there is no basis whatsoever for the Government's complaint.

b) The ABC Experts' Khartoum Meetings Were Not A Serious Departure From A Fundamental Rule of Procedure

330. Second, even if one were to assume, contrary to fact, that the events described in the Government's Memorial amounted to some sort of violation of applicable procedural standards, they clearly do not remotely approach the grounds that would be required for disregarding the ABC Report. The Government's own case is that only a "*serious departure from a fundamental rule of procedure*" would constitute grounds for invalidating the ABC Report.<sup>315</sup> As discussed above, general principles of law impose an even more demanding set of requirements on any effort to disturb the ABC Report on procedural grounds.<sup>316</sup> At the same time, as also discussed above, general principles of law also accord very wide deference to the procedural decisions of an adjudicatory body such as the ABC Experts.<sup>317</sup>

331. Despite these requirements, and its own concessions, the Government's Memorial abandons its previous standard (requiring a "serious departure from a fundamental rule") and instead characterizes the ABC Experts' Khartoum meetings as "irregular procedures in breach of due process" and a "clear departure from the Rules of Procedure."<sup>318</sup> The reason for the Government's rhetorical shift is obvious: even if one assumed, for the sake of argument, that the Rules of Procedure impliedly did not permit meetings between the ABC Experts and third parties absent notice to the parties, the Khartoum meetings could not even remotely be regarded as a serious departure from a fundamental rule of procedure.

332. Any breach of the Rules of Procedure would have to be considered in the context of the ABC Experts' broad, independent investigative authority, the ABC Experts' wide procedural discretion, the deference to be afforded to the ABC Experts' actions, and the deliberately informal and non-technical nature of the ABC proceedings. Any such breach would also need to be considered in the context of the ABC Experts' unchallenged impartiality and the fact that Khartoum meetings complained of were held outside the presence of either party's Commission appointees. Equally, any breach would need to be considered in light of the ABC Experts' obvious view that there was nothing in the slightest bit objectionable about the Khartoum meetings, which were described in detail in the ABC Report.

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<sup>314</sup> Indeed, the Khartoum meetings were at least in part organized in an effort to accommodate members of the public who should have taken part in the meetings held in Abyei, but because they were involved in a car accident. See Second Witness Statement of Minister Deng Alor Kuol, at p. 3, ¶10.

<sup>315</sup> GoS Memorial, at p. 63, Heading (iv), at paras. 177, 179, 186. That standard is developed in Chapter 4 of the Government's Memorial, at paras. 177-186.

<sup>316</sup> See above at paras. 298-310.

<sup>317</sup> See above at paras. 285-297.

<sup>318</sup> GoS Memorial, at p. 68, Heading (ii), and at para. 208.

333. In the circumstances, it is impossible to regard the interviewing of a limited number of additional witnesses, without the presence of the parties or the other ABC members, as a “*serious departure*” from a “*fundamental rule of procedure*.” To the contrary, any violation would have been an unintentional omission, at most inconsistent with implied (not express) provisions of the ABC Experts’ own procedural rules (which they would have been free to alter or amend). Any such violation in relation to the Khartoum meetings would also have been at most a matter of form or timing, since the ABC Experts were indisputably free to meet with whomever they wished in the Abyei Area itself, both as part of their general investigative authority and as specifically guaranteed by the Rules of Procedure.

334. Moreover, as discussed below, any alleged procedural violation by the ABC Experts in relation to the Khartoum meetings would have involved only cumulative testimony that had no material effect on the ABC Experts’ analysis and that the Government itself considers (in any event) to be completely irrelevant. In these circumstances, it is unsustainable to claim that the Khartoum meetings amount to the sort of grave violation of a fundamental procedural guarantee resulting in serious prejudice that could justify invalidating an adjudicative decision.

c) The GoS’s Complaints About the ABC Experts’ Khartoum Meetings Ignore the Parties’ Specific Discussions of the Subject

335. Third, the Government’s complaints about the Khartoum meetings lack any factual basis. In particular, the GoS’s Memorial ignores the fact that the ABC Experts discussed both the general subject of interviewing third parties and the specific subject of the Khartoum interviews with the parties and received no objections. These discussions are fatal to the Government’s claims, even apart from the ABC Experts’ broad procedural and investigative authority.

336. The Government asserts in its Memorial that the Khartoum meetings were held “without informing the GoS,”<sup>319</sup> that “the GoS was neither invited nor even informed of these meetings *beforehand*,”<sup>320</sup> and that “*no information of these meetings* were provided to the GoS until the final presentation of the ABC Experts’ Report.”<sup>321</sup> In what can only be regarded as a tactical decision, and an admission of grave vulnerability, no witness evidence is submitted in support of these allegations. That is because they are false.

337. The ABC Experts discussed the general subject of interviewing third parties with the GoS and SPLM/A delegations and there was no objection by either party. During the parties’ discussions in connection with their initial presentations to the ABC, an issue arose as to the ABC Experts’ research and analysis. Deng Alor (for the SPLM/A) made it clear that the SPLM/A accepted that the ABC Experts’ decision was to be based on scientific research, including such discussions with third parties as the Experts considered useful:

“Yes it is clear. Thank you , Mr Ambassador...[t]he mandate given to the experts is very clear. I mean there is nowhere in the agreement, or in the mandate, where there are conditions at all. There are no conditions given to the experts in coming up with the final report... Of course, we all agree that the whole thing should be based on

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<sup>319</sup> GoS Memorial, at paras. 198, 201.

<sup>320</sup> GoS Memorial, at para. 79 (emphasis added).

<sup>321</sup> GoS Memorial, at para. 205 (emphasis added).

scientific research... *It is research whether you talk to people, or whether you consult references. It is all research.*<sup>322</sup>

338. Dr. Johnson, one of the ABC Experts, then pointed out that:

*“I do not want this to be a part of a misunderstanding between any of us especially when we are in the field. We have rules of procedure for the Abyei Boundaries Commission. My understanding of the section on the terms of reference that you just showed us, suggests to me that we are expected to take testimonies from people in the area. And the rules of procedure that we all agreed on yesterday specifically state that the experts may wish to call people to give testimony. So I would like to just clarify this. If as an expert on this Commission, I am going to be restricted in the sources that I seek or in carrying out my duties, I will have to enter a very strong written protest in the final report explaining why, I think, this undermines the credibility of the report. I do not wish to do that. I wish all of us to have a perfect understanding of what it is that the experts are here to do and how they expect to do their job. I do not want to create a conflict out of this. I just want to alert you that I feel that I cannot accept the restrictions that you have been putting on me. This may not be what you were intending to do; and if that is the case, I am glad to have that clarified.”*<sup>323</sup>

339. The ABC Chairman, Ambassador Petterson, concurred with Dr. Johnson and added:

*“I have always assumed that scientific data done on a scientific basis includes oral testimony. The whole gamut of coming to a scientific conclusion, I should think, would include oral testimony as well as maps and documents. Oral testimony is part of a picture of coming up with a scientifically based conclusion. I hope that that will be the case. Otherwise, there will not be much point in talking to the people in different areas. I do not think that this is the intention.”*<sup>324</sup>

340. Ambassador Dirdeiry then replied, confirming that the ABC Experts had broad discretion in deciding what sources to consult when conducting their research:

*“the mandate, according to what we have read here, is that, ‘This committee shall arrive at its conclusion through analysis and scientific research and this shall be by consulting the British Archives and any other archives wherever they are.’ And any other sources wherever they are. ... I do not know from where you have got that impression that I am saying that we are not going to consult the people; we are not going to seek information from the people. I did not say so. In fact, what I have said today and said yesterday - and what we have signed in the protocol of the modalities and in the Terms of Reference - is that we are going to consult the archives, the sources, to visit the people and to do all those things. What I said here and may be this is where the Doctor got me wrong - that I do not think that there is any person on earth right now who is going to tell us reliably about what had taken place in 1905. You can quote me on that. I have just said that and this is really my belief. And I am*

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<sup>322</sup> Deng Alor, Transcript of GoS Preliminary Presentation, “Oral Evidence Submitted to Abyei Boundaries Commission, 14 to 21 April 2005,” at p. 25, **Exhibit-FE 14/5a** (emphasis added).

<sup>323</sup> Dr. Johnson, Transcript of GoS Preliminary Presentation, “Oral Evidence Submitted to the Abyei Boundaries Commission, 14 to 21 April 2005,” at pp. 34 to 35, **Exhibit-FE 14/5a** (emphasis added).

<sup>324</sup> Ambassador Petterson, Transcript of GoS Preliminary Presentation, “Oral Evidence Submitted to the Abyei Boundaries Commission, 14 to 21 April 2005,” at p. 35, **Exhibit-FE 14/5a** (emphasis added).

quite sure when we come back from there, we will not have had anybody who can tell us about that. But you are the experts; and you are the scientist. And you can tell that, even though nobody had witnessed those events according to the tradition here in Africa and *according to the tradition of the collection of information through oral testimony, one can find something which is very important and tangible and which can assist. I am not saying that you cannot make use of that.*<sup>325</sup>

These comments about the ABC Experts' investigative authority leave no serious doubt as to their freedom to speak with third party witnesses.

341. To the same effect, as discussed below, the Government was also aware of the ABC Experts' independent meetings with Mr. and Mrs. Tibbs and Professor Cunnison; the ABC Experts specifically referred to such meetings, without objection from either the Government or the SPLM/A.<sup>326</sup> Once more, that confirms the parties' mutual expectation that the ABC Experts would conduct exactly such meetings and the Government's lack of objection to such meetings. Even if nothing else on the subject had been said, and even if the applicable procedural rules had not permitted the ABC Experts to meet with third parties (as they did), this alone would have permitted the ABC Experts to proceed with the Khartoum meetings and other contacts with witnesses.

342. Second, and in addition to the general discussions described above, the GoS was also specifically informed – both in advance and afterwards – of the ABC Experts' meetings in Khartoum with Ngok Dinka and Twic Dinka and raised no objections. That was explained in the witness testimony of Minister Deng Alor and James Lual Deng (attached to the SPLM/A's Memorial) as follows:

*“Later in April and in early May 2005, the ABC Experts did notify the parties that they were meeting with some additional individuals in Khartoum. Neither party objected or sent its ABC representatives to these meetings. Among others, the ABC Experts met with Mr. Justin Deng, who had been the Assistant Commissioner of Abyei during the time of Nimeiri, and therefore was important to the ABC's fact finding mission. The Khartoum interviews were continued on 6 and 8 May 2005 when further interviews were conducted. Full transcripts of these meetings were produced with the ABC Report.”*<sup>327</sup>

*“Following the last meeting in Muglad on 20 April 2005, the entire ABC flew back to Khartoum together on 20 April 2005. In Khartoum, the ABC Experts elected to hear further testimony from the representatives of the Ngok and Twic Dinka (and Misseriya) in Khartoum on 21 April 2005, 6 and 8 May 2005. **The ABC Experts made the other ABC members aware that they were conducting these interviews. Both parties were happy for the ABC Experts to carry out these additional interviews, and no-one from the GoS or the SPLM/A objected.**”*<sup>328</sup>

343. That testimony is confirmed by the supplemental witness statements of James Lual Deng and Minister Deng Alor, which are attached to this Memorial. These witness statements describe the circumstances in which the ABC Experts informed the other members

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<sup>325</sup> Ambassador Dirdeiry, Transcript of GoS Preliminary Presentation, “Oral Evidence Submitted to the Abyei Boundaries Commission, 14 to 21 April 2005,” at pp. 35 to 36, **Exhibit-FE 14/5a** (emphasis added).

<sup>326</sup> See below paras. 397-401. See also ABC Report, Part II, App. 4, at p. 46, **Exhibit-FE 15/1**.

<sup>327</sup> Witness Statement of Minister Deng Alor Kuol, at p. 22, ¶136 (emphasis added).

<sup>328</sup> Witness Statement of James Lual Deng, at p. 14, ¶79 (emphasis added).

of the ABC of their intentions to conduct further meetings in Khartoum, and the absence of any objection (from either party) to such meetings.

344. Minister Deng Alor, in his Second Witness Statement, reiterates and expands on the evidence he has already given in his First Witness Statement:

“[I]n response, Chairman Petterson assured Zachariah Atem and the other ABC members that anyone who wished to speak to the ABC Experts would be given the opportunity to do so, and that the Experts were willing to speak with anyone, whether that was in Abyei town, Muglad or Khartoum. There was no objection to this by anyone from the GoS or the SPLM/A.”<sup>329</sup>

“I also recall that later that evening over dinner with the other ABC members, Chairman Petterson again noted that the Experts intended to meet with anyone who had information for the ABC who wished to speak with them, whether that was in the Abyei field area, or when they returned to Khartoum. Again there was no objection to this by the GoS.”<sup>330</sup>

“As far as I was concerned, the ABC Experts had made it clear in Abyei town on 14 April 2005 that they intended to conduct further meetings in Khartoum on their return from the Abyei area. Given that there were many Ngok, Twic and Misseriya representatives in Khartoum, it was obvious to me and the other ABC members that the Experts would be speaking with additional people on their return to Khartoum.”<sup>331</sup>

345. James Lual Deng, in his second witness statement, similarly says:

“During the first ABC meeting in Abyei town, I remember Chairman Petterson announcing at the meeting that the ABC Experts would be prepared to meet with anyone who wanted to speak with them, either in Abyei town, or Muglad or when the Experts returned to Khartoum.”<sup>332</sup>

“I also recall that on at least two occasions during the Abyei field visits, once in Abyei town over dinner and once in Muglad over dinner, Chairman Petterson told the other members of the ABC that the Experts would like to interview some additional people in Khartoum who had been unable to travel to Abyei. Chairman Petterson noted that the Experts would like to meet with Ngok, Twic and Misseriya representatives. We on the SPLM/A side had absolutely no problem with the Experts conducting further interviews in Khartoum, and we made it clear to the Experts that we were happy for them to carry out any additional meetings that they thought necessary. The GoS members did not object to this either.”<sup>333</sup>

346. Moreover, as is equally clear from the witness testimony and the recordings of the GoS representatives during the ABC Proceedings, transcripts of the Khartoum interviews were provided to the parties at the time of the final presentations in mid-June 2005.<sup>334</sup> That is

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<sup>329</sup> Second Witness Statement of Minister Deng Alor Kuol, at pp. 2-3, ¶8.

<sup>330</sup> Second Witness Statement of Minister Deng Alor Kuol, at p. 3, ¶9.

<sup>331</sup> Second Witness Statement of Minister Deng Alor Kuol, at p. 3, ¶11.

<sup>332</sup> Second Witness Statement of James Lual Deng, at p. 4 ¶19.

<sup>333</sup> Second Witness Statement of James Lual Deng, at p. 4 ¶¶20-21.

<sup>334</sup> Second Witness Statement of Minister Deng Alor Kuol, at p. 9, ¶¶45-46; *see also* ABC Experts' Notes entitled "Field Interviews, Khartoum Hilton," dated 16 June 2005, **Exhibit-FE 19/14**.

confirmed, with entirely satisfactory clarity, by the GoS's own submissions made by Ambassador Dirdeiry to the ABC on 16 or 17 June:

“During our stay in Abyei *and maybe also DURING YOUR STAY IN KHARTOUM*, we had an opportunity to know in fact *what the people had said about our efforts, WHAT CONTRIBUTION THEY CAN GIVE TO US* and *we are also very much grateful that you have done all of that important job of trying to really record whatever was said and even now to distribute to us all of that material in a very good format and readable format which we can all understand*. That exercise was very important from us all and we thought it was really a success for this Abyei boundaries commission to complete that job of trying to visit the area and *again to visit Khartoum within this period* which is very important to Sudan and which is still the inception of the peace.”<sup>335</sup>

Ambassador Dirdeiry's expression of appreciation to the ABC Experts for the work that they had done during “*our stay in Abyei*” and during “*your stay in Khartoum*,” and for the ABC Experts' “trying to really report whatever was said” by “the people” leaves little doubt but that he was well aware at the time of the ABC Experts' meetings in Khartoum.

347. In contrast to the Government's current complaints that “[i]nstead of returning to Nairobi [according to the agreed work program], the Experts arranged three unscheduled meetings with Ngok Dinka informants at the Hilton Hotel, Khartoum, without informing the GoS,”<sup>336</sup> Ambassador Dirdeiry expressed no objection to the ABC Experts' return to Khartoum or to their Khartoum meetings. To the contrary, Ambassador Dirdeiry said that the GoS was “very ... grateful” for the ABC Experts' efforts (including in providing transcripts of the interviews) and considered their “visit [to] Khartoum during this period” to be “very important to Sudan.”<sup>337</sup>

348. Nor is it in the slightest surprising that the Government would be fully aware of the ABC Experts' return to Khartoum and their meetings there. Apart from everything else, the ABC Experts' travel to Khartoum required government visas, immigration clearances and other approvals and arrangements; it is clear that the GoS had a significant role in organizing these approvals and the logistics of the ABC Experts' activities for the duration of their stay in Khartoum.<sup>338</sup>

349. It is noteworthy that it was originally contemplated that the “ABC experts [would] return to Nairobi and the party members [would] return to Nairobi or their respective

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<sup>335</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 1, at p. 1, **Exhibit-FE 19/15** (emphasis added).

<sup>336</sup> GoS Memorial, at para. 198.

<sup>337</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 1, at p. 1, **Exhibit-FE 19/15**.

<sup>338</sup> ABC Report, Part I, App. B, at pp. 18, 30, **Appendix B to SPLM/A Memorial**; see also Letter from Idris M. Abdul Elgadir, GoS State Minister of Peace Affairs, to General Sumbeiywo, dated 30 March 2005 (“the GoS had arranged for the experts and the other ABC members visit to Abyei and Bahr-el-Arabs. Planes and helicopters were [al]ready chartered for the internal traveling and vehicles prepared”), **Exhibit-FE 19/10** and Letter from Ambassador Dirdeiry to Joseph McCarten dated 11 April 2005, further illustrating GoS's involvement in organizing the logistics of travel, **Exhibit-FE 14/3**; Ambassador Dirdeiry, transcript of SPLM/A Preliminary Presentation Oral Evidence Submitted to the Abyei Boundaries Commission 14 to 21 April 2005, at p. 15 (“The Embassy is ready to provide transportation. The time of departure, I think, should not be later than 3 o'clock in the afternoon. Passports will be prepared during the course of the day... *Those who do not hold Sudanese passports, we shall provide them with the necessary documents*”), **Exhibit-FE 14/5a** (emphasis added); see also Second Witness Statement of Minister Deng Alor Kuol, at p. 4 ¶¶17-18 (“Also, whenever I was in Khartoum with the ABC Experts for the presentation to the Presidency in July 2005, the GoS provided the ABC Experts with their own security detail to ensure their safety”).

locations” immediately after the visit to the Abyei area.<sup>339</sup> Notably, however, the GoS was aware from at least 11 April 2005 (if not earlier) that both the ABC Experts and the party-appointed members of the Commission would be in fact returning to Khartoum on 20 April 2005.<sup>340</sup>

350. Apart from everything else, it is also highly unlikely that the ABC Experts’ meetings with various Ngok Dinka and Twic Dinka, on the subject of the Abyei Area, at the Hilton Hotel would have been the kind of “secret” that the Government now pretends.<sup>341</sup> Furthermore, as discussed below, there can also be no doubt but that the Government was well aware of the ABC Experts’ meetings in particular with the Twic Dinka on 8 May 2005 which were organized and attended by a prominent supporter and adviser of the Government.<sup>342</sup>

351. Given this, the factual premises for the Government’s purported procedural complaint are entirely lacking. Far from some unplanned visit to Khartoum to conduct “secret” meetings with interested parties, the ABC Experts returned to Khartoum with the full blessing and assistance of the Government where it held meetings that the Government not only was informed of, but specifically thanked the ABC Experts for conducting because they were important to Sudan.

352. The actual sequence of events described above would provide an independent and sufficient basis for rejecting the Government’s procedural objections even if the Rules of Procedure had prohibited the Khartoum interviews (which they do not). In circumstances where the Government was aware of and specifically thanked the ABC Experts for having continued their investigations in Khartoum, there is simply no evidentiary basis for claiming that the Khartoum meetings were a procedural violation.

d) The GoS Waived Any Objection to the ABC Experts’ Khartoum Meetings

353. Fourth, even if one assumed, contrary to fact, that the ABC Experts’ Khartoum meetings had in some way violated the Rules of Procedure, the Government waived any objection to those meetings. As noted above, the Government was well aware of the Khartoum meetings and did not object to them until it submitted its Memorial in these proceedings in December 2008. Prior to that, as noted above, the Government confirmed its knowledge of and affirmatively approved the Khartoum meetings.

354. It is well-settled under all developed international and national legal systems that procedural objections must be raised during the course of arbitral proceedings, or will be waived. This general principle (which applies even where not expressly provided for) is repeatedly affirmed by commentators:

*“It is essential that there is a duty on the parties to raise an objection promptly. This implies that objection should be raised during the arbitration first if the relevant facts are known to the party objecting. Otherwise the party may be estopped from*

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<sup>339</sup> ABC Report, Part II, App. 1, at p. 16, **Exhibit-FE 15/1**.

<sup>340</sup> Letter from Ambassador Dirdeiry to Joseph McCarten, dated 11 April 2005, **Exhibit-FE 14/3**.

<sup>341</sup> Second Witness Statement of Paramount Chief Kuol Deng Kuol Arop, at pp. 2-3, ¶¶4-12.

<sup>342</sup> See below at paras. 368-371.



raising the objection before the enforcing court as this undermines the purpose of the New York Convention.”<sup>343</sup>

“Not all departures from the terms of the *compromis* will lead to nullity. It is a matter of the substantial character of the departure, the prejudice involved, the importance of the departure from the standpoint of the practice of tribunals, **and whether the injured party has by failure to object and subsequent participation in the conduct of the arbitration waived its right to contest validity.**”<sup>344</sup>

355. Also in the context of ICSID annulment proceedings, as the GoS’s own authorities note:

**“A party that is aware of a violation of proper procedure must react immediately by stating its objection and by demanding compliance. ... a party that has failed to protest against a perceived procedural irregularity before the tribunal, is precluded from claiming that this irregularity constituted a serious departure from a fundamental rule of procedure for purposes of annulment.** To hold otherwise would mean that a party could leave a procedural irregularity unopposed to keep it in store as ammunition against a possible unfavourable award in annulment proceedings.”<sup>345</sup>

356. In another of the Government’s authorities, an ICSID *ad hoc* Committee similarly affirmed that, pursuant to the ICSID Rules, the Claimant had:

“not established that it made a timely protest against the serious procedural irregularities it now complains of. ... Rule 26 [now Rule 27] of the ICSID Rules of Procedure for Arbitration proceedings would therefore rule out a good part of its complaints.”<sup>346</sup>

357. This principle constitutes one of the most basic general principles of procedural law (which the Government’s own authorities expressly recognize). Leading European commentators explain its importance thus:

“If [the waiver principle] did not exist, a party witnessing a violation of a procedural rule could remain idle and wait for the resolution of the dispute, i.e. the arbitral award: if it turned out that the award was in its favour, the party could accept it, and if the award was in favour of the opponent, the aggrieved party could dig out the procedural error in order to challenge the award and have it set aside. ... **To prevent such opportunistic behaviour, provisions about implied waivers of the right to object are a staple of modern codes of civil procedure.**”<sup>347</sup>

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<sup>343</sup> J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶26-89 (2003), **Exhibit-LE 23/17** (emphasis added); see also A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* ¶10-44 (2004), **Exhibit-LE 23/15**; A. van den Berg, *The New York Arbitration Convention of 1958* 182-185 (1981), **Exhibit-LE 24/13**.

<sup>344</sup> K. Carlston, *The Process of International Arbitration* 85 (1946, reprint 1972), **Exhibit-LE 27/24**.

<sup>345</sup> C. Schreuer, *The ICSID Convention: A Commentary* Art. 52, ¶262 (2001), **Exhibit-LE 27/17** (emphasis added).

<sup>346</sup> Judgment of 3 May 1985 of the Ad Hoc Committee On the Application for Annulment Submitted by *Klöckner* Against the Arbitral Award Rendered on 21 October 1983 in the *Klöckner v. Cameroon Case*, (ARB/81/2) ICSID Review – Foreign Investment Law Journal, 90, 117 (1986), **Exhibit-LE 23/7**.

<sup>347</sup> Wagner, in K.-H. Böckstiegel, S. Kröll & P. Nacimiento (eds.), *Arbitration in Germany* ZPO §1027 ¶1 (2007), **Exhibit-LE 29/1** (emphasis added).

358. National courts have come to the same conclusion pursuant to the New York Convention. In one of the rare cases in which Article V(1)(d) has been invoked, the Supreme Court of Hong Kong found the applicant's procedural objections to have been waived. The judge emphasized that:

“If the doctrine of estoppel can apply to arguments over the written form of the arbitration agreement under Article II(2), then I fail to see why it cannot also apply to the grounds of opposition set out in Article V. ***It strikes me as quite unfair for a party to appreciate that there might be something wrong with the composition of the tribunal yet not make any formal submission whatsoever to the tribunal about its own jurisdiction, or to the arbitration commission which constituted the tribunal and then to proceed to fight the case on the merits and then 2 years after the award attempt to nullify the whole proceedings*** on the grounds that the arbitrators were chosen from the wrong CIETAC list.”<sup>348</sup>

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<sup>348</sup> *Judgment of 13 July 1994, China Nanhai Oil Joint Service Cpn v. Gee Tai Holdings Co. Ltd.*, 19 (Hong Kong 1994), available at [www.hklii.com](http://www.hklii.com), **Exhibit-LE 29/2** (emphasis added).

359. Most national law regimes approach the issue the same way.<sup>349</sup> The Swiss Federal Court, for example, has held that:

“A party complaining of a violation of the right to be heard, or of another procedural error, *has to undertake all reasonable steps in order to be treated equally and to be heard, as soon as it knows of the procedural flaw or could have known it, it had taken reasonable care.* It is contrary to the principle of good faith to claim a procedural error only in the context of the setting aside proceedings, even though the

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<sup>349</sup> English Arbitration Act, 1996, §73(1) (“If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection ... (b) that the proceedings have been improperly conducted”), **Exhibit-LE 24/1**; *Rustal Trading Ltd. v. Gill & Duffus S.A.* [2000] 1 Lloyd’s Rep. 14, 19 (Comm.) (Q.B.) (2000) (“*The effect of this section is that a party to an arbitration must act promptly if he considers that there are grounds on which he could challenge the effectiveness of the proceedings.* If he fails to do so and continues to take part in the proceedings, he will be precluded from making a challenge at a later date.”), **Exhibit-LE 29/3** (emphasis added); *Margulead Ltd. v. Exide Technologies* [2005] 1 Lloyd’s Rep. 324, 330 (Comm.) (Q.B.) (“That clearly involves raising an objection immediately following the arbitrator’s procedural ruling. *In a case where there is knowledge or reasonable means of knowledge of the grounds for objection, the point must be raised at the hearing.*”), **Exhibit-LE 29/4** (emphasis added); Austrian Code of Civil Procedure, Art. 579 (“Where the arbitral tribunal has not complied with a procedural provision of this Chapter from which the parties may derogate, or with an agreed procedural requirement of the arbitral proceedings, *a party shall be deemed to have waived his right to object if he does not object without undue delay* after being informed, or within the provided time limit.”), **Exhibit-LE 26/4** (emphasis added); Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, Vol. 4 Part 2, §579 ¶2 (2d ed. 2007) (“The provision [of §579] concerns one of the several obligations to object within Section IV of the Code of Civil Procedure on arbitral procedures. It is a manifestation of the principle of good faith and the prohibition of an abuse of law (estoppel) ... Because an objection is excluded at a later stage of the proceedings, the provision also serves to support the finality of arbitral decisions.”), **Exhibit-LE 23/19**; *Judgment of 7 September 1993*, DFT 119 II 386, 388 (Swiss Federal Tribunal) (“A party which considers that its right to be heard has been violated, or that another procedural error has been made, *must complain thereof at the outset of the arbitral proceedings.* If it only complains after an award has been issued which is not in its favour, [the party] violates the principle of good faith.”), **Exhibit-LE 29/5** (emphasis added); *Judgment of 19 December 1990*, DFT 116 II 639, 644 (Swiss Federal Tribunal) (“A party considering that its right to be heard is violated or that another procedural error has occurred, *must complain about this immediately.*”), **Exhibit-LE 29/6**; *Judgment of 10 September 2001*, 4P.72/2001/rnd, cons. 4.c (Swiss Federal Tribunal), **Exhibit-LE 29/7**; *Goff v. Dakota, Minn. & E.R.R. Corp.*, 276 F.3d 992, 998 (8th Cir. 2002) (quoting *Brotherhood of Locomotive Eng’r Int’l Union v. Union Pacific R. Co.*, 134 F.3d 1325, 1331 (8th Cir. 1998)) (“The parties to an arbitration may waive procedural defects by failing to bring such issues to the arbitrator’s attention in time to cure the defects.”), **Exhibit-LE 29/8**; *Marino v. Writers Guild of America, East, Inc.*, 992 F.2d 1480, 1484 (9th Cir. 1993) (“[I]t is well settled that a party may not sit idle through an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse.”), **Exhibit-LE 29/9**; *United Food & Commercial Workers v. Marval Poultry Co.*, 876 F.2d 346, 352 (4th Cir. 1989) (“[A] party to arbitration cannot ‘voluntarily engage in the arbitration of the issues submitted to the arbitrator and then attack the award on grounds not raised before the arbitrator.’”), **Exhibit-LE 29/10** (internal citations omitted); *Shenzhen Nan Da Indus. Trade United Co. v. FM Int’l Ltd*, XVIII Y.B. Comm. Arb. 377, 381 (H.K. High Court S.Ct. 1991) (1993) (party challenging award “took no objection” to use of new institutional rules), **Exhibit-LE 14/12**; *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd* FCV No. 10 of 1998, ¶104 (Hong Kong of Appeal) (1998) available at [www.hklii.org](http://www.hklii.org) (waiver based on fact that party “simply proceeded with the arbitration as if nothing untoward had happened”), **Exhibit-LE 29/11**; *Judgment of 28 February 2008*, RG n° 2007/4403 p. 4 of 5 (Paris Cour d’appel) (“[A]ccording to the rule of estoppel, the claimant, not having complained to the arbitral tribunal about a breach of the adversarial principle, cannot invoke such ground during the annulment proceedings.”), **Exhibit-LE 29/12**; Gaillard, *La Jurisprudence De La Cour De Cassation En Matière D’Arbitrage International*, 4 Rev. arb. 697, 713 (2007) (requirement that a ground for setting aside award must have been raised before the arbitral tribunal is “*a requirement of procedural loyalty*”), **Exhibit-LE 29/13**; German Code of Civil Procedure, §1027 (“A party who knows that any provision of this Book from which the parties may derogate or any agreed requirement under the arbitral procedure has not been complied with and yet proceeds with the arbitration without stating his objection to such con-compliance without undue delay or if a time limit is provided therefore, within such period of time, may not raise that objection later.”), **Exhibit-LE 26/3**; *Judgment of 16 July 2002*, SchiedsVZ 2003, 84, 86 (Oberlandesgericht Stuttgart) (“The applicant is also time-barred from raising objection to the manner of evidence-taking in the arbitral proceedings, if he did not previously object thereto.”), **Exhibit-LE 29/14**.

party would have had the possibility during the arbitration proceedings to give the arbitral tribunal the possibility to cure the flaw by filing an appropriate complaint.”<sup>350</sup>

360. Similarly, Article 4 of UNCITRAL Model Law provides that:

“A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, *shall be deemed to have waived his right to object.*”<sup>351</sup>

361. Moreover, as a general principle of law, the waiver principle will apply even where it is not specifically provided for. The principle is unanimously considered as a “*manifestation of the principle of good faith and the prohibition of an abuse of law (estoppel)*”<sup>352</sup> and as “*a requirement of procedural loyalty.*”<sup>353</sup>

362. Here, as discussed above, it is clear that the Government was perfectly aware of the Khartoum meetings with the Ngok and Twic Dinka (and, as discussed below, facilitated the latter).<sup>354</sup> Given this, the Government’s failure to raise any objection (and on the contrary, its statements of appreciation), would plainly amount to a waiver of whatever procedural objections the Government might raise to the Khartoum meetings.

- e) The Khartoum Meetings Caused No Prejudice to the Government and Did Not Affect the Outcome of the ABC Decision in the Slightest

363. Fifth, even if one assumed (again contrary to fact), that the Khartoum meetings did constitute some sort of procedural violation and that the Government did not waive its right

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<sup>350</sup> *Judgment of 10 September 2001*, 4P72/2001/rnd, cons. 4.c (Swiss Federal Tribunal), **Exhibit-LE 29/7** (emphasis added).

<sup>351</sup> UNCITRAL Model Law, Art. 4, **Exhibit-LE 23/20** (emphasis added). Most institutional rules have the same effect. By way of example, Article 33 of the ICC Rules provides: “A party which proceeds with the arbitration without raising its objection to a failure to comply with any provisions of these Rules, or of any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal, or any requirement under the arbitration agreement relating to the constitution of the Arbitral Tribunal, or to the conduct of the proceedings, *shall be deemed to have waived its right to object.*” ICC Rules, Art. 33, **Exhibit-LE 21/18** (emphasis added). See also UNCITRAL Arbitration Rules, Art. 30 (“A party who knows that any provision of, or requirement under, these rules has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.”), **Exhibit-LE 23/4**; LCIA Rules, Art. 32 (“A party who knows that any provision of the Arbitration Agreement (including these rules) has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have irrevocably waived his right to object.”), **Exhibit-LE 23/6**; AAA International Arbitration Rules, Art. 25, **Exhibit-LE 21/17**; PCA Rules, Art. 30, **Exhibit-LE 29/15**; Stockholm Arbitration Rules, Art. 31, **Exhibit-LE 29/16**; Swiss Rules, Art. 30, **Exhibit-LE 21/16**; ICSID Rules, Art. 27, **Exhibit-LE 23/3**.

<sup>352</sup> Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, Vol. 4 Part 2, §579, ¶2 (2d ed. 2007), **Exhibit-LE 23/19**; see also *Judgment of 7 September 1993*, DFT 119 II 386, 388 (Swiss Federal Tribunal) (“*If [the party] only complains after an award has been issued which is not in its favour, [the party] violates the principle of good faith.*”), **Exhibit-LE 29/5**; *Judgment of 28 February 2008, Société La Marocaine de Loisirs v. Société France Quick*, RG n° 2007/4403 (Paris Cour d’appel) (“*[A]ccording to the rule of estoppel, the claimant, not having complained to the arbitral tribunal about a breach of the adversarial principle, cannot invoke such ground during the annulment proceedings.*”), **Exhibit-LE 29/12** (emphasis added).

<sup>353</sup> Gaillard, *La Jurisprudence De La Cour De Cassation En Matière D’Arbitrage International*, 4 Rev. arb. 697, 713 (2007), **Exhibit-LE 29/13**.

<sup>354</sup> Second Witness Statement of Minister Deng Alor Kuol, at pp. 2-3, 7, 9, ¶¶8-11, 34, 46-47; Second Witness Statement of James Lual Deng, at pp. 4-5, ¶¶19-22, 26-27, 28-29.

to object, there is no suggestion that such violation had the slightest impact on the ABC Experts' decision.

364. The absence of any effect of the Khartoum meetings on the ABC Experts' decision is another independently sufficient basis for rejecting the Government's procedural complaints. As discussed above, a procedural violation will only be grounds for invalidating an arbitral award, or similar adjudicatory decision, if it caused "substantial prejudice" by affecting the outcome of the decision. Indeed, the Government itself acknowledges that any procedural breach "*must be material, that is to say significant both in itself and as to the result reached.*"<sup>355</sup>

365. Here, there is no basis for concluding that this standard of substantial prejudice affecting the ABC Experts' decision has been met. Rather, it is clear that the information obtained in the Khartoum interviews was largely repetitive of what had been obtained by the ABC Experts in their other interviews in the Abyei Area itself and could not have prejudiced the Government. Indeed, the ABC Experts attributed no significant weight to any of the oral testimony that they received, reasoning that "*the oral testimony by itself did not validate one case or the other.*"<sup>356</sup>

366. The insignificance of the witness testimony from the Khartoum interviews is confirmed by the complete absence of any effort in the Government's Memorial to address, challenge, explain or rebut the information from those interviews. The Khartoum interviews' information are recorded and appended to the ABC Report. Had the Government considered that information to have the slightest relevance to its case, it would have attempted to rebut or challenge it. In truth, the interviews produced nothing of interest to anyone, which is precisely why the Government has completely ignored what the testimony said.

367. The GoS has characterized the Khartoum meetings as having involved only Ngok Dinka participants, suggesting that the meetings were somehow prejudicial to the GoS.<sup>357</sup> That ignores the fact that it was the impartial ABC Experts – without the presence of either set of party-appointed members of the Commission – that attended the Khartoum meetings. The taking of evidence in these circumstances did not cause material prejudice to either party (even if one incorrectly assumed that it was a violation of some sort of procedural requirements by the ABC Experts).

368. It is also noteworthy that the 8 May 2005 meeting with the Twic Dinka was arranged by Bona Malwal, a prominent supporter of the Government and harsh critic of the SPLM/A. The ABC Report describes the 8 May meeting as follows: "[The Twic Dinka] came to us after Bona Malwal approached [Douglas Johnson] expressing a concern that the SPLM was trying to annex part of Twich territory to the southern border of Ngok."<sup>358</sup> The ABC Report also clearly indicates that two Twic representatives and a translator attended the third meeting on 8 May 2005 without any SPLM/A representatives or Ngok witnesses present.<sup>359</sup>

369. It is important to note that Bona Malwal has been both a vocal opponent of the SPLM/A and a staunch supporter of the NCP, the leading party of the GoS. Recent Sudanese

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<sup>355</sup> GoS Memorial, at para. 193.

<sup>356</sup> ABC Report, Part I, at p. 10, **Appendix B to SPLM/A Memorial**; *see also* ABC Report, Part I, at p. 11 ("the oral testimony of the two communities ... largely contradicted each other ... and did not conclusively prove either side's position"), **Appendix B to SPLM/A Memorial**.

<sup>357</sup> GoS Memorial, at paras. 76, 92(4), 201, 204.

<sup>358</sup> ABC Report, Part II, App. 4, at p. 156, **Exhibit-FE 15/1**.

<sup>359</sup> ABC Report, Part II, App. 4, at p. 156, **Exhibit-FE 15/1**.

press reports confirm that Bona Malwal has been a political adversary of the SPLM/A, and in particular, of the SPLM/A's focus on Abyei:

- a. In December 2007, the Sudan Tribune reported that “the *presidential advisor* and prominent southern politician, Bona Malwal, has criticised the SPLM for its exaggerated reaction over Abyei Protocol implementation. He blamed [sic] the influence of Abyei native[s] within the SPLM leadership.”<sup>360</sup>
- b. That report stemmed from a paper on the implementation of the CPA that Bona Malwal had released that day, in which he stated amongst other things than: “[t]he real shouting controversy, by passing by far, even the controversies over the most crucial issues, is the Abyei Protocol. *This controversial protocol has assumed much larger than its proper size and share of the CPA. This may be, thanks to the exaggerated, inflated and extremely unrealistic political influence of the leaders of Abyei within the SPLM leadership.*”<sup>361</sup>
- c. In the same paper, Bona Malwal also stated: “*as an area of Southern Kordofan since 1905, the Abyei area is no longer purely a Ngok Dinka area. There are other tribal interests there, that, unfortunately, the Abyei Protocol of the CPA has not catered for and which must be considered in carrying out the Abyei protocol. Otherwise, the fulfillment of the Abyei protocol, which clearly favours one side and is not comprehensive enough, may not necessarily maintain peace in the area.*”<sup>362</sup>
- d. In April 2008, the Sudan Tribune reported on a speech made by Malwal. The article stated: “*Malwal, who had difficult relations with the SPLM, becomes more and more virulent opponent to its policies* on the national and southern Sudan levels. Each time he has a public intervention, he criticises SPLM's management of Southern Sudan and its political conduct with regard to the peace agreement implementation.”<sup>363</sup>
- e. Minister Deng Alor, in his Second Witness Statement, describes Bona Malwal in the following terms: “Bona Malwal is a prominent politician in Southern Sudan and one of the leaders of the Twic community. Bona Malwal was originally very supportive of the struggle, but he fell out with the SPLM/A and has since consistently sided with the GoS. He never supported the CPA negotiations and was always critical of the positions adopted by the SPLM/A. He has also strongly criticised the Abyei Protocol. *He is now a supporter of the GoS, and I understand that he is currently Special Advisor to President Bashir.* Bona Malwal has not hidden his dislike for the SPLM/A or his distaste for the Abyei Protocol, and has come out publicly in the media against it.”<sup>364</sup>

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<sup>360</sup> “Bona Malwal criticises SPLM maladroitness over Abyei row,” Sudan Tribune, 13 December 2007, p. 1, **Exhibit-FE 19/24**.

<sup>361</sup> Malwal, “*The Future of the Comprehensive Peace Agreement*,” Sudan Tribune, 13 December 2007, p. 11, **Exhibit-FE 19/23** (emphasis added).

<sup>362</sup> Malwal, “*The Future of the Comprehensive Peace Agreement*,” Sudan Tribune, 13 December 2007, p. 12, **Exhibit-FE 19/23**.

<sup>363</sup> “Bona Malwal urges establishment of reconciliation body in South Sudan,” Sudan Tribune, 7 April 2008, p. 1, **Exhibit-FE 19/25** (emphasis added).

<sup>364</sup> Second Witness Statement of Minister Deng Alor Kuol, at p. 6, ¶30 (emphasis added).

f. James Lual Deng, in his second statement, similarly says: “I know Bona Malwal quite well as we are both politically involved in Southern Sudan. Bona Malwal is a member of the Twic, and was originally an ally of John Garang, but they fell out sometime during the mid-1990s. Since that point, he became a strong opponent of the SPLM/A and a critic of the Abyei Protocol. *He is now an important ally of the GoS, and I understand that he is currently the Special Adviser to the President and personal friend to President Bashir.* Bona Malwal is regarded by the Dinka as a Southern brother who has gone very astray and is aligned directly with the GoS.”<sup>365</sup>

370. Bona Malwal has also long been regarded as “an objective ally” and a “presidential adviser,” of the GoS, before the May 2005 Khartoum meetings. A Sudan Tribune article dated 9 April 2005 stated that:

*“Bona Malwal and Joseph Lagu are considered by the Sudanese government as objective allies who may be used against John Garang if he does not agree to establish a political partnership with the ruling National Congress party.”*<sup>366</sup>

371. Bona Malwal is also an adviser to President Bashir himself.<sup>367</sup> In the media, Malwal has been variously described as “*presidential advisor*,” “*Special advisor to the President*,” and “*presidential envoy*.”<sup>368</sup> Indeed, it appears that Malwal is one of President Bashir’s closest advisers, having been entrusted with the task of responding, on the President’s behalf, to the request by the International Criminal Court to issue a warrant of arrest for President Bashir for genocide and related crimes.<sup>369</sup>

372. Moreover, the testimony of the Twic was concerned almost entirely with the relations between the Ngok Dinka and the Twic Dinka. The Twic interviewees were generally critical of the Ngok: “[t]he border problem between Ngok and Twich is created by the educated

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<sup>365</sup> Second Witness Statement of James Lual Deng, at p. 5, ¶26 (emphasis added).

<sup>366</sup> “*Bona Malwal to create a new southern political force*,” Sudan Tribune, 9 April 2005, p. 1, **Exhibit-FE 19/11** (emphasis added).

<sup>367</sup> “*Sudan new govt - Three presidential advisers sworn in*,” Sudan Tribune, 25 September 2005, p. 1, (“The newly appointed presidential advisers, Bona Malwal, Ahmed Bilal and Magzoub Al-Khalifa were sworn in before the President of the Republic, Omer Al-Bashir, at the Republican Palace Saturday.”), **Exhibit-FE 19/20**.

<sup>368</sup> “*Bona Malwal criticises SPLM maladroitness over Abyei row*,” Sudan Tribune, 13 December 2007, p. 1, (“The presidential advisor and prominent southern politician, Bona Malwal, has criticised the SPLM for its exaggerated reaction over Abyei Protocol implementation. He blamed the influence of Abyei native within the SPLM leadership”), **Exhibit-FE 19/24**; “*Sudanese president makes first public threat to expel peacekeepers*,” Sudan Tribune, 22 August 2008, p. 1, (“Last month the Sudanese presidential advisor Bona Malwal said that his government ‘can’t be responsible for the well-being of foreign forces in Darfur.”), **Exhibit-FE 19/26**; “*Kenya PM refutes ICC reports on Sudan*,” China Daily, 25 August 2008, p. 1, (“The 62-year old Odinga, who entered into a coalition government with President Mwai Kibaki early this year after post-election crisis, said his position on ICC indictment is very clear and it was communicated to Sudanese presidential advisor Bona Malwal who met him a fortnight ago.”), **Exhibit-FE 19/27**; “*How would the international community support the Sudanese elections, 2009?*,” Sudan Tribune, 21 September 2008, p. 1, (“Besides a distinguished presence by Congressman Don Payne, Ambassador Richard Williamson, and the Special Advisor to the President of Sudan Dr. Bona Malwal, the conference was attended by more than 30 major American and international public policy groups...”), **Exhibit-FE 19/28**.

<sup>369</sup> “*Sudanese president makes first public threat to expel peacekeepers*,” Sudan Tribune, 22 August 2008, p. 1, (“Last month the Sudanese presidential advisor Bona Malwal said that his government ‘can’t be responsible for the well-being of foreign forces in Darfur.”), **Exhibit-FE 19/26**; “*Kenya PM refutes ICC reports on Sudan*,” China Daily, 25 August 2008, p. 1, (“The 62-year old Odinga, who entered into a coalition government with President Mwai Kibaki early this year after post-election crisis, said his position on ICC indictment is very clear and it was communicated to Sudanese presidential advisor Bona Malwal who met him a fortnight ago.”), **Exhibit-FE 19/27**.

people of Abyei in the Movement”<sup>370</sup> and “[w]hat the Ngok are driving at will be clear later on.”<sup>371</sup>

373. The meeting with the Twic Dinka confirms again that the ABC Experts simply met with third parties purporting to have information relevant to the Experts’ research and investigations. The meeting was arranged at the request of a prominent GoS ally (and staunch SPLM/A critic); it in no way suggested any bias on the part of the ABC Experts toward the SPLM/A. To the contrary, the meeting reflected nothing more than the Experts’ effort to obtain information from all points of view and to ensure that all public constituencies felt that they had been listened to.

374. The Government’s Memorial offers no explanation as to how the ABC Experts’ decision was in any way influenced, much less significantly affected, by the Khartoum interviews. In fact, the Government does not suggest that these alleged “procedural violations” affected the ABC Experts’ decision. That is in and of itself sufficient grounds for rejecting the Government’s claim in this respect.

375. The GoS instead confines itself to four specific complaints about the purported consequences of the Khartoum interviews:

a. the ABC Experts “obtained maps and documents” from the participants in the Khartoum Interviews that “were never shown to the Parties, although some were used in the final Report;”<sup>372</sup>

b. at “the Khartoum meeting on 8 May 2006 [sic], one of the ABC Experts reportedly presented his own interpretation of the 1905 formula,” using the phrase “used and claimed,” instead of the “agreed formula” of “transferred,” and that this “deviation had not been agreed to or even discussed with the Commission beforehand;”<sup>373</sup>

c. there “was no indication in the transcripts of the Hilton meetings whether the witnesses were testifying under oath, although this had been the practice until then;”<sup>374</sup> and

d. the 8 May 2005 meeting was not “a continuation of the previous meetings, as testimony was given on new issues by previously unidentified witnesses.”<sup>375</sup>

Each of these claims is groundless, for multiple reasons.

376. First, the GoS complains that:

“it was later revealed that the ABC Experts had obtained maps and other documents from subsequent meetings. The Experts themselves acknowledged that the informants... ‘left us with a draft list of Ngok Dinka age sets and said a final one would be given to us before we left. They will also copy the sketch map they made of the area and give us a copy. They had highlighted place names on a copy of NC35-L

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<sup>370</sup> ABC Report, Part II, App. 4, at p. 158, **Exhibit-FE 15/1**.

<sup>371</sup> ABC Report, Part II, App. 4, at p. 157, **Exhibit-FE 15/1**.

<sup>372</sup> GoS Memorial, at para. 73.

<sup>373</sup> GoS Memorial, at para. 77.

<sup>374</sup> GoS Memorial, at para. 78.

<sup>375</sup> GoS Memorial, at para. 78.



Ghabat Arab [sic] map, and we transferred those to our photocopy of that map’ Again, this was done without the approval or knowledge of the Parties and without any authority from the Commission. The documents obtained by the Experts were never shown to the Parties, although some were used in the final Report.”<sup>376</sup>

377. The GoS’s complaint is once more factually wrong.<sup>377</sup> The Government claims that “some” of those maps and documents “were used in the final Report,” but does not identify which materials were supposedly used.<sup>378</sup> In fact, the only “map” that was recorded as being given to the ABC Experts at the Khartoum interviews was what the Experts describe as a “copy [of] the sketch map,”<sup>379</sup> which was *not* relied upon in the final decision.

378. The ABC Experts produced a comprehensive list of the maps they relied on in Appendix 6 of their Report. There is no mention of the “sketch map” that was reportedly provided to the Experts at the 6 May 2005 meeting.<sup>380</sup>

379. The ABC Experts record that they used a map titled “66-L Ghabat el Arab.”<sup>381</sup> The 1976 version of that is likely to be the ‘NC35-L Ghabat Arab’ map the ABC Experts referred to in their report of the 6 May 2005 meeting. The ABC Report records that the Khartoum witnesses “highlighted place names” on a copy of the map, and the ABC Experts “transferred” those highlights to a “photocopy of that map.”<sup>382</sup> The only result of this interchange, therefore, was the “highlighting” of existing place names. There is no possible basis for suggesting that this materially affected the ABC Experts’ analysis.

380. The only “document” recorded as being given to the ABC Experts at the Khartoum meetings was what the experts described as a “draft list of Ngok Dinka age sets” provided at the 6 May 2005 meeting.<sup>383</sup> The ABC Experts made only one reference in their Report to an age set list, as to which they concluded that the information contained therein revealed “some *anomalies*” and that the age set table could not be relied upon, because, “without supporting evidence, *it is not possible to accept such a claim on its own.*”<sup>384</sup>

381. It is therefore entirely inaccurate for the GoS to suggest that the ABC Experts somehow used the age set information in their Report. On the contrary, the ABC Experts made it crystal clear that they could not (and did not) use the age set information to influence or in any way direct their conclusions.

382. There is also no evidence that the ABC Experts regarded any of the materials or maps (including map “66-L Ghabat el Arab”) as “significant” in any respect. On the contrary, the ABC Experts explicitly noted that “maps are useful guides, but they may be used with caution. They represent the state of knowledge at any given time: they are not necessarily

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<sup>376</sup> GoS Memorial, at para. 73.

<sup>377</sup> The GoS consistently refers to the Khartoum Interviews as taking place in 2006, rather than 2005. That is incorrect. ABC Report, Part II, App. 4, at p. 156, **Exhibit-FE 15/1**.

<sup>378</sup> There is no record of the ABC Experts “obtaining maps and other documents” from any meeting other than the 6 May 2005 interview. There is therefore no basis for the Government’s suggestion that the ABC Experts obtained maps and other documents “from subsequent meetings.” GoS Memorial, at para. 73.

<sup>379</sup> ABC Report, Part II, App. 4, at p. 156, **Exhibit-FE 15/1**.

<sup>380</sup> ABC Report, Part II, App. 6, at pp. 204-207, **Exhibit-FE 15/1**.

<sup>381</sup> ABC Report, Part II, App. 6, at p. 205, **Exhibit-FE 15/1**. (This map is likely 65-L, and incorrectly referenced as 66-L).

<sup>382</sup> ABC Report, Part II, App. 4, at p. 156, **Exhibit-FE 15/1**.

<sup>383</sup> ABC Report, Part II, App. 4, at p. 156, **Exhibit-FE 15/1**.

<sup>384</sup> ABC Report, Part I, at p. 42, **Appendix B to the SPLM/A Memorial** (emphasis added).

accurate records of the state of affairs on the ground.”<sup>385</sup> As to “[m]ap 66-L Ghabat el Arab” specifically, the ABC Experts’ only comment was to point out its limitations:

“[t]he earliest editions of this map were lost. Only two sheets were found: the June 1936 edition and a copy of the 1972 revised edition. Both identify Ngok Dinka territory by the alternative names, ‘Mareig or N’gok’”<sup>386</sup>

Moreover, the “map 66-L Ghabat el Arab” did nothing more than display the same cartographical information depicted on many other maps of the period, and it is impossible to see how it could have impacted the ABC Experts’ decision in any way at all.

383. Second, the GoS also criticizes the ABC Experts for their restatement of the ABC mandate during one of the Khartoum meetings:

“At the Khartoum meeting on 8 May 2006 [sic], one of the ABC Experts reportedly presented his own interpretation of the 1905 formula. He said:

‘The area to be defined is described in the protocol as the area of the nine Ngok Dinka chiefdoms – no one else. And we were supposed to discover what territory was being used and claimed by those nine chiefdoms when the administrative decision was made to place them in Kordofan.’

The phrase ‘used and claimed’ instead of the agreed formula ‘transferred’ was a potentially material deviation from the original formula. That deviation had not been agreed to nor even discussed with the Commission beforehand.”<sup>387</sup>

384. The GoS neglects to note that the ABC Experts had repeatedly used a formula of words that did not include ‘transferred’ when restating the ABC Experts’ mandate at the Abyei field interviews (which were conducted in the presence of both parties), and at no time did the GoS ever raise any objection. For example:

a. When Chairman Petterson addressed the assembled crowd at Dakjur [Arabic: Dembaloya] on 16 April 2005 in the presence of all the other ABC members, he stated: “The [SPLM/A and GoS representatives] have explained to you about the Peace Agreement, and our part is a small part – *to determine the boundaries of the nine Dinka Chiefdoms as they existed 100 years ago.*”<sup>388</sup>

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<sup>385</sup> ABC Report, Part II, App. 6, at p. 204, **Exhibit-FE 15/1**. This view is entirely consistent with the body of international law which recognizes that maps are “not necessarily accurate or objective representations of the realities on the ground. Topography is dependent upon the state of knowledge at the time the maps were made, and particularly with older maps this may have been inadequate.” See *Eritrea v. Ethiopia Boundary Delimitation Award*, 41 ILM 1057, ¶3.19 (2006), **Exhibit-LE 29/17**; see also *Burkina Faso v. Mali Frontier Dispute*, [1986] I.C.J. Rep. 554, 583 (I.C.J.) (“Since relatively distant times, judicial decisions have treated maps with a considerable degree of caution”), **Exhibit-LE 29/18** (relied on by the GoS); *Advisory Opinion on the Question of Jaworzina (Polish-Czechoslovakia Frontier) dated 23 December 1923* PCIJ Ser. B, No. 8, 33 (P.C.I.J. 1923) (“maps and their tables of explanatory signs cannot be regarded as conclusive proof”), **Exhibit-LE 30/1**; *Island of Palmas case (US v. Netherlands)* 2 U.N.R.I.A.A. 829, 852 (1928) (“only with the greatest caution can account be taken of maps in deciding a question of sovereignty”), **Exhibit-LE 30/2**; *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, [1999] I.C.J. Rep. 1045, 1100 (I.C.J.) (“in light of the uncertainty and inconsistency of the cartographic material submitted to it, the Court considers itself unable to draw conclusions from the map evidence in this case.”), **Exhibit-LE 1/9**.

<sup>386</sup> ABC Report, Part II, App. 6, at p. 205, **Exhibit-FE 15/1**.

<sup>387</sup> GoS Memorial, Heading (iii), at para. 77. Presumably, the GoS means 6 May 2005, rather than 8 May 2006.

<sup>388</sup> ABC Report, Part II, App. 4, at p. 41, **Exhibit-FE 15/1** (emphasis added).

b. At Tordac [Arabic: Umm Balael] on 17 April 2005, Professor Muriuki said: ***“Our purpose is to decide on the boundaries that existed in 1905 between the Misseriya and Ngok Dinka.”***<sup>389</sup>

c. At Agok on 18 April 2005, Ambassador Petterson said: “our job is to define and demarcate the area of the Nine Ngok Dinka Chiefdoms, which were transferred to Kordofan Province from Bahr el Ghazal Province in 1905. In making ***our decision as to the location of the nine Ngok Dinka Chiefdoms...***”<sup>390</sup>

385. If the GoS had any objection to the ABC Experts’ failure to use the term “transferred,” or any other aspect of their statements, it would have been free to make this objection – but it did not. In any case, the statements regarding the ABC Experts’ work on 6 May 2005 were no different from those made on other occasions.<sup>391</sup>

386. Third, the Government complains that: “There was no indications in the transcripts of the Hilton meetings whether the witnesses were testifying under oath, although this had been the practice until then.”<sup>392</sup> The GoS fails to note that there is nothing in any of the ABC instruments (the Abyei Protocol, Annex, Terms of Reference or Rules of Procedure) that required any witnesses to testify under oath. Moreover, many of the witnesses at the Abyei field visits did not swear any oath before they testified.<sup>393</sup> In fact, of the 104 witnesses recorded giving testimony during the Abyei field visits, only 48 are recorded as providing any kind of oath prior to testifying (and approximately one third of those witnesses are only recorded as making, at various points in their presentations, some type of unprompted declaration of truth).<sup>394</sup>

387. Fourth, the GoS appears to criticize the 8 May 2005 Khartoum meeting on the basis that: “the meeting was [not] a continuation of the previous meetings, as testimony was given on new issues by previously unidentified witnesses.”<sup>395</sup> That complaint is inaccurate and difficult to understand. There is no evidence that the witnesses from whom testimony was obtained during the Abyei field visits had been notified to the ABC in advance of the visits. The GoS’s criticism is also inaccurate because the information recorded at the Khartoum meetings related to matters that were neither new nor important.

388. The issues were not new, because testimony on where the Twic Dinka were situated relative to the Ngok Dinka had been given by a number of witnesses during the earlier field visits.<sup>396</sup> The issues were also not significant because the ABC Experts ultimately relied on none of the information provided by the witnesses at the 8 May 2005 meeting. In the sole

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<sup>389</sup> ABC Report, Part II, App. 4, at p. 53, **Exhibit-FE 15/1**.

<sup>390</sup> ABC Report, Part II, App. 4, at p. 58, **Exhibit-FE 15/1** (emphasis added).

<sup>391</sup> See SPLM/A Memorial, at paras. 626-630.

<sup>392</sup> GoS Memorial, at para. 78.

<sup>393</sup> For example, at Gole/Langar on 16 April 2005, Musa Ibrahim Masoud, Krafan Rahama Al-Nur and Shogar Mohammed Mahmoud all gave recorded testimony, but there is no record of any oath being provided by any of them either prior to their testimony or afterwards. ABC Report, Part II, App. 4, at pp. 36-38, **Exhibit-FE 15/1**; see also Second Witness Statement of Minister Deng Alor Kuol, at p. 10 ¶¶52-55. By contrast, the final witness who spoke at Gole/Langar, Abu Hamid Mahmoud Al-Haj, did give an oath according to the transcript at pp. 38-39; see ABC Report, Part II, App. 4, at pp. 38-39, **Exhibit-FE 15/1**.

<sup>394</sup> These declarations varied from the dramatic (e.g., “I am going to say the truth in the name of God and if I say lies, then may the Almighty God kill me here”, Nyal Chan Nyal, ABC Report, Part II, App. 4, at p. 60) to the benign (e.g., “I am saying those things in good faith”, Abdallah Deng, ABC Report, Part II, App. 4, at p. 146), **Exhibit-FE 15/1**).

<sup>395</sup> GoS Memorial, at para. 78.

<sup>396</sup> ABC Report, Part II, App. 4, at pp. 38, 39, **Exhibit-FE 15/1**. The testimony from the Khartoum meeting was also limited: the transcript of which comprises only one and a half sides of the ABC Report. See ABC Report, Part II, App. 4, at p. 158, **Exhibit-FE 15/1**.

instance in which these interviews are cited in support of a finding of the Experts in the ABC report, the Agok interviews are also cited as the primary evidence for that particular conclusion.<sup>397</sup>

389. It is clear from the record of the 8 May 2005 meeting, that it occurred in significant part to alleviate the Twic Dinka's misunderstandings as to what the ABC was doing. Much of the meeting involved the ABC Experts explaining the SPLM/A claims to the Twic Dinka reassuring them that "when we were in Abyei and Agok, no one made the claim that Ngok territory extended beyond the Kordofan/Bahr el Ghazal border to Turalei, and no one has yet presented that claim to us on behalf of the Ngok or SPLM."<sup>398</sup> This is consistent with the fact that the Twic meetings of 8 May 2005 were organized by a GoS supporter and were, if anything, adverse to SPLM/A (or Ngok) interests.<sup>399</sup>

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390. In sum, there is no basis at all for the Government's complaints about the Khartoum meetings (quite apart from the fact that such claims do not constitute an excess of mandate). That is true for multiple, independently sufficient reasons:

- a. The parties' procedural agreements and the Rules of Procedure granted the ABC Experts broad procedural discretion and investigatory powers, including the powers to independently interview third parties and conduct other research. Nothing in those agreements imposed any prohibitions against meetings with third parties and, on the contrary, the ABC Experts' freedom to conduct such meetings was specifically guaranteed.
- b. The parties discussed the ABC Experts' general authority to meet with third parties, as well as the specific subject of the Khartoum meetings, during the ABC proceedings and the Government raised no objection whatsoever. Indeed, it was a prominent Government supporter and presidential adviser that arranged the meeting between the ABC Experts and Twic Dinka, while Ambassador Dirdeiry specifically thanked the ABC Experts for having conducted the Khartoum meetings during the GoS presentations. These discussions and arrangements were precisely consistent with the parties' procedural expectations and agreements.
- c. The Government waived any objection it might have had to the Khartoum meetings, both by not raising such objections during the ABC proceedings and by its involvement in the Twic Dinka meetings.
- d. Even if one assumed (contrary to fact) that the Khartoum meetings violated some (unspecified) provision in the parties' procedural agreements, that was not a serious violation of a fundamental procedural guarantee – and it is only such a violation that would permit the ABC Report to be disregarded. Rather, any such violation would at most have been an inadvertent misunderstanding of the limits of the ABC Experts' investigative authority. Notably, the Government has not complained about other such meetings with third parties (including with Mr. and Mrs. Tibbs and Professor Cunnison).

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<sup>397</sup> ABC Report, Part I, at p. 28, **Appendix B to SPLM/A Memorial**.

<sup>398</sup> ABC Report, Part II, App. 4, at p. 158, **Exhibit-FE 15/1**.

<sup>399</sup> See above paras. 368-371.

e. Finally, and in any event, the Government does not identify any injury arising from the Khartoum meetings, much less the sort of grave prejudice required to disregard an adjudicative decision. Here, it is clear that the Khartoum meetings resulted in nothing more than cumulative and largely immaterial information, that had no effect on the ABC Experts' decision.

391. In these circumstances, the Government has entirely failed to sustain its very heavy burden of overcoming the ABC Experts' broad procedural discretion and proving some sort of grave, prejudicial violation by the ABC Experts of a fundamental procedural guarantee. Rather, by all appearances, the Government has disingenuously contrived a procedural complaint from circumstances that it was well aware of and took part in arranging.

5. The Government's Complaints About the Millington Email Are Contrived and Frivolous

392. The Government's second procedural complaint is that the ABC Experts "unilaterally sought and then relied on an email from Jeffrey Millington, an official at the American Embassy in Nairobi, to establish their interpretation of the 1905 formula."<sup>400</sup> According to the Government, this involved a serious procedural breach for three reasons: (a) the ABC Experts "were not authorized to consult the US Government or Mr. Millington as the U.S. Observer to the IGAD peace process;<sup>401</sup> or indeed any other third party;" (b) "the Parties were given no notice of the request or the response and thus had no opportunity to comment;" and (c) the ABC Experts "failed to see that the response [by Mr. Millington] raised many more questions than it resolved."<sup>402</sup>

393. The Government's complaints about the Millington email exchange are even less credible than those regarding the Khartoum meetings, for many of the same reasons. The ABC Experts' one email exchange with Mr. Millington was both entirely consistent with their freedom to consult with third parties (like Mr. and Mrs. Tibbs, Professor Cunnison, and others) and entirely innocuous.

a) The Millington Email Was Fully Consistent With, and Did Not Violate, the Parties' Procedural Agreements

394. The ABC Experts would not have violated any provision of the parties' procedural agreements by corresponding with Mr. Millington via email.<sup>403</sup> The Government again ignores the ABC Experts' express authority to conduct independent investigations and scientific research. This aspect of the ABC Experts' authority is discussed in detail above and is not repeated here.<sup>404</sup> The ABC Experts' investigative authority readily encompassed – and certainly did not affirmatively exclude – making inquiries of third parties such as Mr. Millington.

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<sup>400</sup> GoS Memorial, at para. 209.

<sup>401</sup> Mr. Millington was the U.S. Observer to the IGAD Peace Process. See SPLM/A Memorial, at para. 481; Witness Statement of Jeffrey Millington, at p. 2, ¶4. In his role, he was kept abreast of the developments in the peace process and was copied on related documentation. See e.g. Rumbek Community Position Paper, dated 12 December 2002, **Exhibit-FE 10/4**; Memorandum from Ngok-Dinka of Abyei Area to General Sumbeiywo *Ngok Dinka Speak: On Restoration of Abyei Area to southern Sudan*, dated 10 January 2003, **Exhibit-FE 10/9**.

<sup>402</sup> GoS Memorial, at paras. 210-212.

<sup>403</sup> Preliminary, there is no evidence that Mr. Millington emailed directly with the ABC Experts. The email cited at page 4 of the ABC Report is described as being "Email from Jeffrey Millington to the American Embassy, Nairobi, Kenya, April 27, 2005." ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>404</sup> See above at paras. 245-256.

395. The Government is simply wrong when it says that the ABC Experts “were not authorized to consult the US Government; or indeed any other third party”<sup>405</sup> On the contrary, as discussed above, no provision of the parties’ agreement or the Rules of Procedure prohibited the ABC Experts from contacting third parties. Instead, they were specifically authorized to conduct their own independent “*research and scientific analysis*,” including in the “*British archives and other relevant sources on the Sudan wherever they may be available*.”<sup>406</sup>

396. Nothing in the parties’ agreements or the Rules of Procedure limited the manner in which the ABC Experts conducted their research, investigations and analysis. If the ABC Experts considered, in their expert judgment, that their work would be advanced by discussions with other authorities, with archival personnel, with residents of the Abyei Area or with others having knowledge of the issues, then nothing in the parties’ agreements prevented them from having such discussions. Rather, as noted above, the ABC Experts were granted broad authority both to determine their own rules of procedure (Abyei Annex, Article 4) and to conduct archival studies and “scientific analysis and research.”

397. It is noteworthy that the ABC Experts also had discussions with Mr. and Mrs. Tibbs and Professor Cunnison (the latter being an authority on the Misseriya and one of the GoS’s witnesses in these arbitral proceedings) about the issues in dispute and sought assistance from a number of other third parties. Again, these discussions were entirely appropriate, particularly given the ABC Experts’ broad procedural discretion over the conduct of the ABC proceedings and their own investigative activities. It also bears mention that all of these activities were referred to and detailed very openly and thoroughly in the ABC Report.<sup>407</sup>

398. Additional third parties contacted by the ABC Experts included, to name only a few, Mr. Robert Mwangi Gitau of Tourist Maps Ltd, who is a Kenyan mapping expert and former Chief Mapping Office with Survey of Kenya, and Mr. Saif Al-Islam Mohammed of the Sudanese Ministry of Foreign Affairs. The third parties who assisted the ABC Experts are acknowledged at the beginning of the ABC Report<sup>408</sup> (again, not common practice in an international arbitral award, but not objected to by the GoS in any way).

399. Despite the Government’s claim that the ABC Experts were forbidden from having any contacts with “any other third party,” it alleges no procedural violation as a consequence of the Tibbs/Cunnison meetings – for the simple reason that there was no such prohibition against the ABC Experts meeting with persons having information relevant to their investigations. To the contrary, this was wholly consistent with and contemplated by the parties’ grant of investigative authority and procedural discretion to the ABC Experts.

400. This is confirmed by the fact that the GoS knew in advance of the ABC Experts’ interviews with third parties, including with Mr. and Mrs. Tibbs and Professor Cunnison. That such interviews would occur was made to clear to everyone present at the meeting in Lau on 16 April 2005, at which one of the ABC Experts told the Commission and public attendees:

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<sup>405</sup> GoS Memorial, at para. 210.

<sup>406</sup> ABC ToR, Art. 3.4, **Appendix E to SPLM/A Memorial**.

<sup>407</sup> ABC Report, Part I, at pp. 4, 15, 19, 32, 43, **Appendix B to SPLM/A Memorial**; ABC Report, Part II, at pp. 32, 47, 158-162, **Exhibit-FE 15/1**.

<sup>408</sup> ABC Report, Part I, at p. 6-7, **Appendix B to SPLM/A Memorial**.

“You mention Mr Cunnison; I knew Mr. Cunnison for a very long time. When he was with you, you told him many things and he wrote them down before there was a conflict between Ngok and Misseriya. So if he wrote a true account, we can compare that with what you have told us now and what you told him then. You mentioned Mr. Tibbs. *Just before I came here, I went to see Mr. Tibbs.* He told me, ‘Convey my greetings to the family of Babu Nimir.’ So when I when I saw Mukhtar Babu Nimir, I passed on those greetings. *When we are finished here, we shall go back to England. I shall see these people and I shall find out if they are still confused.* Thank you very much.”<sup>409</sup>

401. The GoS made no objection when Dr. Johnson referred to the ABC Experts’ intention to make contact with and interview the Tibbs and Professor Cunnison. This is not at all surprising; the decision to meet with third parties was, as explained extensively above, completely within the scope of the ABC Experts’ procedural discretion.

402. The Government also errs in complaining that “the Parties were given no notice of the request or the response and thus had no opportunity to comment.”<sup>410</sup> Pursuant to their own procedural agreements, and the Rules of Procedure, the parties were given no notice of, or opportunity to comment on, any of the matters that the ABC Experts ascertained or identified in their independent investigations. That investigatory procedure differs from procedures often used in international investment and commercial arbitrations, but, as discussed above, it is the procedure that the parties specifically agreed to in the ABC proceedings.<sup>411</sup> In these circumstances, it is misconceived to suggest that the ABC Experts committed some grave procedural breach for engaging in precisely the type of investigation, research and analysis that was expected of them.

403. The Government’s complaint that the Millington email “raised many more questions than it resolved”<sup>412</sup> is wholly irrelevant to the question of any breach of procedure. The ABC Experts’ contact with Mr. Millington – like their contact with Mr. and Mrs. Tibbs and Professor Cunnison and their archival research – was entirely proper procedurally. If those contacts or archival reviews produced information of questionable value or debatable meaning, that would not amount to a procedural violation; nor would the ABC Experts’ purported failure properly to appreciate the documents or statements they received amount to a procedural violation. Rather, these would be classic examples of challenges to the substance of the ABC Experts’ decision – which manifestly do not constitute an excess of mandate.<sup>413</sup>

b) The Millington Email Was Not A Serious Departure From A Fundamental Rule of Procedure

404. As with the ABC Experts’ Khartoum meetings, it would be impossible to consider the Millington email as a “*serious departure from a fundamental rule of procedure*,”<sup>414</sup> even if one assumed, contrary to fact, that it was a procedural breach at all. As discussed above, an

<sup>409</sup> ABC Report, Part II, App. 4, at pp. 46-47, **Exhibit-FE 15/1** (emphasis added); *see also* Second Witness Statement of Minister Deng Alor Kuol, at p. 11, ¶¶56-57; Second Witness Statement of James Lual Deng, at p. 6, ¶¶30-31.

<sup>410</sup> GoS Memorial, at para. 211.

<sup>411</sup> *See above* at paras. 122-125, 234-237.

<sup>412</sup> GoS Memorial, at paras. 212.

<sup>413</sup> *See SPLM/A Memorial*, at paras. 771-795. *See also below* at paras. 571-586.

<sup>414</sup> As discussed above, this is the standard for procedural breaches asserted by the Government. *See above* at paras. 176-178, 330-331.

adjudicatory decision may only be set aside exceptionally, if it involved a very grave breach of a fundamentally important procedural right.<sup>415</sup> In the words of one representative authority from the arbitration context, which applies *a fortiori* to the ABC proceedings, “challenges are only possible in case of ***absolutely gross violations of fundamental principles of due process.***”<sup>416</sup> Nothing comes even remotely near to this standard in the case of the Millington email.

405. Again, the ABC Experts plainly considered that their procedural rules and discretion authorized such contact (referring in the ABC Report to the email). Similarly, if the Millington email exchange was any sort of procedural breach (which it was not), it would at most have been the unintentional transgression of some implied limitation on third party contacts – again, hardly a serious departure from a fundamental procedural rule. Moreover, the purported procedural violation would at most have involved a single email, with barely a line of supposedly offending text – again, hardly the stuff of “absolutely gross violations of fundamental principles of due process.”

406. Moreover, as noted above, the ABC Experts’ contacts with third parties such as Mr. and Mrs. Tibbs and Professor Cunnison elicited (and still elicit) no objections from the GoS. Likewise, the Government raised (and still raises) no protests regarding the ABC Experts’ contacts with the IGAD. In these circumstances, it is impossible to see how one email contact with Mr. Millington, who had been involved, as a U.S. diplomat and representative at IGAD in the entire process of negotiating and implementing the Abyei Agreements – can be regarded as materially different.

407. Nor is it possible to see how the ABC Experts’ treatment of the Millington email unfairly impacted the Government. The ABC Experts did not inform either party of the email exchange, nor afford either party an opportunity to comment on the email. Any limitations on the parties’ procedural rights therefore affected both parties in the same manner, and did not grant one party an opportunity denied to the other: particularly in the context of the parties’ grant to the ABC Experts of independent investigatory authority, the Millington email exchange cannot be considered an “absolutely gross violation[] of fundamental principles of due process.”

c) The Millington Email Caused No Prejudice to the Government and Did Not Affect the Outcome of the ABC Decision in the Slightest

408. Even if the Millington email had constituted a serious violation of a fundamental rule of procedure (and even if such a violation could constitute an excess of mandate, both of which are denied), that email would only be a basis for challenging the ABC Report if the Government could demonstrate that it suffered substantial prejudice that affected the outcome of the ABC Experts’ decision.<sup>417</sup> That is not remotely the case.

409. It bears repetition that the supposedly improper actions involve a single email (in turn involving a single sentence), which contained very limited, general and entirely non-

<sup>415</sup> See above at paras. 285-297, 308-310.

<sup>416</sup> *Judgment of 6 September 1990*, 6Ob572/90, p. 3 of 3 (Austrian Oberster Gerichtshof), **Exhibit-LE 27/15** (emphasis added). See also Pitkowitz, *Setting Aside Arbitral Awards under the New Austrian Arbitration Act* in C. Klausegger & P. Klein *et al.* (eds.), *Austrian Arbitration Yearbook 2007* 231, 250 (2007) (“[P]ublic policy, strictly speaking, does not include any and all procedural law, but only the fundamental basic standards of mandatory law.”), **Exhibit-LE 30/3**.

<sup>417</sup> See above at paras. 298-307.



controversial information. Moreover, as the Government itself concedes, the ABC Experts did not even rely on this information in their analysis. In these circumstances, the suggestion that the Government suffered serious prejudice is completely fanciful.

410. The closest the Government comes to arguing that it was affected adversely by the Millington email are its suggestions that the “implication of the [Millington email] exchange was that the mandate [of the ABC Experts] might be rewritten, one way or another” and that the email exchange was “an implied invitation” or “encourage[ment]” to “transmute the formula” defining the Abyei Area.<sup>418</sup> The Government concludes that the ABC Experts’ citation of the Millington email “illustrated the disregard of the constituent agreements which, unfortunately, pervaded the work of the ABC Experts.”<sup>419</sup>

411. The Government’s rhetoric does not even approach a claim that the Millington email had an impact on the ABC Experts’ decision and, in any case, it is without substance. The Millington email exchange was not in any sense an “implied invitation” or “encouragement” to rewrite or alter the definition of the Abyei Area in the Abyei Protocol. It was simply a statement of general historical understanding – that “the area transferred in 1905 was roughly equivalent to the area of Abyei that was demarcated in later [years].”<sup>420</sup> That historical assessment (a) was plainly correct as a substantive matter;<sup>421</sup> (b) was cumulative to the ABC Experts’ own historical views and the views of other experts (including Professor Cunnison, the GoS’s own expert in these proceedings<sup>422</sup>); and (c) reflected only what Mr. Millington himself termed a “rough[] equivalen[ce].”<sup>423</sup>

412. As discussed in detail in the SPLM/A’s Memorial it is hardly surprising or controversial that there would be a rough continuity of tribal territories over time.<sup>424</sup> Even the GoS’s own witness, Professor Cunnison, says “I refer to the 1950s, but there is reason to believe that this pattern of [Humr] life is of long standing.”<sup>425</sup> The statement in Mr. Millington’s email that the U.S. drafters of the definition of the Abyei Area understood that there would be a historical continuity in the area of the nine Ngok Dinka Chiefdoms over time is an entirely unexceptional proposition supported by a wide range of historical evidence (and common sense).<sup>426</sup>

413. Moreover, the statement in Mr. Millington’s email that there was a continuity in the territory of the Ngok Dinka Chiefdoms following 1905 was entirely cumulative. Although the Government does not discuss this point in its treatment of the Millington email, the ABC Experts devoted an entire Proposition (Proposition 8) to this subject and reached the same conclusion without any reference to Mr. Millington’s email: “The administrative record of the Condominium period and testimony of persons familiar with the area attest to the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el Arab between 1905 and 1965.”<sup>427</sup>

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<sup>418</sup> GoS Memorial, at para. 214.

<sup>419</sup> GoS Memorial, at para. 215.

<sup>420</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>421</sup> See SPLM/A Memorial, at paras. 344-345, 1192-1193; Daly Expert Report, at p. 48-51.

<sup>422</sup> See below at paras. 412, 567.

<sup>423</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>424</sup> See SPLM/A Memorial, at paras. 874-877, 959, 1091.

<sup>425</sup> GoS Witness Statement of Professor Ian Cunnison, at p. 1, at ¶6.

<sup>426</sup> See below at paras. 1067-1196.

<sup>427</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial**.

414. Likewise, Mr. Millington’s email expressed only the view that the U.S. drafters of the definition of the Abyei Area considered the area to be “roughly equivalent” to subsequent demarcations of Abyei. Given its general character, Mr. Millington’s broad view did not, and could not, have had any concrete impact on the ABC Experts’ delimitation of the Abyei Area.

415. Nor is it plausible for the Government to suggest that Mr. Millington’s email was an “implied invitation” or “encouragement” – whatever the Government might mean by these expressions – for the ABC Experts to rewrite the definition of the Abyei Area. At most, Mr. Millington’s email contained an (unstated) assumption that the Abyei Protocol’s definition of the Abyei Area meant what it said (i.e., that the Abyei Area encompassed the territory of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905), rather than what the Government now claims (i.e., that the Abyei Area was limited to only that part of the territory of the nine Ngok Dinka Chiefdoms that was transferred to Kordofan in 1905). The notion that the existence of such an unstated assumption constituted an “implied invitation” to “transmute” or rewrite the parties’ agreement is completely unfounded.

416. In any event, the ABC Experts had repeatedly expressed their own understanding of the meaning of the definition of the Abyei Area in the public meetings in the Abyei Area, well before the Millington email exchange (as detailed in SPLM/A Memorial<sup>428</sup> and elaborated below<sup>429</sup>). At the most, and assuming that it was noticed, Mr. Millington’s unstated assumption as to the meaning of the definition of the Abyei Area did nothing but conform to the interpretation that the ABC Experts had previously stated in very explicit terms (and that the Government had not objected to). Again, in these circumstances, it is impossible to see how Mr. Millington’s email was some sort of implicit invitation to rewrite the Abyei Protocol: to the contrary, it was merely consistent with the obvious meaning of the Protocol, which the ABC Experts had already adopted.

417. The Government’s real complaint in this respect is that the ABC Experts in fact misinterpreted (“rewrote” or “transmuted”) the Abyei Protocol’s definition of the Abyei Area. As discussed in detail below, that complaint is specious.<sup>430</sup> In any case, the Government’s objections stand or fall with its substantive disagreement with the ABC Experts’ interpretation of the Abyei Protocol – and not with contrived procedural objections to Mr. Millington’s email.

418. Finally, as already noted, the Millington email provided only what Mr. Millington himself termed a “rough[]”<sup>431</sup> historical view, that was merely cumulative to and confirmed other, more substantial historical evidence cited independently by the ABC Report (in their discussion of Proposition 8<sup>432</sup>). Moreover, as the Government itself concedes, the ABC Experts did “not ... appl[y]” the ‘Millington email’s’ historical formula and “[t]he Abyei LGA [for example] bears no resemblance to the area delimited by the Experts.”<sup>433</sup> In these circumstances, the suggestion that the one sentence email caused serious prejudice, permitting the ABC Report to be disregarded, is entirely unfounded.

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<sup>428</sup> SPLM/A Memorial, at paras. 626-630.

<sup>429</sup> See below at paras. 497, 522.

<sup>430</sup> See below at paras. 570-612.

<sup>431</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>432</sup> ABC Report, Part I, at p. 18-19, **Appendix B to SPLM/A Memorial**.

<sup>433</sup> GoS Memorial, at para. 214.

419. In sum, there is no basis at all for the Government’s complaints about the Millington email (quite apart from the fact that such claims do not constitute an excess of mandate). That is true for multiple, independently sufficient reasons:

a. The parties’ procedural agreements and the Rules of Procedure granted the ABC Experts broad procedural discretion and investigatory powers, including the powers to independently conduct such research as they deemed appropriate, without imposing any prohibitions against such interviews. Nothing forbade, and the parties’ procedural arrangements instead contemplated, contacts with third parties such as Mr. Millington.

b. Even if one assumed (contrary to fact) that the Millington email violated some (unspecified) provision in the parties’ procedural agreements, that was not a serious violation of a fundamental procedural guarantee – and it is only such a violation that would permit the ABC Report to be disregarded. Rather, any such violation would at most have been an inadvertent misunderstanding of the limits of the ABC Experts’ investigative authority, no different in character than contacts that the Government has not protested (e.g., with Mr. and Mrs. Tibbs, Professor Cunnison and the IGAD).

c. Finally, and in any event, the Government does not identify any procedural injury arising from the Millington email, much less the sort of grave prejudice required to disregard an adjudicative decision. Here, the Millington email was a single communication, barely a line long, which provided nothing more than generalized, uncontroversial and cumulative information that, as the Government itself concedes, had no effect on the ABC Experts’ decision.

420. In these circumstances, the Government has entirely failed to sustain its very heavy burden of overcoming the substantial deference owed to the ABC Experts’ procedural decisions and of proving some sort of serious procedural violation by the ABC Experts of a fundamental procedural guarantee in relation to the Millington email. Much less has the Government demonstrated any serious prejudice from what are entirely immaterial events that had no practical importance.

6. The Government’s Complaints About the ABC Experts’ Efforts to Reach Consensus Are Contrived and Frivolous

421. Third, the Government complains that the ABC Experts “fail[ed] to act through the Commission,” supposedly in violation of Article 14 of the Rules of Procedure.<sup>434</sup> In particular, the GoS argues that “the ABC Experts never called a final meeting” of the ABC and did not “endeavour to reach a decision by consensus’ and ... were therefore never placed in a situation where they could have the ‘final say,’ under Rule 14.”<sup>435</sup> The Government contends that the ABC Experts should have presented their final report to the Commission before submitting it to the Sudan Presidency and that the failure to do so “*impugned the integrity of the process as a whole.*”<sup>436</sup>

422. The Government’s complaints about the ABC Experts’ supposed failure to act through the Commission and to seek consensus are disingenuous and frivolous. They ignore

<sup>434</sup> GoS Memorial, at p. 75, Heading (iii).

<sup>435</sup> GoS Memorial, at para. 222.

<sup>436</sup> GoS Memorial, at paras. 224 (“It had to be submitted to the Commission, and then presented by the Commission to the Presidency”), 226.

both the express terms of the parties' agreements and the unequivocal record of the ABC Experts' repeated efforts to obtain a consensus between the Government and the SPLM/A and their representatives on the ABC. The Government also ignores its own repeated statements and conduct approving the ABC Experts' actions and the complete absence of any adverse consequences resulting therefrom.

- a) The ABC Experts' Actions with Regard to Attempting to Reach a Consensus Were Fully Consistent with, and Did not Violate, the Parties' Procedural Agreements

423. There is no basis whatsoever for the Government's suggestion that the ABC Experts failed to comply with the parties' procedural agreements regarding efforts to reach a consensus of the ABC or to work through the Commission as a whole. On the contrary, the Government's complaint rests on obvious and apparently willful distortions of the parties' agreements.

424. Preliminarily, it is undisputed that the ABC consisted of two different categories of members, with very different characteristics and roles: (a) five impartial, internationally recognized experts on African affairs, selected pursuant to the parties' agreements by the U.S., United Kingdom and IGAD; and (b) ten party appointed members of the Commission, who were not required (or expected) to be impartial.<sup>437</sup> (The U.S., United Kingdom and IGAD had each played a central role in the negotiation of the Comprehensive Peace Agreement and the parties considered their involvement in the process of selecting the ABC Experts to be important.) The Government does not dispute the fundamental distinction between the ABC and the ABC Experts, stating "it is important to note that the Understanding on the Abyei Boundaries Commission provided that *the 'Commission' was distinct from the ABC Experts.*"<sup>438</sup>

425. It is also important to note that the ABC Experts (as distinct from the ABC as a whole) were responsible for the overall conduct of the ABC proceedings, the preparation of the Rules of Procedure, and the preparation of the ABC Report. It is useful to consider these provisions of the parties' agreements and the procedural rules with some care, particularly given that the Government's treatment of the issue ignores them entirely.

426. In particular, the parties' procedural agreements and the Rules of Procedure contained the following provisions:

- a. Abyei Annex: "The *Experts in the Commission* shall consult the British Archives and other relevant sources on Sudan wherever they may be available, with *a view to arriving at a decision* that shall be based on scientific analysis and research. *The experts* shall also determine *the rules of procedure of the ABC.*"<sup>439</sup>
- b. Abyei Annex: "The *report of the experts*, arrived at as prescribed in the ABC rules of procedure, shall be final and binding on the Parties."<sup>440</sup>

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<sup>437</sup> See Abyei Annex, Art. 2, **Appendix D to SPLM/A Memorial**; ABC ToR, Art. 2.1, **Appendix E to SPLM/A Memorial**; see also SPLM/A Memorial, at paras. 592-606.

<sup>438</sup> GoS Memorial, at para. 67.

<sup>439</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial** (emphasis added).

<sup>440</sup> Abyei Annex, Art. 5, **Appendix D to SPLM/A Memorial** (emphasis added).

- c. Terms of Reference: “The two parties shall submit their presentations to the ABC at its seat in Nairobi. *The experts* [and] other members may ask questions and seek clarifications.”<sup>441</sup>
- d. Terms of Reference: “*The experts* shall consult the British Archives and other relevant sources on the Sudan wherever they may be available, with a view to arriving at a decision that shall be based on research and scientific analysis.”<sup>442</sup>
- e. Program of Work: “[Last week of March 05 to April 1] – *Experts* meet in Nairobi and develop rules of procedure. *ABC convenes with its full membership* in Nairobi. *The experts* present the rules of procedure.”<sup>443</sup>
- f. Program of Work: “April 16 to May 16 – *Experts* consult archives and other documents as they deem appropriate.”<sup>444</sup>
- g. Program of Work: “May 20-26 – *The experts* examine and evaluate the evidence received and *prepare the final report*”<sup>445</sup>
- h. Program of Work: “May 28 – *The ABC* travels to Khartoum for *the presentation of the final report*.”<sup>446</sup>
- i. Program of Work: “May 29 – *THE EXPERTS* present *in the presence of the whole membership of the ABC THEIR final report* to the Presidency.”<sup>447</sup>
- j. Rules of Procedure: “proceedings will be conducted under the *chairmanship of Ambassador Petterson*.”<sup>448</sup>
- k. Rules of Procedure: “*the experts* will prepare the rules of procedure for the remainder of the Commission’s work. *The experts* will present the rules of procedure to the two parties.... Approval will be by consensus.”<sup>449</sup>
- l. Rules of Procedure: “After each [of the parties’ presentations], *the experts* will ask questions or make comments as they deem appropriate.”<sup>450</sup>
- m. Rules of Procedure: “Upon completion of the visits to the field, *Commission members* will return via Khartoum to Nairobi or their respective locations. *The experts* will determine what additional documentation and/or archival material will need to be consulted.”<sup>451</sup>
- n. Rules of Procedure: “[*T*]he *experts* will examine and evaluate all the material they have gathered and will prepare *the final report*.”<sup>452</sup>

<sup>441</sup> ABC ToR, Art. 3.1, **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>442</sup> ABC ToR, Art. 3.4, **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>443</sup> ABC ToR, at p. 2 (“Program of work”), **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>444</sup> ABC ToR, at p. 2 (“Program of work”), **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>445</sup> ABC ToR, at p. 3 (“Program of work”), **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>446</sup> ABC ToR, at p. 3 (“Program of work”), **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>447</sup> ABC ToR, at p. 3 (“Program of work”), **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>448</sup> ABC RoP, Art. 2, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>449</sup> ABC RoP, Art. 3, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>450</sup> ABC RoP, Art. 4, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>451</sup> ABC RoP, Art. 11, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>452</sup> ABC RoP, Arts. 12, 13, 14, **Appendix F to SPLM/A Memorial** (emphasis added).

o. Rules of Procedure: “*The Commission* will endeavour to reach a decision by consensus. If, however, an agreed position *by two sides* is not achieved, *the experts* will have the final say.”<sup>453</sup>

427. The Government’s Memorial ignores almost all of the foregoing provisions. Instead, its complaint rests entirely on the allegation that the ABC Experts violated Article 14 of the so-called “Arbitration Rules”<sup>454</sup> (presumably, a reference by the Government to the “Rules of Procedure” for the ABC) by failing first to discuss its draft ABC Report with the full Commission. That complaint is an after-the-fact contrivance that bespeaks bad faith on the part of the Government.

428. As noted above, Article 14 of the Rules of Procedure expressly provided that:

“The Commission will endeavour to reach a decision by consensus. If, however, an agreed position by two sides is not achieved, the experts will have the final say.”<sup>455</sup>

429. The Government now pretends to interpret this provision as requiring the ABC Experts to prepare a draft of the ABC Report, next to “submit[] [that draft] to the Commission,”<sup>456</sup> and then to call a “meeting ... to try to reconcile the views of the two Parties,”<sup>457</sup> before finally submitting a final report to the Presidency. The Government’s interpretation flatly contradicts the text of Article 14, as well as the other provisions of the parties’ agreements and the Rules of Procedure and the efforts that were made to reach a compromise between the parties’ representatives.

430. Importantly, Article 14 provides only that “the Commission *will endeavour* to reach a decision by consensus,” and, if no agreed position is achieved, that “the experts will have the final say.” By its plain terms, Article 14 imposes an obligation on the entire ABC (not just the ABC Experts) to “endeavour to reach a decision by consensus.”

431. Consistent with the general procedural flexibility of the ABC Experts, Article 14 sensibly contemplates only reasonable efforts (“*will ENDEAVOUR*”) to reach a consensus and does not impose specific mandatory requirements on the ABC Experts (or anyone else) regarding consultation, circulation of drafts, meetings or other details. Even if Article 14 is viewed entirely in a vacuum, as the Government pretends to do, there is no way to interpret the provision as requiring any particular procedures in order for the ABC Experts to determine that a consensus had not been reached prior to submitting their final report; rather, Article 14 does nothing more than provide for reasonable best efforts to reach a consensus, without prescribing any specific mandatory procedural steps.

432. In this case, there is nothing to suggest that the ABC Experts’ chosen method of determining whether a consensus could be reached violated Article 14’s reasonable endeavors provision. As discussed below, the ABC Experts attempted after the parties’ final presentations to the ABC to determine whether the parties and their appointees on the Commission could find a common position, but were informed that this was not possible. Article 14 did not require any further or different efforts, or any specific procedural steps to be taken. As already noted, it merely contemplated that the “Commission will endeavour to

<sup>453</sup> ABC RoP, Art. 14, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>454</sup> GoS Memorial, at paras. 219-226 under Heading (iii) (“Failure to act through the Commission (Arbitration Rule 14).”).

<sup>455</sup> ABC RoP, Art. 14, **Appendix F to SPLM/A Memorial**; see above at para. 241(d).

<sup>456</sup> GoS Memorial, at para. 224.

<sup>457</sup> GoS Memorial, at para. 225.

reach a decision by consensus.” Those endeavors were plainly made, and that is an end of the matter.

433. Furthermore, while the language of Article 14 is entirely clear, it is further confirmed by the text of the Terms of Reference (which the Government’s Memorial unhelpfully omits to mention). As discussed above, the Terms of Reference contained the following provisions in its Program of Work:

- a. Program of Work: “May 20-26 – *The experts* examine and evaluate the evidence received and *prepare the final report*”<sup>458</sup>
- b. Program of Work: “May 28 – *The ABC* travels to Khartoum for *the presentation of the final report*”<sup>459</sup>
- c. Program of Work: “May 29 – *THE EXPERTS* present *in the presence of the whole membership of the ABC THEIR final report* to the Presidency”<sup>460</sup>

434. Several points in this description of the ABC Experts’ work are important, and completely refute the Government’s pretended complaints:

- a. First, it is completely clear that it is the “[ABC] *experts*” who are to “prepare the *final report*” (between 20 May and 26 May). The parties expected the “ABC *experts*” to complete this task alone, without involvement of other ABC members, and the ABC Experts were expected to complete a “*final report*,” not a draft report.
- b. Second, it was clearly understood by both parties that once the ABC Experts had completed their “final report,” then all of the ABC members were to travel to Khartoum on 28 May “for *the presentation* of the *final report*.” The Program of work did not provide that the ABC was to travel to Khartoum to “discuss a draft report,” to “comment on the final report” or to “seek to reach a consensus.” Rather, the Program of work provided in terms that the ABC members were to travel to Khartoum on 28 May 2005 for the “presentation” of the “final report” which the “ABC experts” had prepared during the proceeding week.
- c. Third, the next day (29 May 2005), after the entire ABC was due to have arrived in Khartoum, “*the experts*” were to present “*their final report*” to the Presidency “in the presence of *the whole membership of the ABC*.” The Program of work did not provide that the “whole membership of the ABC” would “seek to reach consensus” or that the “ABC Experts would present their draft report to the whole membership of the ABC for comment.” Rather, in language that could not be any clearer, the Program of work provided that the ABC Experts would present the “final report,” which they had prepared, to the Presidency “in the presence of the whole membership of the ABC.” Moreover, it is notable that the Program of work included no time between the anticipated 28 May 2005 travel to Khartoum and the 29 May 2005 presentation of the final report to the Presidency for further efforts to reach consensus.

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<sup>458</sup> ABC ToR, at p. 3 (“Program of work”), **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>459</sup> ABC ToR, at p. 3 (“Program of work”), **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>460</sup> ABC ToR, at p. 3 (“Program of work”), **Appendix E to SPLM/A Memorial** (emphasis added).

435. The Government’s interpretation of Article 14 cannot be reconciled with the foregoing language. That language reveals very clearly what the parties intended with regard to the preparation and presentation of the ABC Report and it contradicts any suggestion that the ABC Experts somehow violated the terms of the parties’ procedural agreements. It bears emphasis that the text of the Program of work does not merely provide no support for the Government’s interpretation of Article 14 of the Rules of Procedure; in addition, the Program of work also contradicts and renders wholly implausible the Government’s interpretation.

436. Thus, the Program of work required that the “ABC *experts*” (not the full Commission) prepare “*their*” report (not the full Commission’s report), which was to be “the *final* report” (not a draft report), and that they present this “*final report*” to the Presidency (not to the Commission), “in the presence of the *whole membership of the ABC.*” The Rules of Procedure specifically authorized exactly what the ABC Experts did and do not make any provision for what the Government now claims that the ABC Experts should have done. On the contrary, the Rules of Procedure left no room, as a practical matter, for the various procedural steps that the Government now suggests.

437. If the ABC Experts had considered it appropriate to do so, the Program of work would not have forbidden them from trying another effort to seek consensus between the parties after completing their final report. As discussed above, the Program of work was a summary plan of expected activities, and not an all-inclusive and prohibitory regulation: had the ABC Experts chosen to do so, they could have met again with either the parties or the entire ABC to attempt to broker a consensus. But nothing even remotely contemplated, much less required, that they should do so.

438. In sum, there is utterly no substance to the Government’s claim that the parties intended the ABC Experts to circulate a copy of their draft ABC Report to the full Commission before delivering it to the Presidency. The Government’s claim is contradicted by the specific language and structure of the parties’ procedural arrangements, which make perfectly clear that the ABC Experts proceeded precisely as intended in preparing and presenting their final report.

b) The Parties Specifically Discussed and Approved the Preparation and Presentation of the ABC Report by the ABC Experts

439. In any event, the parties’ conduct at the time also flatly contradicts the Government’s after-the-fact complaints about the ABC Experts’ alleged failures to notify the ABC that it was presenting its final Report and/or trying to reach consensus. When the parties’ actions in connection with the preparation and presentation of the ABC Experts’ final report are considered, it is difficult to see how the Government’s Memorial seriously can complain about the procedures that were used.

440. The Government omits to mention that – as contemplated by the Program of work contained in the Terms of Reference – the ABC Experts informed the members of the full Commission that they were going to present their final report to the Presidency and that the ABC members should travel to Khartoum for the presentation. The members of the ABC then did so.

441. Among other things, the GoS members of the ABC made preparations for the presentation of the ABC Report to the Presidency at the Presidential Palace. They arranged



for a formal occasion, attended by President Bashir, First Vice President John Garang and Vice President Taha, with a press contingent present outside the meeting room.<sup>461</sup> The members of the full ABC all attended the presentation ceremony and all, quite clearly, were anticipating the delivery of a final Report.<sup>462</sup>

442. The evidence clearly shows that Ambassador Dirdeiry and Minister Deng Alor were both liaising closely by email and telephone with the ABC Experts and IGAD to arrange a date for the presentation of the ABC Report to the Presidency in early July 2005, without any suggestion that there be any further effort to achieve a consensus between the parties or party-appointed ABC members:

a. Email from Dr. Johnson to Ambassador Petterson (copying Mr. Gutto) on 3 July 2005: "I spoke to Dirdeiry, as you suggested. He confirmed that the 10 July date is still scheduled. He wasn't aware that he was supposed to tell IGAD this. He also said they were just waiting for Garang to arrive in Khartoum to be sworn in. But otherwise, they are still wanting to hear from the ABC on 10 July. I then rang Deng Alor. He, too, confirmed, that 10 July was still the date they had in mind, that Garang had confirmed to him that the ABC was the first order of business after the swearing in. Deng relayed that to Dirdeiry, to relay it to Bashir... Dirdeiry asked me to contact him personally with each of our travel plans. He didn't want to be emailed, and asked that I use his mobile number... I suggest that we each give IGAD our travel details to pass on to Khartoum 'in a timely fashion,' but that I should contact Dirdeiry when I know each of your travel details as well - unless you wish to contact him yourself."<sup>463</sup>

b. Email from Dr. Johnson to Mrs. Keiru of IGAD, (copying Don Petterson) on 3 July 2005: "[Now] that Ambassador Dirdeiry and Deng Alor have both confirmed to us that the report of the ABC to the Presidency is still scheduled for 10 July, I have made my travel arrangements. Please pass this information on to the Ministry of Foreign Affairs. I will also be telling Ambassador Dirdeiry this."<sup>464</sup>

c. Email from Alemu Kassahun to Mrs. Keiru of IGAD, dated 4 July 2005: "Greetings. I was hoping that I will be informed of my travel arrangements today. I will collect my Sudan visa tomorrow. Ambassador Petterson says that Dirdeiry and Deng Alor have confirmed the date..."<sup>465</sup>

d. Email from Mrs. Keiru of IGAD to unnamed recipient(s) on 5 July 2005: "I have spoken to Dirdeiry this afternoon on the confirmation of the appointment with the Presidency on 10<sup>th</sup> July for purposes of presenting the Abyei Boundaries Commission report. He informed me that he has been trying to get Dr. Johnson and Ambassador Petterson with a view of postponing the 10<sup>th</sup> date because of the commitment of the Presidency on the days following the swearing in... In view of this he advised that you arrange to arrive Khartoum on Tuesday, 12<sup>th</sup> July 2005 and he will confirm the new date for this appointment."<sup>466</sup>

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<sup>461</sup> Witness Statement of Minister Deng Alor Kuol, at p. 25, ¶154; Witness Statement of James Lual Deng, at p. 18, ¶100.

<sup>462</sup> Witness Statement of Minister Deng Alor Kuol, at p. 25, ¶153; Witness Statement of James Lual Deng, at p. 18, ¶100.

<sup>463</sup> Email from Douglas Johnson to Donald Petterson, dated 3 July 2005, at pp. 11 to 12, **Exhibit-FE 19/19**.

<sup>464</sup> Email from Douglas Johnson to Mrs. Keiru of IGAD, dated 3 July 2005, at p. 10, **Exhibit-FE 19/19**.

<sup>465</sup> Email from Alemu Kassahun to Mrs Keiru of IGAD, dated 4 July 2005, at p. 9, **Exhibit-FE 19/19**.

<sup>466</sup> Email from Mrs Keiru to unnamed recipient(s), dated 5 July 2005, at pp. 7 to 8, **Exhibit-FE 19/19**.

e. Email from Dr. Johnson to Mrs. Keiru of IGAD (copying in Donald Petterson) dated 5 July 2005: “This is going to be VERY difficult. On the strength of what both Dirdeiry and Deng Alor told me on Sunday I booked and paid for a non-refundable, non-changeable ticket. Ambassador Petterson has already informed Dirdeiry and others that he CANNOT be in Khartoum after 11 July, as he has a commitment in California on 14 July... I do not think it advisable for any of us to go to Khartoum to wait for confirmation of a date. We must have a firm date BEFORE any of us fly there. We ALL need a FIRM date NOW.”<sup>467</sup>

f. Email from Dr. Johnson to Shadrack Gutto (copying in Donald Petterson) on 5 July 2005: “As you may recall, Don has to be in California on 14 July ... I hope that IGAD and Dirdeiry can reach him through the State Dept before he sets off for Khartoum tomorrow...”<sup>468</sup>

443. If the GoS or the SPLM/A members of the ABC had expected that there was going to be an additional meeting of the full ABC to attempt to achieve consensus prior to the presentation of the ABC Report to the Presidency (following the ABC’s conclusion of its final meeting in Nairobi in mid-June 2005), or if the GoS or SPLM/A had desired that such a meeting take place, then it is inconceivable that Ambassador Dirdeiry and Minister Deng Alor would have neglected to mention this during their conversations with IGAD and the ABC Experts in early July 2005, less than two weeks before the final presentation to the Presidency. Yet, no such objection was made in these email exchanges. Rather, Ambassador Dirdeiry is recorded by Dr. Johnson on 3 July 2005 as “wanting to hear from the ABC on 10 July,” the date that was scheduled for the presentation to the Presidency.

444. Similarly, if the GoS or the SPLM/A members of the ABC had expected that there was going to be a draft version of the ABC Report circulated to the parties before the presentation of the final Report to the Presidency, then it is inconceivable that Ambassador Dirdeiry and Minister Deng Alor would not have raised this issue with the ABC Experts while liaising with them during this email exchange. Again, however, there is no hint of this issue being raised. The inescapable conclusion is that both the SPLM/A and GoS members of the ABC were well aware in early July 2005 that the ABC Experts did not intend to put forward any new initiative to reach consensus, either by scheduling a further meeting between the ABC members or by circulating a draft version of the ABC Report for discussion.

445. Moreover, the Government’s statements during the final presentations to the parties make it perfectly clear that it neither expected nor wanted any further effort to reach a consensus between the party-appointed members of the Commission, and instead welcomed a final decision by the ABC Experts. During the Government’s final presentation on 16 June 2005, the Head of the GoS’s delegation on the ABC, Ambassador Dirdeiry, made the following comments:

a. “***When a decision is agreed and accepted before hand it has to be final and binding***, is not acceptable by anybody to deny the right of that committee or body to issue that decision. And, it’s unmanly of any person not to accept that decision and respect it. Because you should have the confidence in those people and you should

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<sup>467</sup> Email from Douglas Johnson to Mrs Keiru of IGAD (copying in Donald Petterson), dated 5 July 2005, at pp. 2 to 6, **Exhibit-FE 19/19** (emphasis original).

<sup>468</sup> Email from Douglas Johnson to Shadrack Gutto (copying in Donald Petterson), dated 5 July 2005, at p. 1, **Exhibit-FE 19/19**.

respect it knowing that it will be taken on completely impartial grounds. Those in fact, are very, very important reminders.”<sup>469</sup>

b. “*We are very much confident in your assessment, yourself [and] your colleagues. We are very much in fact, assured by the way you have handled things since you have started and we are waiting for the conclusion and looking forward for the judgment.*”<sup>470</sup>

446. It is clear that Ambassador Dirdeiry’s remarks were directed to the ABC Experts and that it was the ABC Experts’ “decision” and “assessment” that the Government was awaiting and committing itself to respect. Ambassador Dirdeiry, who was a member of the ABC, was not directing his comments to either himself or his GoS colleagues on the Commission, but to the ABC Experts. That is clear from Ambassador Dirdeiry’s references to the impartiality of the ABC Experts<sup>471</sup> – a characterization which obviously did not apply to either the GoS or the SPLM/A members of the Commission. The same conclusion is compelled by the fact that Ambassador Dirdeiry repeatedly used the second person – speaking of “*your decision*” and “*your view*,” rather than “our decision” or “our view.”<sup>472</sup>

447. Even more explicitly, immediately following the parties’ final presentations, Ambassador Dirdeiry declared that:

“I leave this *to the Experts. If the Experts are feeling* that there is anything that needs to be clarified by us we will do that. We have given *the Experts* the reference where they can get those maps, *where they can get those reports*, and definitely *they are entitled to the conclusions that they want to draw* upon those references and they can assess them the way they like. So, we don’t feel the need to assess, to comment, on whatever has been said on those.”<sup>473</sup>

448. Finally, with regard to the ABC Report, the same understanding of the parties’ agreements was shared by General Sumbeiywo of the IGAD. As detailed in the ABC Report, the ABC Experts met with General Sumbeiywo after completing the ABC Report and discussed the fact that the contents of the Report would not be disclosed prior to presentation to the Presidency.<sup>474</sup> That approach was entirely consistent with the plain language of the parties’ procedural arrangements (discussed above) and the parties’ own conduct.

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<sup>469</sup> See Ambassador Dirdeiry, extract transcript from IGAD Tape Recordings, dated 16 June 2005, **Exhibit-FE 14/21** (emphasis added).

<sup>470</sup> Ambassador Dirdeiry, extract transcript from IGAD Tape Recordings, dated 16 June 2005, **Exhibit-FE 14/21**.

<sup>471</sup> Ambassador Dirdeiry, extract transcript from IGAD Tape Recordings, dated 16 June 2005, **Exhibit-FE 14/21**.

<sup>472</sup> See also Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 2, at p. 2 (“Now people will consider the conclusion, Mr. Chairman, as a conclusion of a judge. This conclusion of judicial nature. Ah, the decision that *you* are going to focus on archives which was also told to the people there, and which was reactivated in *your* preliminary or progress report, about the visit, was also made known to the people. And it was hailed and accepted by the people. They say well, if *you* are going to establish this kalenke, according to the archives of 1905, according to what the British say, we are going to accept that... This will make it very easy for Deng and for me and for everybody involved to convince the people that this is *your* view”), p. 2 (“we are very much hopeful that the material which we have managed to present to you here will assist *you* to arrive at a fair conclusion that will resolve this conflict once and for all. We are very much confident in *your assessment, yourself and your colleagues*. We are very much in fact, assured by the way *you* have handled things since you have started and we are waiting for the conclusion and looking forward for the judgment”), **Exhibit-FE 19/21**.

<sup>473</sup> Ambassador Dirdeiry, Taped Recording of SPLM/A Final Presentation, dated 16 June 2005, File 4, at p. 1, **Exhibit-FE 19/17** (emphasis added).

<sup>474</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

449. It is therefore hardly surprising that General Sumbeiywo testifies as follows:

“I am not aware that the ABC Experts had any communication with the SPLM/A or GoS delegates on the ABC after the parties had given their final presentations on 16 and 17 June 2005. I understand from the record that the ABC Experts did give the parties the opportunity to reach a decision between themselves by consensus at their final meeting but, perhaps unsurprisingly, this was not possible. Instead, therefore, it fell to the ABC Experts to produce a final and binding decision, which was to become a public document after it had been formally presented to the Presidency (in accordance with the ABC Rules of Procedure).”<sup>475</sup>

450. The Government’s Memorial contends that “Lt.-General Sumbeiywo had no authority to dispense with the requirements of the Rules of Procedure.”<sup>476</sup> That misses the point. No “*dispensation*” was required from General Sumbeiywo. Rather, the relevant point is that – like everyone else involved in the process, including the GoS – General Sumbeiywo understood the Terms of Reference and Rules of Procedure to authorize exactly what the ABC Experts were doing, a process that the entire ABC (and highest level members of the parties’ respective Governments) acquiesced in.

451. Nor were General Sumbeiywo’s views some random, uninformed opinion. The IGAD, and General Sumbeiywo in particular, had played a central role in assisting the parties in reaching the Comprehensive Peace Agreement. His understanding, while not decisive, is relevant, objective and impartial evidence of the parties’ contemporaneous understanding.

452. At no point during the entire ABC process did the Government suggest in any way that the ABC Experts were violating the parties’ procedural arrangements, that another effort to achieve consensus would be desirable or that a different course should be adopted. On the contrary, the GoS delegation and members of the ABC not only attended the ABC Experts’ presentation of their final report, but made the arrangements for the presentation to the Presidency of Sudan in the presence of the press to report on the decision.

453. The Government’s contemporaneous actions confirm the plain meaning of the Terms of Reference’s Program of work and the Rules of Procedure. The reason that the Government did not object to the ABC Experts’ actions, and instead co-operated fully with them, was that the ABC Experts were doing precisely what both parties expected them to do. The Government’s recent claims that it expected something different from Article 14 are after-the-fact contrivances, that are contradicted by its contemporaneous conduct.<sup>477</sup>

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<sup>475</sup> Witness Statement of General Sumbeiywo, at p. 20, ¶118.

<sup>476</sup> GoS Memorial, at para. 222.

<sup>477</sup> It is well-settled that the parties’ conduct in the application of an agreement is relevant to its interpretation; *See Case Concerning Oil Platforms (Iran v. United States of America)*, [1991] I.C.J. Rep. 804, 815 (I.C.J.), **Exhibit-LE 30/4**; *The Corfu Channel Case (Merits) (Great-Britain v. Albania)*, [1949] I.C.J. Rep. 4, 25 (I.C.J.), **Exhibit-LE 30/5**; Vienna Convention on the Law of Treaties 1969, Art. 31 (“2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, ... 3. There shall be taken in account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation ...*”), **Exhibit-LE 1/10** (emphasis added); P. Dupuy, *Droit International Public* ¶308c (2008) (“[I]f necessary, attention may also be drawn upon what is generally called the ‘subsequent practice of the contracting parties,’ i.e. *the subsequent conduct of the contracting parties with respect to the treaty at issue and its application, which is regarded as tangible evidence of the way they understand the meaning and the scope of the obligations they have agreed to ...*”). These considerations are equally valid with respect to the unilateral conduct of one of the contractual parties”), **Exhibit-LE 30/6** (emphasis added).

454. In sum, there is no basis for the Government’s claim that it – much less the parties mutually – had anticipated that the ABC Experts would circulate a copy of their draft ABC Report to the full Commission. The Government’s claim is contradicted by the language and structure of the parties’ procedural arrangements, as well as by the parties’ conduct at the time. In truth, the Government’s purported interpretation of Article 14 of the Rules of Procedure is a disingenuous invention which provides no basis for challenging the ABC Report.

c) The ABC Experts’ Approach to Reaching Consensus Was Not a Serious Departure from a Fundamental Rule of Procedure

455. Even if one assumed (contrary to fact) that the ABC Experts breached some provision of the Rules of Procedure by failing adequately to attempt to reach consensus within the full Commission, this was not a serious breach of a fundamental procedural guarantee. Accordingly, even if there were some procedural misstep by the ABC Experts in this regard (which there clearly was not), and such step qualified as an excess of mandate (which it clearly would not), it would still not have been grounds for disregarding the ABC Report.

456. As discussed above, an arbitral award or adjudicatory decision may only be set aside or invalidated exceptionally, if it involved a very grave breach of a fundamentally important procedural right.<sup>478</sup> Nothing comes even remotely near to this standard in the present case.

457. Preliminarily, it is important to note that the concept of the parties reaching consensus before the presentation of the Report to the Presidency was introduced by the ABC Experts in the Rules of Procedure very late in the process of organizing the ABC proceedings.<sup>479</sup> The parties themselves negotiated the Terms of Reference and Program of work which envisaged that, once the parties had made their final presentations, “the [experts would] examine and evaluate the evidence received; and prepare their final report.”<sup>480</sup> Like the Abyei Protocol and the Abyei Annex, these provisions contained nothing regarding efforts by the Commission to seek consensus.

458. Instead, the concept of consensus was introduced late in the process *by the ABC Experts themselves* in an effort to permit the parties gradually to work towards a compromise during the ABC proceedings. The concept of consensus was not, as the GoS now asserts, a key aspect of how the parties conceived the work of the ABC. Nor was it some inviolable procedural guarantee that the parties themselves had demanded from the outset. Rather, it was merely an addition of the ABC Experts who – as part of their general efforts to resolve the parties’ dispute in an “informal yet businesslike” manner – sought to introduce the possibility of forging a consensual resolution between the parties.

459. Further, as also discussed above, Article 14 of the Rules of Procedure provides only that “the Commission *will endeavour* to reach a decision by consensus,” and, if no agreed position is achieved “the experts will have the final say.” Article 14 sensibly expressed a reasonable efforts expectation (“*will endeavour*”) and did not impose specific mandatory

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<sup>478</sup> See above at paras. 285-310.

<sup>479</sup> ABC RoP, Art. 14 (“The Commission will endeavour to reach a decision by consensus. If, however, an agreed position by the two sides is not achieved, the experts will have the final say”), **Appendix F to SPLM/A Memorial**. Article 4 of the Abyei Annex and Article 3 of the Rules of Procedure provided for the ABC Experts to determine the Rules of Procedure. Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**; ABC RoP, Art. 3, **Appendix F to SPLM/A Memorial**; see also Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶¶93-96; Witness Statement of James Lual Deng, at p. 8, ¶¶42-43.

<sup>480</sup> ABC ToR, at p. 3 (“Program of work”) and Art. 3.5, **Appendix E to SPLM/A Memorial**.

steps regarding consultations, circulation of drafts, meetings or other details. This sort of “reasonable endeavours” language could hardly be regarded as a fundamental procedural safeguard for the parties, and its violation could only in the most exceptional cases – if ever – be grounds for disregarding the ABC Report.

460. Here, the evidence makes it abundantly clear that the ABC Experts went beyond any possible procedural requirement in seeking to obtain a consensus between the parties. The GoS Memorial unhelpfully omits any mention of (at least) three attempts to reach a consensus between the members of the ABC. Each time, it was the Government that rejected proposals for attempting to reach a consensus. Far from the ABC Experts failing to attempt to reach a consensus, it was the GoS and the GoS members of the ABC that failed meaningfully to pursue the three attempts to forge a consensus.

461. First, in early June 2005, a group of Ngok and Misseriya community representatives made it known to Dr. Luka Biong Deng of the SPLM/A that they believed that they could reach an acceptable compromise solution on the definition of Abyei, which could be acceptable to the parties, if the SPLM/A and the GoS would give them the opportunity to do so.<sup>481</sup> Dr. Biong Deng and Minister Deng Alor, the head of the SPLM/A party-nominated members on the ABC, approached Ambassador Dirdeiry, the head of the GoS delegation, with the proposal as a basis for finding a consensus. Notwithstanding the terms of Article 14 of the Rules of Procedure, Ambassador Dirdeiry rejected the proposal out of hand.<sup>482</sup>

462. Minister Deng Alor described this first attempt in his witness statement as follows:

“[I]n June 2005, before we reconvened in Nairobi for the final presentations, there were discussions between some politicians in Khartoum that the proposing Ngok Dinka people and Misseriya people could agree on the disputed Ngok boundaries. The suggestion by these politicians was passed on to Dr. Luka Biong Deng and he took it up with Ambassador Dirdeiry. Ambassador Dirdeiry dismissed the idea outright and simply said no. We were willing to discuss this proposal but the GoS did not accept our proposal. The GoS only wanted to wait for the decision of the Commission.”<sup>483</sup>

463. Second, when the ABC reconvened at the La Mada Hotel in Nairobi for the final presentations of the parties to the ABC, there was a second attempt to reach consensus by the

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<sup>481</sup> See Witness Statement of Minister Deng Alor Kuol, at p. 22, ¶140; Second Witness Statement of Minister Deng Alor Kuol, at pp. 14, ¶¶74-76, ¶75 (“To elaborate on this, I recall that Dr. Luka Biong Deng came to me and said that the leaders of both the Misseriya and Ngok communities wanted to be given the chance to settle the Abyei boundary issue themselves, because they knew the Abyei area better than anyone. Dr. Biong Deng said that the chiefs of both communities were ready to sit down and try to reach consensus – they just needed the SPLM/A and the GoS to give them the go ahead.”); Second Witness Statement of James Lual Deng, p. 2, ¶¶8-9.

<sup>482</sup> Second Witness Statement of Minister Deng Alor Kuol, at p. 14, ¶76. Ambassador Dirdeiry rejected the proposal on the basis that the presence of oil in Abyei made it an issue of national importance and that it was therefore inappropriate for it to be settled by anyone other than the ABC: Second Witness Statement of Minister Deng Alor Kuol, at p. 14, ¶¶76-77 (“However, when Dr. Biong Deng and myself put this proposal to Ambassador Dirdeiry, he rejected it straight away. His view was that the Abyei issue was no longer just between the Ngok and the Misseriya, it was also about the national interest in natural resources, specifically oil. He argued that the GoS had a significant stake in the outcome of the Abyei dispute, as it could affect the oil revenue available to the GoS in the future. Also, the GoS had put together quite a detailed first presentation to the ABC in Nairobi on 11 April 2005, while the SPLM/A had only given a general historical background. Consequently, Ambassador Dirdeiry seemed very confident that the ABC Experts would agree with their conclusions about Abyei and seemed to conclude that there was no need for the GoS to agree to any form of compromise or consensus.”).

<sup>483</sup> Witness Statement of Minister Deng Alor Kuol, at p. 22, ¶140.

parties' representatives in the ABC proceedings.<sup>484</sup> This attempt involved both parties nominating one representative to discuss the parties' dispute behind closed doors, where it was hoped that a compromise proposal could be developed and then submitted to the respective delegations of the GoS and SPLM/A on the Commission for their approval. Mr. James Lual Deng was the ABC member nominated by the SPLM/A, with Mr. Ahmed Assalih Soloha being the ABC member chosen by the Government.<sup>485</sup> This proposal had the complete support and approval of the ABC Experts, who were fully aware of it.<sup>486</sup>

464. In their discussions, James Lual Deng and Ahmed Assalih Soloha agreed on a compromise which gave the GoS a share of the oil rights in the Abyei Area and guaranteed the grazing rights of the Misseriya, in exchange for the Government accepting the SPLM/A's definition of the Abyei Area. Nonetheless, as described in the witness testimony of James Lual Deng and Minister Deng Alor, and notwithstanding the terms of Article 14 of the Rules of Procedure, Ambassador Dirdeiry again rejected the proposal.<sup>487</sup>

465. Third, after the GoS had given its final presentation on 17 June 2005, the Chairman of the ABC, Ambassador Petterson, proposed that the ABC make one final attempt to reach consensus. In order to facilitate a consensus, Chairman Petterson proposed that Professor Berhanu take the leaders of each delegation into a separate room to attempt to reach an agreement that might be acceptable to all parties on the ABC. The members of the ABC appointed by the GoS and SPLM/A accepted the proposal and Ambassador Dirdeiry and Minister Deng Alor agreed to make a final effort to achieve consensus.<sup>488</sup> Unfortunately, soon after Professor Berhanu and Minister Deng Alor started discussions, and again notwithstanding the terms of Article 14, Ambassador Dirdeiry stated that the GoS was not willing to reach any kind of consensus with the SPLM/A on the definition of the Abyei Area.<sup>489</sup>

466. As a result, Professor Berhanu informed Chairman Petterson and the other ABC members that the ABC had been unable to reach consensus.<sup>490</sup> In turn, Chairman Petterson

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<sup>484</sup> See Witness Statement of James Lual Deng, at p. 15, ¶83 ("Before the ABC reconvened on 16 June 2005 and final presentations were given, at the initiation of the parties it was agreed between the GoS and SPLM/A ABC members that we should try again to reach a consensual compromise through a closed door negotiation (as several earlier attempts to reach consensus had failed)."); Witness Statement of Minister Deng Alor Kuol, at p. 23, ¶¶142-143; Second Witness Statement of James Lual Deng at pp. 2-3, ¶¶10-15; Second Witness Statement of Minister Deng Alor Kuol, at pp. 14-15, ¶¶78-79.

<sup>485</sup> See Witness Statement of James Lual Deng, at p. 15, ¶83; Witness Statement of Minister Deng Alor Kuol, at p. 23, ¶142.

<sup>486</sup> See Witness Statement of James Lual Deng, at p. 15, ¶83.

<sup>487</sup> See Witness Statement of James Lual Deng, at p. 14, ¶¶84-85; Witness Statement of Minister Deng Alor Kuol, at p. 23, ¶143; Second Witness Statement of James Lual Deng, at p. 3, ¶13.

<sup>488</sup> Second Witness Statement of James Lual Deng, at p. 3, ¶16 ("I recall that there was a final effort to achieve consensus after the GoS had given its last presentation on 17 June 2005. I remember that Chairman Petterson asked the parties if they would be prepared to make one final effort to achieve consensus. Both Ambassador Dirdeiry and Minister Deng Alor agreed that they would try."); Second Witness Statement of Minister Deng Alor Kuol, at p. 15, ¶81, ("Chairman Petterson noted that it would be much better if the parties could agree some kind of compromise between themselves, rather than placing the burden of the decision on the ABC Experts. To that end, he asked if the parties would be willing to make one final attempt to reach consensus. Both myself and Ambassador Dirdeiry agreed this would be a good idea.").

<sup>489</sup> Second Witness Statement of Minister Deng Alor Kuol, at p. 15, ¶82, ("Ambassador Dirdeiry quickly made it clear that he was not interested in reaching any kind of compromise. He wanted the ABC Experts to make their decision.").

<sup>490</sup> Second Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶83 ("When it became clear that Ambassador Dirdeiry had no interest in negotiating let alone reaching consensus, Professor Berhanu informed the whole of the ABC that it was not possible to reach consensus."); Second Witness Statement of James Lual Deng, at p. 3, ¶16 ("I recall that the three of them went into a separate room to discuss whether it would be possible to come to some kind of compromise, but they quickly returned declaring that it had not been possible to reach agreement.").

made it clear to the ABC members that the ABC Experts would now proceed to write the ABC Report without any further input or comment from the other members, and that their report would be final and binding on the parties. This was agreed to by all of the ABC members<sup>491</sup> and it is the basis on which the ABC Experts proceeded.

467. The sufficiency of these efforts at reaching a consensus should also be considered in light of the likelihood that the ABC Experts might succeed in achieving consensus. From the very commencement of the Commission's activities, at the parties opening presentations on 12 April 2005, the parties had made explicit the unlikelihood of their reaching some consensus on the issue being determined. At these presentations, Ambassador Petterson asked whether there was agreement between the parties on a point made explicitly by the GoS – that is, that there could be no compromise. Both parties agreed that this was so.<sup>492</sup> Ambassador Dirdeiry stated:

“[w]e said that the decision should be based on research and **not on compromise**. It is very clear. If people were going to make compromises, it should not have stated, ‘based on scientific analysis and research.’ ... We also said that it shall not be open to any re-negotiation. We mean exactly that.”<sup>493</sup>

As discussed below, this position remained unaltered during the course of the Commission's work, and was reiterated in the GoS's final presentations.<sup>494</sup>

468. The GoS's attitude toward settlement was clear. Any effort to reach compromise – by the ABC members, the ABC Experts or the members of the Abyei community themselves – was rebuffed. The Government's attitude toward settlement was summed up by Ambassador Petterson in his paper “*Abyei Unresolved*” where he says: “When I suggested privately to Ambassador Dirdeiry that an equitable decision based on compromise would be a good outcome, **he told me flat out that there could be no compromise on a land issue**.”<sup>495</sup> The evidence unequivocally confirms that view.<sup>496</sup>

469. The ABC's Program of work and Rules of Procedure did permit multiple opportunities for the parties' nominees on the ABC to have reached some form of consensus had they wished to do so. The parties' representatives collaborated closely in helping to finalize the draft of those Rules of Procedure initially presented by the ABC Experts. Pursuant to those Rules, the parties and the full ABC sat and listened to one another's first presentations, were present during every field interview in the Abyei Area and reconvened again for final presentations over a two day period. The Government could have asked the

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<sup>491</sup> Second Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶83 (“The ABC members all agreed that consensus would not be possible.”).

<sup>492</sup> Transcript of GoS Preliminary Presentation, “Oral Evidence Submitted to the Abyei Boundaries Commission 14 to 21 April 2005,” at pp. 24-30, **Exhibit-FE 14/5a**.

<sup>493</sup> Ambassador Dirdeiry, Transcript of GoS Preliminary Presentation, “Oral Evidence Submitted to the Abyei Boundaries Commission 14 to 21 April 2005,” at pp. 29-30, **Exhibit-FE 14/5a** (emphasis added).

<sup>494</sup> See below at paras. 479-480.

<sup>495</sup> D. Petterson, *Abyei Unresolved: A Threat to the North-South Agreement* Paper contributed to the 11 September 2006 Symposium entitled, Sudan's Peace Settlement: Progress and Perils, at p. 3, **Exhibit-FE 19/22** (emphasis added).

<sup>496</sup> Witness Statement of Minister Deng Alor Kuol, at p. 24, ¶151 (“I do recall a conversation, shortly after the conclusion of the parties' final presentations, with Ambassador Dirdeiry regarding the process for completing the ABC Report. He expressed his view to Mr James Lual Deng and me that the scope of the parties' differences on the question of the Abyei Area was such that there was little point in trying to achieve any kind of consensus between the SPLM/A and the GoS representatives on the ABC Commission. He told us that the issue had now become something far greater than a dispute simply about the Misseriya and the Ngok Dinka. He told us that it would better to wait for the decision of the Experts to be delivered to the Presidency in Khartoum, as the parties were clearly never going to agree between themselves.”).



ABC Experts to make another effort to seek consensus at any time during this period (but, of course, did not do so).

470. Even after the parties' final presentations to the ABC had been made, nothing in the Rules of Procedure precluded the GoS from requesting the ABC Experts to arrange a meeting before the presentation to the Presidency, or to circulate a draft of the Report for the purposes of reaching consensus. As discussed above, the GoS never made such a request and never complained about the lack of any such meeting or the failure of the ABC Experts to circulate the draft Report.<sup>497</sup>

471. In sum, there is no basis for characterizing the ABC Experts' efforts in seeking a consensus between the parties or the ABC as a violation of a procedural guarantee, much less a *serious* violation of a *fundamental* procedural guarantee. Neither the Article 14 consensus provision, introduced into the ABC proceedings by the ABC Experts themselves rather than the parties, nor the actions of the ABC Experts and the parties, provide even a tenuous basis for the Government's claim that there was some sort of grave procedural breach in this respect. On the contrary, the Government's misleading and inaccurate account of the ABC proceedings obscures the fact that it not only expected, but insisted upon, exactly the course of action that the ABC Experts followed.

d) The GoS Waived Any Objection to the ABC Experts' Efforts to Reach Consensus

472. Even if one assumed (contrary to fact) that the ABC Experts had violated Article 14 of the Rules of Procedure, any such violation was waived by the Government. As discussed above, it is well-settled that procedural objections must be raised at the time they occurred or they will be waived.<sup>498</sup>

473. If the GoS had genuinely considered the ABC Experts' actions to violate the Rules of Procedure, they had ample opportunity to raise the objection, either before completing the parties' final presentations, before making arrangements for the presentation of the ABC Experts' final report in Khartoum, before travelling to Khartoum, before making arrangements for the presentation at the Presidential Palace, before the ABC Experts began to present the ABC Report to the Presidency or immediately after the ABC Experts had concluded their presentation. The Government raised no objection at any of these points; on the contrary, the Government affirmatively cooperated with the ABC Experts' implementation of the Terms of Reference and Rules of Procedure.

474. Indeed, the Government's complaints that the "ABC Experts never called a final meeting"<sup>499</sup> or made any "attempt to discuss their findings with the Parties"<sup>500</sup> are belied by its own position in presentations to the ABC. The GoS made its hostility to any form of compromise very clear in its First Presentation, where slide 51 (stating the Government's view of "what the ABC shall not do") declared:

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<sup>497</sup> See above at para. 469.

<sup>498</sup> See above at paras. 354-362.

<sup>499</sup> GoS Memorial, at para. 221.

<sup>500</sup> GoS Memorial, at para. 92(6).

“It shall not open the issue for renegotiation. It shall not prefer equitable compromise to scientific research.”<sup>501</sup>

475. If the Government had raised a procedural objection under Article 14 at any of the times identified above, it could have been taken into account. The ABC Experts could have discussed with the parties whether they wanted to review a draft of the ABC Report or make another effort to reach consensus. But, of course, the Government did no such thing, because it considered that the ABC Experts were doing exactly what was contemplated and because it realized that efforts to reach consensus had been exhausted and would have been futile.

(1) The GoS Suffered No Prejudice from the ABC Experts’ Approach to Reaching Consensus

476. Even if one assumed (again, contrary to fact) that the ABC Experts committed some serious procedural breach as a result of its approach to reaching consensus, which was not waived, and that this might be an admissible ground for claiming an excess of mandate, it would still not constitute a ground for invalidating the ABC Report. That is because the ABC Experts’ actions in this regard would have had no impact on the outcome of the Experts’ decision. For the reasons already discussed,<sup>502</sup> this is a fatal obstacle to the procedural complaints raised by the Government.

477. As discussed above, despite multiple efforts to reach consensus, the parties’ delegations on the Commission (and their other representatives) were unable to reach any common ground.<sup>503</sup> There is no basis whatsoever for suggesting that further efforts at reaching an agreement would have produced any different result. Indeed, despite the Experts’ efforts to encourage a consensus between the parties, there was no realistic prospect of achieving this.

478. The ABC Experts’ unsuccessful efforts to achieve a compromise (detailed above) illustrate the absence of any realistic possibility that the parties’ might have settled their disputes through further negotiations.<sup>504</sup> Dr. Johnson acknowledged exactly this in an interview in the Sudan Tribune in May 2006:

“[A]t the beginning of our deliberations, before we went to the field, our chairman said to the chairman of the government delegation that we hoped there might be compromise that would be just and equitable to both sides. ***He was told that there could be no compromise. The government could not compromise over its control of land, and if there was any attempt at that, we risked going back to war.*** We were presented with a situation that was very difficult to deal with. ***There was no possibility of persuading the two sides to compromise on their positions,*** and all we could do was treat what they presented us as evidence to be compared with other evidence, for us to come up with a decision.”<sup>505</sup>

<sup>501</sup> GoS Opening Presentation, dated 11 April 2005, at p. 51, **Exhibit-FE 14/2**.

<sup>502</sup> See above at paras. 298-307.

<sup>503</sup> See above at paras. 460-466.

<sup>504</sup> See above at paras. 458-466.

<sup>505</sup> “Interview with Douglas Johnson, expert on the Abyei Boundary Commission,” Sudan Tribune, 29 May 2006, at p. 3, Annex 85 to GoS Memorial (emphasis added). See also GoS Opening Presentation, dated 11 April 2005, at p. 48 (“NO PARTY CAN MAKE ANY CONCESSION WITH REGARD TO SUCH ISSUE. 2. To determine what had exactly taken place one hundred years ago, is a matter that shall be left for historians and experts not facilitators or mediators. 3. The decision shall be based on scientific research NOT compromise”).

479. Similarly, as noted above, the Government again made it clear in its final presentation to the ABC Experts that it opposed any effort to reach consensus:

“[T]he ABC is now being known as the committee that is going to resolve this issue once and for all. Its decision is binding and its decision is on scientific and legal documents that are going to be presented, *it’s not a compromise committee, it’s a sort of a judicial committee.*”<sup>506</sup>

“The communities had understood that, the nature of this dispute is a dispute of a kalenke. Kalenke is the Misseriya word for boundaries ... Kalenke are drawn, Mr Chairman, *on legal and factual grounds and not on compromise.*”<sup>507</sup>

480. In these circumstances further discussions among the members of the Commission would have accomplished nothing in reaching a consensus. Any purported failure adequately to seek consensus by the ABC Experts certainly would not remotely approach the degree of prejudice required to disregard the ABC Report.

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481. In sum, there is no basis at all for the Government’s complaints about the ABC Experts’ handling of efforts to reach consensus among the Commission members (quite apart from the fact that such claims do not constitute an excess of mandate). That is true for multiple, independently sufficient reasons:

a. The parties’ procedural agreements and the Rules of Procedure specifically provided that the ABC Experts were to prepare the final ABC Report, without limiting or restricting how the ABC Experts might seek to achieve consensus. The only provision of the Rules of Procedure cited by the Government was nothing more than the contemplation of reasonable efforts by the ABC Experts (“*will endeavor*”), and not the prescription of particular mandatory procedural steps. Indeed, the parties’ Terms of Reference and Program of work made it perfectly clear that the ABC Experts prepared and presented the ABC Report in exactly the manner that was contemplated by the parties. Certainly nothing forbade, and the parties’ procedural arrangements instead contemplated, the approach that the ABC Experts adopted.

b. The parties repeatedly and specifically discussed the presentation of the ABC Experts’ final ABC Report to the Presidency during the weeks before that presentation occurred. Throughout these discussions, there was never any suggestion by the Government that the course being adopted by the ABC Experts was improper or that the GoS preferred a different approach. On the contrary, the Government made it clear that it wanted no further efforts to achieve a consensus and that such efforts would be futile.

c. Even if one assumed (contrary to fact) that the ABC Experts’ efforts to achieve a consensus violated some (unspecified) provision in the parties’ procedural agreements, that was not a serious violation of a fundamental procedural guarantee – and it is only such a violation that would permit the ABC Report to be disregarded.

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<sup>506</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 2, p. 1, **Exhibit-  
FE 19/16**. (emphasis added).

<sup>507</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 2, p. 1, **Exhibit-  
FE 19/16**.

The only provision of the Rules of Procedure cited by the Government only contemplated reasonable efforts by the ABC Experts (“*will endeavor*”) to achieve consensus and were contained in a provision that the ABC Experts themselves introduced (rather than the parties). Any violation of such a provision would at most have been an inadvertent misunderstanding of the ABC Experts’ own Rules of Procedure.

d. The Government waived any possible objection to the ABC Experts’ approach to achieving consensus and presenting the final ABC Report.

e. In any event, the Government does not identify any procedural injury arising from the ABC Experts’ efforts to achieve consensus, much less the sort of grave prejudice required to disregard an adjudicative decision. The ABC Experts made three separate efforts to achieve consensus – each of which failed; at the same time, the Government made very clear that it was unwilling to accept any compromise on the question of the Abyei Area boundaries. In these circumstances, there is no basis at all for suggesting that further efforts to achieve consensus would have been successful.

In these circumstances, the Government has entirely failed to sustain its very heavy burden of overcoming the deference owed to adjudicative bodies’ procedural decisions and proving some sort of serious violation by the ABC Experts of a fundamental procedural guarantee in relation to their final ABC Report – much less a procedural violation that would begin to justify disregarding the Report.

482. Finally, there is a broader point which demands to be made. The Government’s Memorial asserts in unequivocal terms that:

“[d]espite the clear language and intent of the Abyei Protocol and the Rules of Procedure, the GoS was never informed nor consulted on the final outcome of the ABC Report.... The constituent instruments specified the conditions – the only conditions – under which the Experts could decide for themselves. Those conditions were never fulfilled. ... *Not only did the ABC Experts not comply with the Rules of Procedure; through that failure they produced a result which impugned the integrity of the process as a whole.*”<sup>508</sup>

483. That high rhetoric is a mask for low motives. As discussed above, the Government’s pretended procedural objections and accusations of a lack of integrity are after-the-fact inventions. The parties’ agreements concerning preparation and presentation of the ABC Report – which the Government’s Memorial unhelpfully fails to mention – were crystal clear and unmistakable. The parties’ contemporaneous conduct regarding the ABC Report – again, unhelpfully omitted by the Government – was precisely and comprehensively consistent with these agreements. In particular, the GoS’s own actions were perfectly consistent with the parties’ agreements and the ABC Experts’ actions.

484. The truth of the matter is that the Government has disingenuously manufactured a purported procedural complaint based on a deliberate misreading of the parties’ agreements and a deliberate omission of the relevant procedural history. That is no basis for criticizing the ABC Experts; it is only another basis for criticizing the Government’s own litigation

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<sup>508</sup> GoS Memorial, at paras. 226-227 (emphasis added).

tactics, which appear to be aimed at sowing as much confusion as possible, regardless of the truth of its statements or the sincerity of its claims.

*D. Three of the “Substantive” Breaches Alleged by the Government Were Not Excesses of Mandate and Were Instead Manifestly Correct Interpretations of the Parties’ Agreements and the Evidentiary Record*

485. The Government asserts that the ABC Experts also exceeded their “substantive mandate,” defined by the GoS Memorial as “the scope of the consent given by the Parties to the [ABC Experts] to resolve the dispute” submitted to them.<sup>509</sup> In particular, the Government alleges that the ABC Experts committed four separate substantive excesses of mandate based on allegedly: (a) “refus[ing] to decide the question asked;” (b) “answering a different question than that asked;” (c) “ignoring the stipulated date of 1905;” and (d) “allocating grazing rights within and beyond the Abyei Area.”<sup>510</sup>

486. We consider the first three of these purported “substantive” breaches in this section (Part II(D)) and then consider the Government’s final claim regarding the supposed allocation of grazing rights separately (in Part II(E)). Each of the first three of these alleged “substantive” breaches amounts to either the same, or a closely related, complaint and they are best considered together.

487. None of these three alleged excesses of substantive mandate has any basis. That is true for multiple independently sufficient reasons. In particular, none of the Government’s claims about the ABC Experts’ supposed disregard of their substantive mandate are supported by the content of the ABC Report, the terms of which flatly contradict each of the Government’s claims.

488. Rather, the complaints in the GoS Memorial are nothing more than inadmissible efforts by the GoS – under various guises to relitigate different aspects of the merits of the parties’ dispute. At bottom, what the Government’s Memorial complains of is the ABC Experts’ refusal to accept the GoS’s substantive interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol. That substantive disagreement is simply not grounds for challenging the ABC Report as an excess of mandate (and, in any event, the ABC Experts’ substantive decision was perfectly correct).

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489. The Government’s three complaints about the ABC Experts’ supposed excess of their substantive mandate are wholly unfounded. When one considers each one of the Government’s complaints, and compares these allegations with what the ABC Report actually says, there is no basis for concluding that the ABC Experts “refused to perform the task” put to them, “answered the wrong question,” or “ignored the stipulated date.” Rather, the ABC Experts diligently addressed precisely the issue that was set forth in Article 5.1 of the Abyei Protocol – namely, “to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.”<sup>511</sup>

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<sup>509</sup> GoS Memorial, at paras. 227-228.

<sup>510</sup> GoS Memorial, at para. 229.

<sup>511</sup> Abyei Protocol, Art. 5.1, **Appendix C to SPLM/A Memorial**; see also Abyei Annex, Art. 1, **Appendix D to SPLM/A Memorial**; ABC ToR, Art 1.1 and 1.2, **Appendix E to SPLM/A Memorial**.

1. The ABC Experts Did Not Commit a Substantive Excess of Mandate by Refusing to Answer the Question Presented to Them

490. First, the Government argues that the ABC Experts “refused to carry out [the] task [assigned to them,] and thereby exceeded their mandate.”<sup>512</sup> According to the GoS Memorial, “[t]he mandate of the ABC Experts was clear, i.e. to define an area transferred in 1905,” but “the ABC Experts declined to answer the question they were tasked to answer.”<sup>513</sup>

491. There is no substance to the Government’s claim that the ABC Experts did not answer the question, or carry out the task, with which they were presented. That is true for a number of separate reasons, any one of which is independently sufficient grounds for rejecting the Government’s complaint.

(1) The ABC Experts Answered the Question that Was Addressed to Them

492. The ABC Experts carefully and thoroughly addressed exactly the issue that was submitted to them. That is made clear by the content and substantive analysis in the ABC Report.

493. Preliminarily, it is striking that, in the course of arguing that the ABC Experts refused to decide the dispute submitted to them, the Government never defines what it considers the dispute to be. As discussed elsewhere, the relevant task that the ABC Experts were to address under the Abyei Protocol was “to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.”<sup>514</sup> It is impossible to see how the Government can claim that the ABC Experts did not substantively address this task. On the contrary, any attention to the terms of the ABC Report makes it clear that the ABC Experts decided exactly the matter that was submitted to them.

494. The ABC Report began by restating the ABC’s mandate (which the Government claims the ABC Experts ignored): “the Presidency shall establish the ‘Abyei Boundaries Commission (ABC) *to define and demarcate the Area of the nine Dinka Chiefdoms transferred to Kordofan in 1905.*”<sup>515</sup> It would be surprising for the ABC Experts to have ignored this mandate – as the Government claims – given that they began the ABC Report by referring so prominently to it.

495. The ABC Report’s Preface then noted that the “two sides [had] presented their own positions concerning *the mandate of the ABC* and their contrasting definitions of the *area under consideration.*”<sup>516</sup> The Report also noted that the parties and their witnesses presented “two sharply differing versions of *what constitutes the Abyei Area.*”<sup>517</sup> The ABC Experts next summarized these different versions as follows:

“The Government of Sudan’s position is that the *only area transferred* from Bahr el Ghazal to Kordofan in 1905 was a strip of land south of the Bahr el Arab/Kiir; that the Ngok Dinka lived south of the Bahr el Arab/Kiir prior to 1905, and migrated to the territory north of the river only after coming under the direct administration of

<sup>512</sup> GoS Memorial, at para. 234.

<sup>513</sup> GoS Memorial, at para. 230.

<sup>514</sup> Abyei Protocol, Art. 5.1, **Appendix C to SPLM/A Memorial.**

<sup>515</sup> ABC Report, Part I, at p. 3, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>516</sup> ABC Report, Part I, at p. 10, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>517</sup> ABC Report, Part I, at p. 10, **Appendix B to SPLM/A Memorial** (emphasis added).

Kordofan. Therefore the *Abyei Area* should be defined as lying south of the Bahr el Arab/Kiir, and excluding all territory to the north of the river, including Abyei Town itself. This is opposed by the SPLM/A position, which is that the *Ngok Dinka have established historical claims to an area* extending from the existing Kordofan/Bahr el Ghazal boundary to north of the Raqaba ez Zarga/Ngol, and that the boundary should run in a straight line along latitude 10°35'N.<sup>518</sup>

Again, there can be no doubt but that the ABC Experts clearly understood from the parties' submissions both of their respective positions on the definition of the Abyei Area.

496. The ABC Report then turned to the definition of the Abyei Area, in the context of the issues and the evidence that had been presented by the parties. The ABC Report explained that the Commission had sought "to determine as accurately as possible *the area of the nine Ngok Dinka Chiefdoms as it was in 1905*."<sup>519</sup> In doing so, the ABC Experts observed that "[n]o map exists showing the area inhabited by the Ngok Dinka in 1905" and that there was not "sufficient documentation produced in that year [1905] ... that adequately spell out the administrative situation that existed in that area at that time."<sup>520</sup>

497. The ABC Experts' treatment of the definition of the Abyei Area in the ABC Report was consistent with the explanations that the Experts had provided during the preceding months, without objection from the parties, of the definition of the Abyei Area. These explanations included (by way of example) references to the "territory [which] was being *used and claimed by those 9 chiefdoms* when the administrative decision was made to place them in Kordofan,"<sup>521</sup> "the *boundaries of the nine Dinka Chiefdoms* as they existed 100 years ago,"<sup>522</sup> and "the *area of the nine Ngok Dinka Chiefdoms*, which were transferred to Kordofan Province from Bahr El Ghazal Province in 1905."<sup>523</sup>

498. Again, it is perfectly clear from both the language of the ABC Report and the ABC Experts' statements during the ABC proceedings, that they were focused on precisely the task that is set forth in Article 5.1 of the Abyei Protocol. That is, the ABC Experts were attempting "to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area."<sup>524</sup>

499. As a consequence, the ABC Report went on to consider nine Propositions which the ABC Experts explained had "emerged from the GoS and SPLM/A presentations and from the oral testimony."<sup>525</sup> The ABC Experts' discussion of these Propositions provided an expert analysis of the geographic scope of the Abyei Area and, in particular, "*the area of the nine Ngok Dinka Chiefdoms as it was in 1905*"<sup>526</sup> (or, as alternatively phrased in the Report, "*the territory occupied and used by the nine Ngok Dinka Chiefdoms*").<sup>527</sup>

500. The ABC Experts' responses to the nine Propositions rejected each party's most expansive claims about the historic extent of the Abyei Area (Propositions 2, 3, 6, 7 and 9).<sup>528</sup>

<sup>518</sup> ABC Report, Part I, at p. 11, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>519</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>520</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>521</sup> ABC Report, Part II, App. 4, at pp. 155-156, **Exhibit-FE 15/1** (emphasis added).

<sup>522</sup> ABC Report, Part II, App. 4, at p. 41, **Exhibit-FE 15/1** (emphasis added).

<sup>523</sup> ABC Report, Part II, App. 4, at p. 58, **Exhibit-FE 15/1** (emphasis added).

<sup>524</sup> Abyei Protocol, Art. 5.1, **Appendix C to SPLM/A Memorial**.

<sup>525</sup> ABC Report, Part I, at p. 12, **Appendix B to SPLM/A Memorial**.

<sup>526</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>527</sup> ABC Report, Part I, at p. 18 (Proposition 8), **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>528</sup> ABC Report, Part I, at pp. 13-14, 16-17, 19, **Appendix B to SPLM/A Memorial**.

The ABC Report provided a detailed discussion of historical evidence aimed at defining the extent of the territory that was used and occupied by the Ngok Dinka and by the Misseriya in 1905 (Propositions 2, 3, 4, 6, 7, and 8).<sup>529</sup> The ABC Experts relied in the first instance on evidence from 1905 (and from immediately preceding and following years), but subsidiarily considered evidence from subsequent periods, based on their conclusion that there had been a “continuity” of usage and occupation by the Ngok Dinka. The ABC Experts explained that this continuity of usage and occupation enabled inferences to be drawn about the extent of Ngok Dinka territory in 1905, based upon the extent of their territory in later periods (Proposition 8).<sup>530</sup>

501. Relying on these conclusions about the historical record, the ABC Report identified an area where the Ngok Dinka had in 1905 “established dominant rights of occupation,”<sup>531</sup> as well as a further area (“between latitudes 10°10’N and 10°35’N”) as to which the Ngok Dinka had “secondary rights.”<sup>532</sup> The ABC Experts separately noted that the area of shared rights it had identified “closely coincides with the band of Goz, which a number of sources identify as the border zone between the Ngok and the Misseriya.”<sup>533</sup> The ABC Report then relied on local principles of land law, and the “legal principle of the equitable division of shared secondary rights,” which the ABC Experts concluded mandated division of the area of shared rights in the *goz* between the Ngok Dinka and the Misseriya.<sup>534</sup>

502. Relying on their extensive historical analysis of the land rights and usage of the Ngok Dinka, the ABC Experts made specific geographic determinations about the area occupied and used by the nine Ngok Dinka Chiefdoms in 1905. In particular, the ABC Experts concluded that (a) the Ngok Dinka had enjoyed “dominant rights to areas along the Bahr el-Arab and Ragaba ez-Zarga ... that predated 1905;”<sup>535</sup> (b) “there is as yet no clear independent evidence establishing the northernmost boundary of the area either settled or seasonally used by the Ngok;”<sup>536</sup> (c) there is “sufficient evidence ... to accept Ngok claims to permanent rights southwards roughly from latitude 10°10’ N,”<sup>537</sup> being the southern border of the *goz*; (d) “the Misseriya have established secondary rights through the Goz belt to the area south of it, while the Ngok have secondary rights north of latitude 10°10’N [to latitude 10°35’N, being the northern border of the *goz*];”<sup>538</sup> and (e) “[b]ased on the legal principle of equitable division of shared secondary rights ... the northern boundary [of the Abyei Area] should fall within the zone between latitudes 10°10’ N and 10°35’ N,”<sup>539</sup> and specifically “latitude 10°22’30’’N.”<sup>540</sup>

503. Having defined the Abyei Area, the Commission then set forth latitudinal and longitudinal lines defining the Abyei Area’s geographic scope in a “Final and Binding

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<sup>529</sup> ABC Report, Part I, at pp. 16-19, **Appendix B to SPLM/A Memorial.**

<sup>530</sup> ABC Report, Part I, at p. 21 (“The administrative record of the Condominium period and testimony of persons familiar with the area attest to the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between 1905 and 1965.”), **Appendix B to SPLM/A Memorial.**

<sup>531</sup> ABC Report, Part I, at p. 21 (“There is compelling evidence to support the Ngok claims to having dominant rights to areas along the Bahr el-Arab and Ragaba ez-Zarga and that these are *long-standing claims that predated 1905.*”), **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>532</sup> ABC Report, Part I, at pp. 21-22, **Appendix B to SPLM/A Memorial.**

<sup>533</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial.**

<sup>534</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial.**

<sup>535</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial.**

<sup>536</sup> ABC Report, Part I, at p. 43, **Appendix B to SPLM/A Memorial.**

<sup>537</sup> ABC Report, Part I, at p. 43, **Appendix B to SPLM/A Memorial.**

<sup>538</sup> ABC Report, Part I, at p. 44, **Appendix B to SPLM/A Memorial.**

<sup>539</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial.**

<sup>540</sup> ABC Report, Part I, at p. 22, **Appendix B to SPLM/A Memorial.**



Decision.”<sup>541</sup> Those coordinates were then drawn by a cartographer on Map 1 (titled “*Abyei Area Boundaries*”).<sup>542</sup>

504. Given the terms of the ABC Report, it is impossible to conclude that the ABC Experts refused to “carry out the task” or “answer the question” put to them. To the contrary, the ABC Experts very clearly “*define[d] and demarcate[d]*” the Abyei Area, doing so both with specific latitudinal and longitudinal coordinates in their “Final and Binding Decision,” and by delimiting the same coordinates on Map 1 showing the “*Abyei Area Boundaries*.” This was precisely the task that the ABC Experts were mandated to perform and their Report responded to precisely the question they were asked to answer.

(2) The Government’s Bases for Claiming that the ABC Experts Refused to Answer the Question Put to Them Are Patently Misconceived

505. Despite the foregoing, the Government’s Memorial contends that “[t]he mandate to the ABC Experts was clear, i.e., to define an area transferred in 1905,” but “the ABC Experts declined to answer the question they were tasked to answer.”<sup>543</sup> In particular, the Government cites a two sentence passage from Appendix 2 of the ABC Report, which observes that the “boundaries of the Ngok Dinka ... [were] not precisely delimited and demarcated,” and states that the ABC Experts therefore had to “determine the nature of the established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms.”<sup>544</sup> The passages from the ABC Report relied upon by the Government do not begin to suggest that the ABC Experts refused to “answer the question” put to them; that is true for a number of separate reasons.

506. First, it is notable that the Government’s principal basis for claiming that the ABC Experts refused to fulfill their mandate is a two sentence passage from an Appendix to the 45 page ABC Report. If the ABC Experts had in fact refused to answer the question that was put to them, one could presumably find that refusal in the body of the ABC Report, and not buried in one of a number of lengthy Appendices. When one in fact looks at the ABC Report – as detailed at paragraphs 492-504 above – it is obvious that the ABC Experts in one way refused to answer the question put to them. To the contrary, they answered it very specifically – with the Government’s real complaint being with the substance of the answer, rather than with the purported fact that no answer was given.

507. Second, the quoted passage from Appendix 2 is plainly not a refusal by the ABC Experts to answer the question put to them. The passage in question merely says that:

“[t]he boundaries of the Ngok Dinka that were transferred to Kordofan for administrative reasons in 1905 were, like most boundaries in Sudan at the time, not precisely delimited and demarcated.... It is therefore incumbent upon the experts to determine the nature of the established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms, with particular focus on those in the northernmost areas that formed the transferred territory.”<sup>545</sup>

<sup>541</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial**.

<sup>542</sup> ABC Report, Part I, at p. 46, **Appendix B to SPLM/A Memorial**.

<sup>543</sup> GoS Memorial, at para. 230.

<sup>544</sup> GoS Memorial, at para. 230 (quoting “ABC Experts’ Report, Appendix 2, at p. 21”).

<sup>545</sup> ABC Report, Part II, App. 2, at p. 21 (quoted in GoS Memorial, at para. 230), **Exhibit-FE 15/1**.

508. This is a wholly unexceptional set of observations, which in no way evidences a refusal by the ABC Experts to define the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905. The quoted passage says only that there were no clearly delimited or demarcated boundaries of the Ngok Dinka in 1905. That observation is plainly correct (as the Government’s Memorial subsequently acknowledges)<sup>546</sup> and cannot be cause for criticism of any sort. Indeed, a comparable observation is made in the Preface to the ABC Report, which comments that “a 1905 map showing the Ngok territory does not exist”<sup>547</sup> – a comment that the Government does not criticize.

509. Equally, the observation in Appendix 2 that, given the absence of any delimitation of the Ngok Dinka territory in 1905, it was necessary for the ABC Experts to “determine the nature of established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms”<sup>548</sup> is also wholly unexceptional. The passage in Appendix 2 is merely an observation that, since there was no contemporaneous map or delimitation of the Ngok Dinka territory in 1905, the ABC Experts themselves would have to ascertain the nature and extent of the Ngok Dinka’s occupation and use of territory at the time. This is not a refusal by the ABC Experts to address the issue presented to them, but instead a forthright statement that the Experts would need to address that issue in making their decision.

510. The Government also claims that the ABC Experts’ statements in Appendix 2 “assert that [it] was impossible” to determine the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, supposedly because the ABC Experts noted that the Ngok Dinka territory had not been delimited at that time.<sup>549</sup> The quoted passage from Appendix 2 does nothing of the sort. The observation that the territorial boundaries of the Ngok Dinka had not been delimited was not a statement that the Abyei Area could not be determined: on the contrary, it was a step in the ABC Experts’ explanation of how they went ahead to determine the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 (in the body of their 45 page ABC Report).

511. The Government also levels a page of criticisms of the foregoing passage in Appendix 2, claiming that it is “imprecise,” “misdirect[ed],” “contradictory” and historically inaccurate.<sup>550</sup> Those criticisms are wrong as a matter of substance, but also irrelevant. It would not matter if the quoted passage were as confused or inaccurate as the Government claims: errors or contradictions in the ABC Experts’ reasoning are irrelevant. The relevant issue is whether or not the ABC Experts answered the question that was put to them, which they plainly did.

512. The Government’s Memorial also criticized the ABC Report for stating that there was not “sufficient documentation produced in that year [1905] by Anglo-Egyptian Condominium government authorities that adequately spell out the administrative situation that existed in that area at that time.”<sup>551</sup> The Government cryptically attacks this observation as

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<sup>546</sup> GoS Memorial, at para. 231(a) (“The many peoples of the Sudan had never had fixed boundaries”). *Although the Government’s comment accurately acknowledges the absence of clearly delimited and defined boundaries in the Sudan, its assertion that there were no fixed boundaries at all is in fact inaccurate.* Many of the tribes of the Sudan, particularly in the Nile regions, did have fixed boundaries, *albeit they were not clearly delimited.*”).

<sup>547</sup> ABC Report, Part I, at p. 11, **Appendix B to SPLM/A Memorial.**

<sup>548</sup> ABC Report, Part II, at p. 21 (quoted in GoS Memorial, at para. 230), **Exhibit-FE 15/1.**

<sup>549</sup> GoS Memorial, at para. 231(c).

<sup>550</sup> GoS Memorial, at para. 231(a)-(d).

<sup>551</sup> GoS Memorial, at para. 232 (quoting “ABC Experts’ Report, Preface, p. 4”).

“misdirection,” suggesting that it indicated that the ABC Experts were demanding proof of a boundary in 1905 “beyond a reasonable doubt.”<sup>552</sup>

513. It is plain that the extract quoted in the GoS Memorial does nothing more than record an observation that there was limited Anglo-Egyptian documentation produced in 1905 (“that year”) that showed “the area inhabited by the Ngok Dinka in 1905.” That observation is not misdirected or inaccurate, but plainly true and to the point. The ABC Experts merely observed that there were neither maps nor Condominium documents from the year 1905 that clearly showed the full extent of the Ngok Dinka territory. That is made clear by the very next sentence of the ABC Report (which the Government chooses not to quote):

“Therefore, it was necessary for the experts to avail themselves of relevant historical material produced both before and after 1905, as well as during that year, *to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905.*”<sup>553</sup>

514. This (very next) sentence again makes perfectly clear that the ABC Experts’ observations about the documentary and cartographic evidence from 1905 were in no way a refusal to define the Abyei Area and delimit the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905. This sentence shows, exactly to the contrary, that the ABC Experts were intent, despite evidentiary obstacles, on “*determin[ing] as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905.*” Again, it is impossible to see how the Government can attempt to shoe-horn a refusal to perform the ABC Experts’ mandate into this statement.

## 2. The ABC Experts Did Not Answer a Different Question from that Asked

515. The Government also claims that the ABC Experts refused to ask the “right question – what was ‘the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905,’” and instead “answered a quite different question, about tribal customary rights concerning a much later date (apparently 1956 or 1965).”<sup>554</sup> According to the GoS Memorial, the ABC Report made “an unwarranted shift from transferred area to land use,”<sup>555</sup> which amounted to an excess of mandate.

516. The Government’s allegations are, for the most part, simply the converse or mirror image of its claims that the ABC Experts refused to answer the question, or to perform the task, that was addressed to them. Again, the Government’s allegations are simply wrong, for many of the reasons discussed in the preceding section. That is clear from the terms of the ABC Report and the ABC Experts’ analysis.

517. As already discussed, the ABC Experts began their analysis by restating their mandate (“the right question”),<sup>556</sup> and then went on to discuss in detail “the area of the nine Ngok Dinka Chiefdoms as it was in 1905”<sup>557</sup> (or, as alternatively phrased in the Report, “the territory occupied and used by the nine Ngok Dinka Chiefdoms”).<sup>558</sup> The ABC Report also

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<sup>552</sup> GoS Memorial, at para. 232.

<sup>553</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>554</sup> GoS Memorial, at para. 235.

<sup>555</sup> GoS Memorial, at para. 238(d).

<sup>556</sup> ABC Report, Part I, at p. 3, **Appendix B to SPLM/A Memorial**.

<sup>557</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>558</sup> ABC Report, Part I, at p. 18 (Proposition 8), **Appendix B to SPLM/A Memorial**.

concluded by “defin[ing] and delimit[ing]” the latitudes and longitudes of the Abyei Area, both in words and on Map 1.

518. Moreover, the ABC Experts did not answer “a quite different question” about tribal customary rights in 1956 or 1965. Rather, as explained above, in determining the “area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905,” the ABC Experts obviously needed to determine what “the area of the nine Ngok Dinka Chiefdoms” was. One could hardly determine what the boundaries of the Abyei Area were without determining what was included in the “area of the nine Ngok Dinka Chiefdoms.”

519. Thus, as also explained above, the ABC Experts devoted substantial historical research to identifying as precisely as possible the area used and occupied by the nine Ngok Dinka Chiefdoms in 1905.<sup>559</sup> Not surprisingly, that is exactly how the ABC Report described the ABC Experts’ analysis (in a sentence that the Government continues studiously to avoid):

“[I]t was necessary for the experts to avail themselves of relevant historical material produced both before and after 1905, as well as during that year, *to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms as it was in 1905.*”<sup>560</sup>

520. There is nothing to the Government’s suggestion that the ABC Experts wrongly considered a “much later date” than 1905.<sup>561</sup> That is manifestly not true (because, as they explained, the ABC Experts merely considered evidence from later and earlier periods in order to determine as accurately as possible the state of affairs in 1905); it is also nothing but a repetition of the Government’s claim that the ABC Experts “ignored the stipulated date” (which is discussed separately below).<sup>562</sup>

521. There is also nothing to the Government’s suggestion that, by considering the “tribal customary rights” or “land use” of the Ngok Dinka and the Misseriya, the ABC Experts answered “a different question” than that put to them. To the contrary, the ABC Experts made it perfectly clear that, in order to determine the area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905, it was necessary to ascertain the area used and occupied by the Ngok Dinka in 1905.

522. Again not surprisingly, this is exactly what the ABC Report said in the sentence quoted above. Similarly, the ABC Experts said the same thing elsewhere, when they noted, for example, that in order to determine “[t]he boundaries of the Ngok Dinka that were transferred to Kordofan for administrative reasons in 1905,” they needed “to determine the nature of the established land or territorial occupation and/or use rights by all the nine Ngok Dinka chiefdoms.”<sup>563</sup>

523. The simple point, again, is that in determining the extent of the territory used and occupied by the Ngok Dinka in 1905, the ABC Experts did not “answer a different question.” Rather, as their Report explained they were doing, the ABC Experts addressed themselves specifically to defining and delimiting the area of the nine Ngok Dinka Chiefdoms transferred

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<sup>559</sup> See above at paras. 492-504.

<sup>560</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>561</sup> GoS Memorial, at para. 235.

<sup>562</sup> See below at paras. 545-569.

<sup>563</sup> ABC Report, Part II, App. 2, at p. 21 (quoted in GoS Memorial, at para. 230), **Exhibit-FE 15/1**.

to Kordofan in 1905. There is no basis for claiming that this is the “wrong” or a “different” question; it is just the question that Article 5.1 of the Abyei Protocol put to the ABC Experts.

524. The Government’s Memorial also criticizes the ABC Report for “express[ing]” its conclusions “in terms of an alleged dominant tribal claim of a group,” instead of “in terms of territory transferred.”<sup>564</sup> In particular, the GoS quotes the ABC Experts’ statement that “[t]he Ngok have a *legitimate dominant* claim to the territory from the Kordofan-Bahr-el-Ghazal boundary north to latitude 10°10’N,”<sup>565</sup> and criticizes the ABC Report for being “expressed in terms of legitimacy” and not “of fact.”<sup>566</sup>

525. The Government again deliberately misreads the ABC Report. It is clear from the ABC Experts’ analysis that their “expression” of the Ngok Dinka’s dominant rights was a summary of the ABC Experts’ conclusion about the extent of the Ngok Dinka territory in 1905. That is obvious from the ABC Report’s discussion, only one page earlier, of its historical conclusions that “[t]here is *compelling evidence* to support the Ngok claims to having dominant rights to areas along the Bahr el-Arab and Ragaba ez-Zarga and that these are *long-standing claims that predated 1905*”<sup>567</sup> and that there is “*sufficient evidence* ... to accept Ngok claims to permanent rights southwards roughly from latitude 10°10’ N.”<sup>568</sup>

526. The ABC Experts were clearly addressing the extent of the territory that the Ngok Dinka used and occupied in 1905 (as discussed in greater detail below).<sup>569</sup> They were doing so for the stated purpose of answering the question that was put to them. The ABC Experts’ observation that the Ngok Dinka’s rights were “legitimate” does not, by any conceivable reading, contradict or undo their extensive and careful historical analysis. It merely confirms that, given the historical record, the Ngok Dinka’s claims to have occupied and used the territory in question in 1905 were well-founded. The use of the term “legitimate” does not somehow undermine or contradict the ABC Experts’ historical conclusions.

527. The Government also criticizes the ABC Experts for “shift[ing] to the (utterly unscientific) assessment of land use without records, of land rights without land rights laws.”<sup>570</sup> These criticisms, so far as they can be understood, have no place in the discussion of an alleged excess of substantive mandate. The Government’s claim that the ABC Experts lacked the “records” necessary to determine “land rights” in a sufficiently scientific manner is a complaint about the evidentiary record and the ABC Experts’ appreciation of that record – not grounds for alleging that the ABC Experts exceeded their mandate.

528. Moreover, the Government ignores the fact that the ABC Experts and both parties spent six days in the Abyei Area interviewing more than 100 residents and inspecting local sites, precisely in order to determine what territory the Ngok Dinka and the Misseriya used in

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<sup>564</sup> GoS Memorial, at para. 236.

<sup>565</sup> GoS Memorial, at para. 236 (quoting “ABC Experts’ Report, at p. 21”) (emphasis added by GoS).

<sup>566</sup> GoS Memorial, at para. 236 (quoting “ABC Experts’ Report, at p. 21”) (emphasis added by GoS).

<sup>567</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>568</sup> ABC Report, Part I, at p. 43, **Appendix B to SPLM/A Memorial**.

<sup>569</sup> See below at paras. 780-784.

<sup>570</sup> GoS Memorial, at para. 238(b).

1905.<sup>571</sup> The Government also ignores the fact that the documentary record from the Anglo-Egyptian Condominium does permit historical and other experts to draw well-reasoned conclusions regarding the use and occupation of territory in 1905 by the Ngok Dinka and Misseriya – which is precisely what the Government’s presentations to the ABC purported to do<sup>572</sup> and precisely what the Government’s Memorial in this arbitration purports to do.<sup>573</sup>

529. There is no basis for the Government’s suggestion that there were no “records” that would support a “scientific” inquiry into the occupation and use of territory by the Ngok Dinka and Misseriya. Indeed, it bears emphasis that it was precisely in order to perform a scientific analysis of the witness testimony, oral traditions, historical sites, documentary record and other evidence that the parties specified the expertises of the five ABC Experts that they did (being “history, geography and any other relevant expertise”) and that experts in history, politics, culture, and ethnography were selected.

530. It was by no means considered to be “unscientific” or impossible, as the Government claims,<sup>574</sup> for these experts to assess the evidence in order to determine the territory used and occupied by the Ngok Dinka and Misseriya in 1905. To the contrary, it was precisely to ensure a scientific analysis – which the ABC Report provided – that these particular ABC Experts were selected.

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<sup>571</sup> The Government’s presentations repeatedly made claims as to the territory used by the Ngok Dinka and Misseriya in 1905. See GoS Opening Presentation, dated 11 April 2005, at p. 23 (“Part III, Location of the Ngok Dinka Chiefdoms in 1905”), at p. 28 (“Sultan Rob lived on [the River Kiir’s] southern bank”), at p. 34 (“the country of Sultan Rob and Sheikh Rihan was “to the south of the Bahr el-Arab”) **Exhibit-FE 14/2**; GoS Additional Presentation, dated 17 June 2005, at p. 2 (“The Misseriya move to their present homeland was triggered by their confrontation with Sultan Sabun of Wadai who reigned in the 17<sup>th</sup> Century”) at p. 4 (“[b]efore the last quarter of the eighteenth century the Misseria managed to fully establish themselves in their new country”), at p. 6 (“Since [1850] the Messeria started referring to their homeland as *Dar Abusalman*. During [these days] the Ngok Dinka did not yet cross to the north of the river”) at p. 12 (“throughout the Mahdia, and until the advent of the condominium, the Ngok Dinka continued to settle South of Bah el Arab”), **Exhibit-FE 14/17**; ABC Report, Part II, App. 3, at pp. 27-28, **Exhibit-FE 15/1**.

<sup>572</sup> The Government’s presentations repeatedly relied on the historical record to make claims as to the territory used by the Ngok Dinka and Misseriya in 1905. See Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, File 1, at p. 1 (“the third area of focus was the reports of the travelers and British Officials who visited the area during the period 1902 up to 1905, especially Major Wilkinson and Bimbashi Percival because they were the people who told us where they found Sultan Rob and the people and the Ngok Dinka people. And the reports had in fact told us about the Dinka country, so to speak, and that this Dinka country in which they found Sultan Rob was to the south of Bahr El Arab.”), at p. 3 (“The relevant Misseriya testimonies are that they, that is to say the Misseriya, fought against the Mahdiyya in Goleh.... This is Mr. Chairman telling us that the Misseriya were there during the time of the Mahdiyya and during the Turkish rule”), at p. 5 (“we feel, Mr. Chairman, that this report of the Bimbashi Percival is very much relevant when it comes to the location and the country of the tribe in 1905... we can never over emphasize the importance of this very valuable and relevant piece of evidence that we have presented early on and I think it is answering conclusively the question you have posed to most of the people about the Dinka country...Mr. Chairman, I think this tells where the nine Ngok Dinka chieftains were”), **Exhibit-FE 19/15**; GoS Additional Presentation, dated 17 June 2005, (citing various documents from the historical record to seek to substantiate claims regarding location of Ngok Dinka and Misseriya), **Exhibit-FE 14/17**; Ambassador Dirdeiry, Taped Recording of GoS Additional Presentation, dated 17 June 2005, File 5, at pp. 1-2, (“This is Kordofan Province Monthly Diary, January 1951...“...a map of the Misseriya Homeland including Abyei was drawn by D.C. Mr. Tibbs in 1953.”), **Exhibit-FE 19/18**.

<sup>573</sup> GoS Memorial, at paras. 279(e), 332-334, 341 (“having established who the Ngok Dinka are and where they came from, we may now consider where they lived prior to 1905”), at paras. 342-348, 349 (“[o]ne of the next descriptions of the Ngok position appears in the May issue of the 1905 Intelligence Report by Bimbashi Percival...This puts Sultan Rob’s country squarely south of the Bahr al Arab and in the province of Bahr el Ghazal”), at paras. 350-353, 354 (“[t]hus there was no particular uncertainty as to where the Dinkas lived in this period.”)

<sup>574</sup> GoS Memorial, at para. 231(b) (“it would have been practically impossible to draw boundaries for them” (i.e., the Ngok Dinka or other peoples of Sudan)), at para. 238(b) (“utterly unscientific” to determine where Ngok Dinka and Misseriya lived).

531. The Government also criticizes the ABC Experts for considering the Ngok Dinka's "use" of territory in 1905, contending cryptically that "[t]he criterion was transfer, not use."<sup>575</sup> As already discussed, the ABC Experts considered the territory used by the Ngok Dinka (and the Misseriya) because that was necessary in order to determine the "area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905." That was also why *both* parties repeatedly addressed the extent of the territory "used" by the Ngok Dinka and Misseriya – without any suggestion that this information was either immaterial or outside the scope of the dispute submitted to the ABC Experts.

532. In assessing the Government's complaint that the ABC Experts supposedly inappropriately considered the "use" of territory, it is relevant to consider the repeated submissions that the GoS and its Misseriya witnesses made regarding the historic usage of territory in the Abyei region by the Ngok Dinka and Misseriya. In every one of these submissions, the Government specifically addressed the supposedly inappropriate questions of what territory the Ngok resided or settled in, established villages in, used, controlled or were seated in:

a. In the GoS' First Presentation to the ABC, section III is entitled "Location of the Ngok Dinka Chiefdoms, Country of Sultan Rob, in 1902, and their precise location in March 1905, which is the fateful date."<sup>576</sup> Behind this title page is a two-page extract which is noted as being "The Anglo Egyptian Sudan, The Rhodes Library, Oxford."<sup>577</sup> On the second page of that extract, there is a section highlighted which reads: "***Sultan Rob appears to exercise a certain amount of authority over a large area of country*** extending from [the] Shilluks boundary in the E. to Chak Chaks boundary in the W., with the Bahr el Arab as his Arab frontier on [the] N. and the Lol river, both banks, and the Bahr El Ghazal on the S."<sup>578</sup>

b. Ambassador Dirdeiry urged during the GoS' Final Presentation to the ABC on 16 June 2005: "[In] Abyei Town unanimously we had been told that there were only three tombs. The two tombs which we had visited and the third tomb of Deng Abot of which we did not visit. This is telling us Mr. Chairman of very important and relevant part of the story. That ***Abyei Town was not at all the seat of any of the Ngok Dinka Sultans before Deng Majok.***"<sup>579</sup>

c. The "Second" Final Presentation to the ABC by GoS, 17 June 2005 stated: "***The Ngok Dinka continued to move along with other Dinkas for centuries. They settled in the Zeraf Island, Upper Nile. ... [T]he third generation retreated for security reasons and settled in Kerreita*** to the south of the River Bahr el Arab. The fourth generation, led by Sultan Arob, went deep in the south *to settle* near their next of kin the Twij. ... Throughout the Mahdia, and until the advent of the condominium, the Ngok Dinka continued to settle South of Bahr el Arab. Their paramount chief ***hosted the non-Mahdist Messeria*** who took refuge in Baralil near Lol River. ... Chief Arob sealed a pact of brotherhood with Ali El Gula the Nazir of the Messeria. ***Because of that pact, Chief Arob and his people started crossing the river and establishing villages north of Bahr el Arab.*** The Ngok Dinka did not cross in one

<sup>575</sup> GoS Memorial, at para. 238(a).

<sup>576</sup> Basic Documents of the Government of the Sudan, First Presentation, at p. 17, **Exhibit-FE 14/4**.

<sup>577</sup> Basic Documents of the Government of the Sudan, First Presentation, at pp. 17–19, **Exhibit-FE 14/4**.

<sup>578</sup> Basic Documents of the Government of the Sudan, First Presentation, at p. 19, **Exhibit-FE 14/4** (emphasis added).

<sup>579</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 17 June 2005, File 1, at p. 2, **Exhibit-FE 19/15** (emphasis added).

patch. After crossing they continued extending their now ‘permanent’ villages further to the north up to 1927.”<sup>580</sup>

533. Again, the GoS submissions to the ABC did not choose to address the questions of land use and settlements because these questions were irrelevant to the ABC Experts’ task or because it was “unscientific” to consider such issues. Rather, the GoS presentations addressed these issues precisely because they were – and were understood by the parties to be – central to the ABC Experts’ decision.

534. The Government also complains that the ABC Experts engaged in a “partisan inquiry” into “land use” because they supposedly did not consider “any of the Humr omodiyas.”<sup>581</sup> Again, that statement can only be made by grossly mischaracterizing the terms of the ABC Report. In fact, the ABC Experts considered with great care and diligence the land use of the Misseriya. Among other things, the ABC Experts made the following points (or addressed the following issues) in their Report:

- a. “*The Misseriya contended* that the land from their northern permanent settlement to south of the Bahr el-Arab has been theirs for several centuries, that the Ngok are newcomers who were destitute and had, at their own request, been allowed to reside in the southern river area in recent times as guest...”<sup>582</sup>
- b. “One of the few sources [prior to the Condominium] is an itinerary recorded by W.G. Browne, which he obtained while residing in Darfur in 1794-1795, and which *places the Misseriya* in Baraka (near Muglad) ...”<sup>583</sup>
- c. “It is beyond question that Muglad was, and remains, *the heart of the Dar Misseriya*,” citing Henderson and Cunnison.<sup>584</sup>
- d. “The known *dry-season grazing areas of the Humr* in the early twentieth century were concentrated near the Ngol River, not the Bahr el-Arab, much less to the south of the Bahr el-Arab.”<sup>585</sup>
- e. “If W.G. Browne’s evidence (cited in Proposition 1, above) establishes that *the Misseriya were in the Muglad-Baraka area*, it establishes with equal force that the Dinka were settled in the Ragaba ez-Zarga by the same date.”<sup>586</sup>
- f. “There is good reason to believe that *the nomadic Misseriya had few permanent settlements outside their headquarters in Muglad*. ... The *secondary rights of the Misseriya* to all of these locations [referring to a number of specific sites north of Abyei town] visited by the Commission ... were established.”<sup>587</sup>
- g. “Nyama, which the Commission was not able to visit, is a place of considerable importance *to both peoples*. ... *Neither side* was able to conclusively

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<sup>580</sup> Final Presentation of the GoS to the ABC, dated 17 June 2005, at pp. 7-8, 10-12 and 14-16, **Exhibit-FE 14/17** (emphasis added).

<sup>581</sup> GoS Memorial, at para. 238(d).

<sup>582</sup> ABC Report, Part I, at p. 10, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>583</sup> ABC Report, Part I, at p. 12, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>584</sup> ABC Report, Part I, at p. 12, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>585</sup> ABC Report, Part I, at p. 13, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>586</sup> ABC Report, Part I, at p. 14, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>587</sup> ABC Report, Part I, at p. 16, **Appendix B to SPLM/A Memorial** (emphasis added).



establish a claim of dominant rights to Nyama, but *both* have been able to demonstrate secondary (seasonal) rights.”<sup>588</sup>

h. “In the immediate aftermath of the Mahdiyya *both the Humr and the Ngok* benefited from the British administration’s general policy in the Sudan to encourage peoples to return to their original homelands in order to revive abandoned rural areas.”<sup>589</sup>

i. “[T]he *Misseriya* enjoyed established secondary rights of use in the same region [i.e., along the Ragaba ez Zarga].”<sup>590</sup>

j. “The area between latitudes 10°10’N and 10°35’ N therefore represents the area of secondary rights shared between the Ngok and *the Misseriya*. This area closely coincides with the band of Goz, which a number of sources identify as the border zone between the Ngok and *Misseriya*.”<sup>591</sup>

k. “[T]he *Misseriya* have clear ‘secondary’ (seasonal) grazing rights to specific locations north and south of Abyei Town.”<sup>592</sup>

535. Further examples could be provided. The essential point is that the Government is again simply wrong when it asserts that the ABC Experts engaged in “no enquiry as to land use rights of *any* of the Humr omidiyas” and that their Report was a “*partisan* inquiry.”<sup>593</sup>

536. In fact, the ABC Experts very carefully and even-handedly examined the land use rights of *both* the Misseriya and the Ngok Dinka. Among other things, the ABC Experts reached the general conclusion that in 1905, the Misseriya had “dominant” (or permanent) rights in the area north of the *goz*, centered on Muglad, while enjoying “secondary” (or seasonal) rights south to roughly the Kiir/Bahr el Arab, including in a number of specific locations, with the Ngok Dinka having dominant (or permanent) rights extending north to the southern edge of the *goz* (latitude 10°10’N), while enjoying shared secondary rights extending to the northern edge of the *goz* (latitude 10°35’N).

537. The Government may consider these conclusions to be flawed, but the claim that the ABC Experts did not inquire into the land usage and rights of the Misseriya (“conducted no enquiry as to the land use rights” of the Misseriya) is again false. After carefully examining both tribes’ historic land use patterns and settlements, and after rejecting the more extreme claims by each party, the ABC Experts drew very careful and even-handed conclusions about the land use and rights of the Misseriya, as well as the Ngok Dinka. There is no other way to read their Report.

538. Finally, the Government criticizes the ABC Experts for the following statement (again, drawn from Appendix 2 to the ABC Report):

“The narratives contained in the Annual Reports of Kordofan and Bahr el Ghazal provinces immediately before and after 1905 refer to “lines” drawn between rivers, mountains and longitudes as well as roads, settlements, soil types and trees but these

<sup>588</sup> ABC Report, Part I, at p. 16, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>589</sup> ABC Report, Part I, at p. 18, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>590</sup> ABC Report, Part I, at p. 19, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>591</sup> ABC Report, Part I, at pp. 19-20, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>592</sup> ABC Report, Part I, at p. 13, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>593</sup> GoS Memorial, at para. 238(d).

hardly ever demarcate actual boundaries in terms of land use rights and population dynamics on the ground.”<sup>594</sup>

According to the Government, this is supposedly “an extraordinary statement” because it “is difficult to imagine any boundary that is not established by ‘lines’ between mountains and other landmarks” and because “the Experts were asked to define an ‘area’ transferred between two Provinces, not to establish ‘population dynamics.’”<sup>595</sup>

539. The ABC Experts’ statement was in no way “extraordinary,” but a simple and accurate observation that any purported provincial boundary between Kordofan and Bahr el Ghazal did not reflect the territory that the Ngok Dinka used and occupied in 1905. That is indisputably correct (as discussed in detail in the SPLM/A Memorial<sup>596</sup> and below<sup>597</sup>).

540. Equally, it is incorrect to say, as the Government does, that it “is difficult to imagine any boundary that is not established by ‘lines’ between mountains and other landmarks.”<sup>598</sup> In fact, Sudanese (and other African) boundaries were not uncommonly drawn on the basis of tribal territory. That is obvious from the description, for example, of Sudanese provincial boundaries in Gleichen,<sup>599</sup> as well as the Kordofan/Bahr el Ghazal boundary after the 1905 transfer of the Ngok Dinka and Twic Dinka.<sup>600</sup>

541. Likewise, the Government’s disparaging comment that the Experts were not asked to “establish ‘population dynamics’” misses the point. As discussed above<sup>601</sup> (and in the ABC Report<sup>602</sup>), the ABC Experts were required to determine where the Ngok Dinka lived in 1905 in order to determine the “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.” Such an enquiry necessarily involved consideration of the Misseriya insofar as they seasonally grazed on Ngok territory.

542. For just this reason, the Government made repeated submissions to the ABC Experts about the “population dynamics” of the Ngok Dinka and the Misseriya. To note only a few of many examples of the Government’s own arguments about “population dynamics:”

a. The entire first 16 pages (out of a total of 37) of the GoS’ Final Presentation to the ABC on 17 June 2005 was devoted to describing, in the GoS’ own words on page 1 of that document, the “*Migration* of the Messeria”, the “*Migration* of the Ngok Dinka” and “Transferring of the *Ngok Dinka* to Kordofan.”<sup>603</sup>

b. Ambassador Dirdeiry argued during the GoS’ First Presentation to the ABC on 12 April 2005: “We are in different places but we came from that area. Once we came here definitely we had boundaries. This is the reason why *the Ngok Dinka*

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<sup>594</sup> GoS Memorial, at para. 239 (quoting “ABC Experts’ Report, Appendix 2, p. 22”).

<sup>595</sup> GoS Memorial, at para. 240.

<sup>596</sup> SPLM/A Memorial, at paras. 297-343.

<sup>597</sup> See below at paras. 761-777.

<sup>598</sup> GoS Memorial, at para. 240.

<sup>599</sup> E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government Vol. 1*, 335 (1905), **Exhibit-FE 2/14**; MENAS Report, at paras. 62-64, 73.

<sup>600</sup> See below at paras. 1438-1439.

<sup>601</sup> See above at paras. 492-504.

<sup>602</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>603</sup> Final Presentation of the GoS to the ABC, dated 17 June 2005, at pp. 1-16, **Exhibit-FE 14/17** (emphasis added).

*since 1905 crossed the river and moved to different areas of western Kordofan. They settled in Antila and Tebeldia and other parts of western Kordofan.*<sup>604</sup>

c. The “Second” Final Presentation to the ABC by GoS, 17 June 2005 stated: *“The Ngok Dinka continued to move along with other Dinkas for centuries. They settled in the Zeraf Island, Upper Nile. The migration of the Ngok Dinka from Zeraf Island started in the 19th Century and was triggered by two reasons: ... The second migrant generation reached the Tebusayya bend of the Regeba Zerga (Ngol). However, the third generation retreated for security reasons and settled in Kerreita to the south of the River Bahr el Arab. ... Chief Arob and his people started crossing the river and establishing villages north of Bahr el Arab. The Ngok Dinka did not cross in one patch. After crossing they continued extending their now ‘permanent’ villages further to the north up to 1927.”*<sup>605</sup>

543. The Government took the same approach to “population dynamics” elsewhere in its Memorial to this Tribunal, specifically addressing (in Chapter 6) the question of land usage and population movements of the Ngok Dinka and the Misseriya. That discussion includes claims about the “*demographic facts*” of where the Ngok Dinka supposedly had a “collective presence” and where the Misseriya allegedly “*migrated*,”<sup>606</sup> about how and when the Ngok Dinka “*gradually migrated*” to Abyei,<sup>607</sup> about where the Misseriya “*lived*,”<sup>608</sup> and about the general location of where the Ngok Dinka lived.<sup>609</sup>

544. The Government’s current pretense – that these submissions about “population dynamics” were irrelevant and beyond the ABC Experts’ mission – is simply wrong. As the Government’s own presentations at the time and in its Memorial made clear, it was entirely appropriate and necessary for the ABC Experts to address the question of where the Ngok Dinka and Misseriya populations were located in 1905. Indeed, that question was central to determining the “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”

### 3. The ABC Experts Did Not Ignore the Stipulated Date

545. The Government also alleges that the ABC Experts exceeded their mandate by “*ignoring the stipulated date of 1905.*”<sup>610</sup> According to the GoS Memorial, “[h]aving initially identified the agreed date for determination of the transferred area (1905), the Experts referred to a much more recent, albeit indeterminate, date (apparently 1965).”<sup>611</sup> In particular, the Government relies on the ABC Report’s references to a 1965 agreement between the Ngok Dinka and the Misseriya, arguing that “the ABC Experts effectively ignored the stipulated date of 1905 and therefore exceeded their mandate.”<sup>612</sup>

546. The Government’s claim is yet again impossible to reconcile with the plain text and obvious intentions of the ABC Report. That Report makes it perfectly clear that the ABC Experts in no way “ignored” the 1905 date and that they instead based their determination of

<sup>604</sup> Transcript of oral presentation by Ambassador Dirdeiry to ABC on 12 April 2005, at p. 19, **Exhibit-FE 14/5a** (emphasis added).

<sup>605</sup> Final Presentation of the GoS to the ABC, dated 17 June 2005, at pp. 7-8, 11 and 15, **Exhibit-FE 14/17** (emphasis added).

<sup>606</sup> GoS Memorial, at paras. 279(d) and (e).

<sup>607</sup> GoS Memorial, at para. 333.

<sup>608</sup> GoS Memorial, at para. 350.

<sup>609</sup> GoS Memorial, at paras. 332-371.

<sup>610</sup> GoS Memorial, at para. 82, Heading (iii).

<sup>611</sup> GoS Memorial, at para. 242.

<sup>612</sup> GoS Memorial, at para. 248.

the Abyei Area's boundaries precisely on their assessment of the extent of the territory of the nine Ngok Dinka Chiefdoms in 1905.

547. The ABC Report began with a Preface that confirmed the ABC Experts' understanding of the issue they were to resolve, by restating the issue they were to address under the Abyei Protocol, including the 1905 date: "the Presidency shall establish the 'Abyei Boundaries Commission (ABC) to define and demarcate the area of the nine Dinka Chiefdoms transferred to Kordofan in **1905**.'"<sup>613</sup>

548. The ABC Experts noted repeatedly the decisive importance of the 1905 date in their Preface, while emphasizing the evidentiary difficulties that were presented in identifying materials relevant to the extent of the Ngok Dinka territory in 1905. In particular, the ABC Report stated that:

"No map exists showing the area inhabited by the Ngok Dinka *in 1905*."<sup>614</sup>

"Nor is there sufficient documentation produced *in that year [i.e., 1905]* by Anglo-Egyptian Condominium government authorities that adequately spell out the administrative situation that existed in that area *at that time*."<sup>615</sup>

549. For these reasons, the ABC Experts then said – in a sentence that the Government's Memorial strikingly fails to mention – that:

"Therefore, it was necessary for the experts to avail themselves of relevant historical material produced both *before and after 1905*, as well as *during that year*, to determine as accurately as possible the area of the nine Ngok Dinka chiefdoms *as it was in 1905*."<sup>616</sup>

550. Despite the Government's effort to ignore this sentence, it could not have been clearer that the ABC Experts considered the relevant issue and date to be the area of the Ngok Dinka "as it was in 1905." Materials from earlier and later periods were being considered only to determine circumstantially and indirectly what the territory of the Ngok Dinka had been in 1905.

551. Given this language, it is impossible to see how the Government can say that the ABC Experts "effectively" or "virtually" ignored the 1905 date. To the contrary, in framing their inquiry, the ABC Experts made unmistakably clear both that they were determining the territory of the Ngok Dinka as it was in 1905 and that the only reason for considering materials from other dates was to assist in determining "as accurately as possible the area of the nine Ngok Dinka chiefdoms **AS IT WAS IN 1905**."<sup>617</sup>

552. In this regard, the ABC Experts' reasoning was precisely consistent with the attitude that they had adopted and communicated to the parties throughout the entire ABC proceedings. As discussed in the SPLM/A Memorial, as well as above, the ABC Experts had repeatedly emphasized the importance of the 1905 date throughout the ABC proceedings.

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<sup>613</sup> ABC Report, Part I, at p. 3 (quoting Abyei Protocol, Art. 5.1), **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>614</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>615</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>616</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>617</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial** (emphasis added).

Among other things, the ABC Experts repeatedly said during their meetings with the parties and local residents that it understood the Abyei Area to comprise the

- a. “boundaries of the nine Dinka Chiefdoms *as they existed 100 years ago*,”<sup>618</sup>
- b. “boundaries that existed *in 1905* between the Misseriya and Ngok Dinka,”<sup>619</sup>
- c. “area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan from Bahr el-Ghazal province *in 1905*,”<sup>620</sup> and
- d. “area of the Nine Ngok Dinka Chiefdoms, which were transferred to Kordofan Province from Bahr El-Ghazal Province *in 1905*.”<sup>621</sup>

553. Again, the suggestion that the ABC Experts “virtually ignored” the 1905 date is simply wrong. From the beginning of the ABC proceedings, the ABC Experts repeatedly said that they were attempting to determine the area of the nine Ngok Dinka Chiefdoms in 1905. That could not have been more clear.

554. The ABC Report then went on to recite the ABC Experts’ understanding of the parties’ respective claims, again leaving no doubt that the ABC Experts understood the importance of the 1905 date:

“The Government of Sudan’s position is that the only area transferred from Bahr el Ghazal to Kordofan *in 1905* was a strip of land south of the Bahr el Arab/Kir; that the Ngok Dinka lived south of the Bahr el Arab/Kir prior to *1905*, and migrated to the territory north of the river only after coming under the direct administration of Kordofan. Therefore the Abyei Area should be defined as lying south of the Bahr el Arab/Kir, and excluding all territory to the north of the river, including Abyei Town itself. This is opposed by the SPLM/A position, which is that the Ngok Dinka have established *historical claims* to an area extending from the existing Kordofan/Bahr el Ghazal boundary to north of the Ragaba ez Zarga/Ngol, and that the boundary should run in a straight line along latitude 10°35’ N.”<sup>622</sup>

555. Nor is there any shred of truth to the Government’s suggestion that the ABC Experts somehow forgot along the way what they had said about the 1905 date. Throughout the ABC Report, from start to finish, the ABC Experts emphasized the importance of the 1905 date. The following examples illustrate the point:

- a. “as noted in the preface, the Abyei Area has been defined as the area of the nine Ngok Dinka chiefdoms transferred from Bahr el-Ghazal to Kordofan *in 1905*.”<sup>623</sup>
- b. “Some accounts were given of events long before and immediately prior to 1905, but details of actual events *in 1905* were scanty. Many witnesses – Ngok

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<sup>618</sup> ABC Report, Part II, App. 4, at p. 41, **Exhibit-FE 15/1** (emphasis added).

<sup>619</sup> ABC Report, Part II, App. 4, at p. 53, **Exhibit-FE 15/1** (emphasis added).

<sup>620</sup> ABC Report, Part II, App. 4, at p. 79, **Exhibit-FE 15/1** (emphasis added).

<sup>621</sup> ABC Report, Part II, App. 4, at p. 58, **Exhibit-FE 15/1** (emphasis added).

<sup>622</sup> ABC Report, Part I, at p. 11, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>623</sup> ABC Report, Part I, at p. 9, **Appendix B to SPLM/A Memorial** (emphasis added).

Dinka, Misseriya and other Dinka-made reference to later periods and later events ... and drew inferences from those periods about the situation that existed *in 1905*.”<sup>624</sup>

c. “The evidence is compelling, then, that in no way were the Ngok newcomers in the *early twentieth century*.”<sup>625</sup>

d. “[The Misseriya were] carrying out raids against the Ngok and Twich Dinka in the *early years of the twentieth century*.”<sup>626</sup>

e. “The assertion that the Ngok Dinka were destitute is rendered doubtful by contemporary observations made by British officials in the *early 1900s*.”<sup>627</sup>

f. “What occurred *in 1905* was that because of Dinka complaints about Humr raids, the British authorities decided to transfer the Ngok and part of the Twich Dinka from the administrative control of Bahr el-Ghazal Province to Kordofan Province.”<sup>628</sup>

g. “Proposition 6: The Misseriya claim that specific locations north of Abyei Town (e.g., Goleh/Langar, Pawol, Dernbloya/Dak Jur, Umm Bilael/Tordach, Chigel/Thigel, Lukjl/Kol Jith, Lau, Nyama) have belong to them since the time of the Turkiyya, *through 1905*, to the present. (Misseriya oral testimony) ... There is good reason to believe that the nomadic Misseriya had few permanent settlements outside their headquarters in Muglad. *In 1902*, Major E.B. Wilkinson remarked on some ‘badly built’ huts of the Feleita Humr at Keilak, where the Feleita moved their cattle in the dry season...”<sup>629</sup>

h. “Proposition 7: The only area affected by *the 1905 decision* of the Condominium authorities to administer the Ngok Dinka as part of Kordofan was an area south of the Bahr el-Arab; and that the Ngok Dinka settled in territory north of the river only after *1905*. (GOS presentation) ... At first glance, the evidence adduced by the government in support of its interpretation of the *1905 boundary* is persuasive. ... The experts’ research revealed to them that there was considerable geographical confusion about the Bahr el-Arab and Bahr el-Ghazal regions for the *first two decades of the Condominium* rule. ... The government’s assertions that only the Ngok Dinka territory south of the Bahr el-Arab was *transferred to Kordofan [in 1905]* is, although understandable, incorrect. Contemporary documents before *1905* record that the Ngok Dinka occupied an area that extended from the Bahr el-Arab/Kir north to at least the Ragaba ez-Zarga/Ngol.”<sup>630</sup>

i. Proposition 8: There was a continuity in the territory occupied and used by the nine Ngok Dinka chiefdoms which was unchanged between *1905* and 1965, when armed conflict between the Ngok and the Misseriya began. (Ngok Dinka oral testimony and SPLM/A presentation) ... The administrative record of the *Condominium period*, along with the testimony of persons familiar with this area at

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<sup>624</sup> ABC Report, Part I, at p. 10, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>625</sup> ABC Report, Part I, at p. 14, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>626</sup> ABC Report, Part I, at p. 14, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>627</sup> ABC Report, Part I, at p. 14, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>628</sup> ABC Report, Part I, at p. 15, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>629</sup> ABC Report, Part I, at p. 16, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>630</sup> ABC Report, Part I, at pp. 17-18, **Appendix B to SPLM/A Memorial** (emphasis added).

the end of the Condominium, establishes that there was a continuity of Ngok Dinka settlements in the area...<sup>631</sup>

j. “*In 1905* there was no clearly demarcated boundary of the area transferred from Bahr el-Ghazal to Kordofan.”<sup>632</sup>

k. “The GOS belief that the area of the nine Ngok Dinka chiefdoms placed under the authority of Kordofan *in 1905* lay entirely south of the Bahr el-Arab is mistaken.”<sup>633</sup>

l. “There is compelling evidence to support the Ngok claims to having dominant rights to areas along the Bahr el-Arab and Ragaba ez-Zarga and that these are *long-standing claims that predated 1905*.”<sup>634</sup>

m. “The Ngok and the Humr were put under the authority of the same governor solely for reasons of administrative expediency *in 1905*.”<sup>635</sup>

n. “The administrative record of the Condominium period and testimony of persons familiar with the area attest to the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between *1905* and 1965.”<sup>636</sup>

556. It is impossible to read the ABC Report and conclude that the ABC Experts somehow “ignored” or “virtually ignored” the 1905 date. That is nonsense. On the most simple level, the ABC Experts referred to the 1905 date multiple times – the best count is 48 separate references to the 1905 date in the 45-page ABC Report.

557. More fundamentally, it is crystal clear that the ABC Experts specifically sought to identify the area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905. That is exactly what the ABC Expert said they were doing, defining the issue before then as “determin[ing] as accurately as possible the area of the nine Ngok Dinka chiefdoms *as it was in 1905*.”<sup>637</sup>

558. The ABC Experts made it equally clear that they were answering this question by reference in the first instance to materials from 1905 (or in the immediately surrounding years at the beginning of the 20<sup>th</sup> century); at the same time, the ABC Experts also said that, because of the “continuity” in Ngok Dinka settlements during much of the 20<sup>th</sup> century (“between 1905 to 1965”), they would also have regard to post-1905 materials to shed light on the extent of Ngok Dinka territory in 1905.

559. The ABC Experts very diligently followed this approach in its analysis, looking primarily to evidence from 1905 and subsidiarily to post-1905 evidence. That is detailed in the quotations set forth above and is evident from a reading of the ABC Report itself.

560. The Government also criticizes the ABC Experts for referring to the 1965 peace agreement between the Ngok Dinka and Misseriya (at page 19 of the ABC Report).

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<sup>631</sup> ABC Report, Part I, at pp. 18-19, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>632</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>633</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>634</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>635</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>636</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>637</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial** (emphasis added).

According to the Government's Memorial, "the 1965 agreement [is] unrelated both to the 1905 transfer and the ABC Experts' final boundary [and] was superseded by the Abyei Agreement between Tribes of Messeria and Mareg Dinka of 1966."<sup>638</sup>

561. Again, the GoS Memorial demonstrably misconstrues the plain language of the ABC Report. What the ABC Experts said was that the 1965 Agreement was one of a number of pieces of evidence that demonstrated "a continuity of Ngok Dinka settlements in the area of the Bahr el-Arab/Kir, the Umm Biero, the Ragaba Lau, and the Ragaba ez-Zarga/Ngol."<sup>639</sup> The ABC Experts' reason for relying on the 1965 Agreement in this regard was that the agreement recorded the Misseriya and Ngok Dinka's mutual acknowledgement that "the Ngok could *return to their homesteads* at 'Ragaba Zarga and other places where *they used to live*."<sup>640</sup>

562. It is impossible to see how the ABC Experts' reliance on the 1965 Agreement, along with other post-1905 sources of evidence (not criticized by the Government), to conclude that there was a continuity in the Ngok Dinka settlements over time is in the least bit controversial. The 1965 Agreement recorded the Misseriya and Ngok Dinka's mutual acknowledgement that "the Ngok could *return to their homesteads* at 'Ragaba Zarga and other places where *they used to live*,'"<sup>641</sup> demonstrating that in 1965 the Misseriya recognized that the Ngok Dinka "used to live" around the Ngol/Ragaba ez Zarga.<sup>642</sup> The 1966 Agreement reiterated the parties' understanding the Ngok Dinka had permanent settlements in the Ragaba ez Zarga.<sup>643</sup> Further, the accounts of the 1966 conference which lead to the signing of the 1966 Agreement note that this was "*the first time that claims on territory known as Ngokland have been tabled by Misiriyya openly in a conference*."<sup>644</sup>

563. The Government's suggestion that it was illegitimate of the ABC Experts to consider the 1965 Agreement because it had been superseded by the 1966 Agreement is wrong. As explained above, the ABC Experts did not rely on the 1965 Agreement for the substance of what the parties agreed to, but rather for the factual inferences which could be drawn regarding the views of the Ngok Dinka and Misseriya as to their respective territories and the continuity of occupation of those territories. There is nothing in the 1966 Agreement which could make it inappropriate to conclude that such an inferences could be drawn from the 1965 Agreement; indeed, the 1966 Agreement reiterated the parties' understanding the Ngok Dinka had permanent settlements in the Ragaba ez Zarga.<sup>645</sup> In any event, it is clear that the ABC Experts considered *both* the 1965 and the 1966 Agreements (as well as the accounts of the conferences which culminated in the signing of these two Agreements).

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<sup>638</sup> GoS Memorial, at para. 246.

<sup>639</sup> ABC Report, Part I, at p. 19, **Appendix B to SPLM/A Memorial**.

<sup>640</sup> ABC Report, Part I, at p. 19, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>641</sup> ABC Report, Part I, at p. 19, **Appendix B to SPLM/A Memorial**.

<sup>642</sup> See "The First Peace Agreement Between The Misiriyya Humur And The Ngok Dinka, Concluded At Abyei, March 3, 1965", Appendix 12 to A. D Saeed "The State And Socioeconomic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan" (January 1, 1982). ETD Collection for University of Connecticut. Paper AAI8213913, **Exhibit-FE 18/30**.

<sup>643</sup> Annex 62 to GoS Memorial, ("Dinka shall return to their homes and farms at the Ragaba Zerga and other places and the Messeria shall frequent all Ragabas and water and pasture-places which they used to frequent before the incident").

<sup>644</sup> ABC Report, Part II, Appendix 5, at p. 190, (replicating A. D Saeed "The State And Socioeconomic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan, at p. 235 ), **Exhibit-FE 15/1**.

<sup>645</sup> Annex 62 to GoS Memorial, ("Dinka shall return to their homes and farms at the Ragaba Zerga and other places and the Messeria shall frequent all Ragabas and water and pasture-places which they used to frequent before the incident").



564. It is also clear that *all* of the foregoing materials support the conclusion the ABC Experts reached regarding the Ngok Dinka occupation of the Ngol/Ragaba ez Zarga. The ABC Experts included in Appendix 5 of the ABC Report (summarizing the documentary evidence which they had relied on) a number of references to the dissertation of Sudanese academic, Abdalbasit Saeed, which contains translations of both the 1965 and 1966 Agreements.<sup>646</sup> As discussed below, Saeed’s account stated that the 1966 Peace Conference in Abyei was “*the first time that claims on territory known as Ngokland have been tabled by Misiriyya openly in a conference.*”<sup>647</sup> This observation further corroborates the conclusions the ABC Experts drew from these materials.

565. In addition, it is disingenuous for the Government now to claim that it was wrong for the ABC Experts to consider the 1965 and 1966 Agreements and related materials. That is because it was the Government itself that raised the 1966 Agreement during the course of its presentations to the ABC. Further, when the ABC Experts requested during these presentations that the Government provide to them both Agreements, and the minutes of the conferences relating thereto, the Government indicated that it would do their best to comply with that request.<sup>648</sup>

566. Given this, it is simply confused for the Government to say that the 1965 agreement was “unrelated both to the 1905 transfer and the ABC Experts’ final boundary.” On the contrary, the continuity and extent of the Ngok Dinka territory recognized in the 1965 agreement were very clearly related to the extent of the Ngok Dinka territory in 1905 – because the 1965 agreement provided evidence as to the extent of the Ngok’s territory at a later date, and the continuity of the Ngok’s rights over time, both of which could be used inferentially to assist in defining the Ngok’s territory at an earlier date (i.e., 1905). For exactly the same reasons, the 1965 agreement’s acknowledgment was also clearly related to the ABC Experts’ determination as to the extent of the Ngok’s territory in 1905.

567. Finally, in this respect it is also noteworthy that the Government itself has cited and relied upon events occurring after 1905 as evidence of the location of the Ngok Dinka and Misseriya in 1905 in these proceedings. This is evident from paragraphs 385 to 396 of the GoS Memorial, which contain a lengthy, if inaccurate, treatment of post-1905 literature and documents, as well as the witness statement of Professor Cunnison.<sup>649</sup>

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<sup>646</sup> ABC Report, Part II, Appendix 5, at pp. 187, 190, **Exhibit-FE 15/1**.

<sup>647</sup> ABC Report, Part II, Appendix 5, at p. 190, (setting out an excerpt from A. D Saeed “The State And Socioeconomic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan, at p. 235), **Exhibit-FE 15/1**.

<sup>648</sup> Ambassador Dirdeiry, Taped Recording of GoS Additional Presentation, dated 16 June 2005, File 5, at pp. 3 to 5, **Exhibit-FE 19/18**.

<sup>649</sup> See GoS Memorial, at paras. 385-396. Among other things, the Government argues that the location of the Ngok Dinka and the Misseriya in 1905 “is powerfully illuminated by material from the preceding and immediately following years.” GoS Memorial, at para. 398.

568. The same was true of the Government's presentations to the ABC, which also cited and relied upon post-1905 documents.<sup>650</sup> During Ambassador Dirdeiry's first presentation for the Government, one of the experts, Dr. Johnson, complimented the Government for its approach to the historic material, and particularly, the use of post-1905 documents to shed light on the situation and events of 1905:

"I was fascinated by the presentation and I must say you have put together a range of sources and given us some indication of the provenance of them.... You have also highlighted something that I think all of us, who have been researchers on any period of Africa from the beginning of the 20<sup>th</sup> century, experience – our great frustration in the contemporary historical records which are incomplete. There are always gaps. I think that you were very resourceful in being able to *go to later documents that referred back to the period that we are talking about* and bringing into the discussion information and data that *can be found illuminating the events of the period that we are concerned about. But they are not contemporary with those events.* And I think that is a good example for us to follow."<sup>651</sup>

569. In sum, the Government's claim that the ABC Experts ignored the stipulated 1905 date, or instead focussed on another date, is baseless. The ABC Experts said in clear terms that they were determining the area of the nine Ngok Dinka Chiefdoms in 1905 and that is precisely what their analysis did. That is an end of the matter.

4. The Government's Complaints About the ABC Experts' Supposed Failure to Fulfill Their Mandate are Merely Inadmissible Objections to the Substance of the ABC Report

570. Second, the Government's complaints about the ABC Experts' supposed "refusal to perform their task," "answering of the wrong question" or "ignoring the stipulated date" are in fact inadmissible objections to the substance of the ABC Experts' definition of the Abyei Area and the ABC Experts' factual findings. That criticism is demonstrably not the basis for an excess of mandate claim (and is also clearly wrong).

a) The Government's Complaints About the ABC Experts' Supposed Failure to Fulfill Their Mandate Are Merely Inadmissible Substantive Objections to the ABC Experts' Interpretation of the Definition of the Abyei Area

571. The Government's three claims that the ABC Experts exceeded their substantive mandate all rest on the GoS's wholly unexplained premise that the Abyei Area as defined in Article 1.1.2 of the Abyei Protocol consisted of only that sub-part of the territory of the Ngok

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<sup>650</sup> See GoS First Presentation, dated 10 April 2005, at p. 24 (citing Dupuis' Report, "Note on the Ngok Dinka of Western Kordofan" (1922): "in 1922, Dupuis was able to locate them at Khor Alal, north of Lol River..."), and at pp. 36 *et seq.* (citing post 1905 maps), **Exhibit-FE 14/2**; GoS Final Presentation, dated 16 June 2005, at p. 27 (citing Cunnison (1954)), at p. 28 (citing excerpts from Willis, "Notes on Western Kordofan Dinkas" (1909), **Exhibit-FE 14/18**); GoS Additional Presentation, dated 17 June 2005, at p. 16 (citing a letter from the Governor of Bahr el Ghazal dated 21 July 1927), at p. 14 (citing a report of the District Commissioner of Western Kordofan from 1950), p. 20 (citing Kordofan Province Monthly Diary, 1951), **Exhibit-FE 14/17**; Transcript of Ambassador Dirdeiry, Taped Recording GoS Final Presentation, File 1, at p. 2, ("the second area of focus is how the contemporary maps since 1908 and up to 1936 had reflected the 1905 transfer"), at p. 5 ("maybe you recall Mr Chairman that during our first presentation we had made a presentation of a report written in 1922 indicating the nine Ngok Dinka chieftans"), **Exhibit-FE 19/15**.

<sup>651</sup> Ambassador Dirdeiry, transcript of Oral Evidence Submitted to the ABC 14 to 21 April 2005, at p. 21, **Exhibit-FE 14/5a** (emphasis added).

Dinka Chiefdoms which was transferred to Kordofan from south of the Kiir/Bahr el Arab in 1905. That premise is only occasionally mentioned in the GoS Memorial, usually obliquely,<sup>652</sup> but it forms the essential basis for the Government's true criticism of the ABC Report. Thus, the GoS Memorial asserts that the Abyei Area was "the area of the nine Ngok Dinka chiefdoms *which was* transferred to Kordofan in 1905"<sup>653</sup> and that "*areas which were already part of Kordofan in 1905 could not have been transferred to it.*"<sup>654</sup>

572. As a consequence of this substantive interpretation of the definition of "Abyei Area" in Article 1.1.2 of the Abyei Protocol, the Government's analysis proceeds on the basis that the ABC Experts (and the parties) should not have considered matters such as "tribal customary rights,"<sup>655</sup> the areas that the "Ngok Dinka annually used,"<sup>656</sup> an "assessment of land use,"<sup>657</sup> and "'territorial occupation and/or use rights' and 'population dynamics.'"<sup>658</sup> Rather, the Government contends that only "[t]he 1905 border [between Kordofan and Bahr el Ghazal] should ... have served as the basis for international delimitation."<sup>659</sup>

(1) The Government Ignores the Definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol

573. All of the Government's complaints about supposed excesses of substantive mandate rest on its substantive interpretation of the meaning of the parties' agreed definition of the Abyei Agreement in Article 1.1.2 of the Abyei Protocol:

"1.1.2 The territory [i.e., the Abyei Area] is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."<sup>660</sup>

574. Without ever explaining, or even mentioning the issue, the Government's Memorial rests on the assumption that Article 1.1.2 means "that part of the area of the nine Ngok Dinka chiefdoms *which was* transferred to Kordofan in 1905." More specifically, the GoS's position rests on the premise that the Abyei Area as defined in Article 1.1.2 can only be determined by identifying what part of the Ngok Dinka territory was located outside of Kordofan before 1905 (as defined by reference to the purported general Kordofan/Bahr el Ghazal boundary), and that was transferred into Kordofan in 1905. Thus, the Government claims that the Abyei Area is "*the area which was not within Kordofan prior to 1905 but which falls within Kordofan now by reason of the transfer of 1905,*"<sup>661</sup> and that the "*areas which were already part of Kordofan in 1905 could not have been transferred to it.*"<sup>662</sup>

575. As discussed below (and in the SPLM/A's Memorial),<sup>663</sup> the Government's interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol is plainly wrong. In fact, Article 1.1.2 is properly interpreted as referring to the area of the nine Ngok Dinka Chiefdoms which were transferred to Kordofan in 1905; the parties did not intend to divide the historic territory of the Ngok Dinka Chiefdoms (as it stood in 1905), nor

<sup>652</sup> GoS Memorial, at paras. 19, 229, 401.

<sup>653</sup> GoS Memorial, at para. 19.

<sup>654</sup> GoS Memorial, at para. 19.

<sup>655</sup> GoS Memorial, at para. 235.

<sup>656</sup> GoS Memorial, at para. 238(a).

<sup>657</sup> GoS Memorial, at para. 238(b).

<sup>658</sup> GoS Memorial, at para. 241.

<sup>659</sup> GoS Memorial, at para. 234.

<sup>660</sup> Abyei Protocol, Art. 1.1, **Appendix C to SPLM/A Memorial**.

<sup>661</sup> GoS Memorial, at para. 401.

<sup>662</sup> GoS Memorial, at para. 19.

<sup>663</sup> See below at paras. 587-589; SPLM/A Memorial, at paras. 1123-1189.

to separate the nine Ngok Dinka Chiefdoms from one another, but instead defined the Abyei Area as all of the territory used and occupied by the nine Ngok Dinka Chiefdoms at the time that they were transferred to Kordofan in 1905.<sup>664</sup>

576. The decisive point for present purposes, however, is that the substantive correctness of the ABC Experts' interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol is irrelevant to the question of an excess of mandate. The ABC Experts' interpretation of Article 1.1.2's definition of the Abyei Area is a matter of the substance of their decision and their assessment of the evidence, rather than a potential excess of mandate.

(2) The Government Ignores Well-Settled Authority that a Substantive Error of Law is not an Excess of Mandate

577. The SPLM/A's Memorial sets out in detail the authorities demonstrating that an error of law or fact is not a basis for challenging an arbitral award or other adjudicative decision.<sup>665</sup> As the Commentary to the Draft ILC Convention on Arbitral Procedures explains, "***the decision of the arbitrators cannot be attacked on the ground that it is wrong or unjust. Errors in calculation excepted from this statement.***"<sup>666</sup> As another authority observes: "***An excess of power must not be confused with an essential error,***"<sup>667</sup> and:

"The arbitrator commits an ***excess of power*** where he goes beyond the terms of the arbitration agreement, that is, by crossing the limits of the scope of his powers. ... ***It could not be considered as resulting from an error of law or of fact, nor from an essential error***, but rather from violation, which expresses itself, in a case, which is beyond doubt."<sup>668</sup>

578. To the same effect, in *CMS v. Argentine Republic* (relied on by the GoS), the *ad hoc* Committee considered the standard of manifest excess of power within Article 52 of the ICSID Convention and held that an error of law was not recognized as a sufficient basis for nullity. The Committee held that although the tribunal had applied the law "***cryptically and defectively,***" it did apply the law, and thus there was "***no manifest excess of powers.***"<sup>669</sup>

579. Similarly, the Government quotes part of the *ad hoc* Committee's reasoning in the *MINE* annulment decision, but omits the immediately following sentence:

"A Committee might be tempted to annul an award because that examination disclosed ***a manifestly incorrect application of the law, which, however, is not a ground for annulment.***"<sup>670</sup>

580. The Committee in *MINE* went on to state that:

<sup>664</sup> See below at paras. 881-884; SPLM/A Memorial, at paras. 1123-1197.

<sup>665</sup> SPLM/A Memorial, at paras. 771-791.

<sup>666</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, available at www.un.org, **Exhibit-LE 1/1**, referring to J. Bluntschli, *Le droit international codifié*, Sect. 495, at p. 289 (1886), **Exhibit-LE 14/5**.

<sup>667</sup> D. Guermanoff, *L'excès de pouvoir de l'arbitre* 63 (1929), **Exhibit-LE 13/9**.

<sup>668</sup> D. Guermanoff, *L'excès de pouvoir de l'arbitre* 63 (1929), **Exhibit-LE 13/9** (emphasis added).

<sup>669</sup> *Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, CMS Gas Transmission Company v. Argentine Republic* (25 September 2007), (ICSID Case No. ARB/01/8) (Annulment Proceeding), ¶136 (2007), **Exhibit-LE 15/2**.

<sup>670</sup> Judgment of 22 December 1989 of the ad Hoc Committee On the Application for Annulment Submitted by Guinea Against the Arbitral Award Rendered on 6 January 1988 in the *MINE v. Government of Guinea Case* (ARB/84/4), ¶5.08 (1988), **Exhibit-LE 26/24** (partially quoted in GoS Memorial, at para. 163) (emphasis added).

“Article 52(1) makes it clear that annulment is a limited remedy. ***This is further confirmed by the exclusion of review of the merits of awards by Article 53. Annulment is not a remedy against an incorrect decision. Accordingly, an ad hoc Committee may not in fact reverse an award on the merits under the guise of applying Article 52.***”<sup>671</sup>

581. In the *Klöckner* annulment decision (again, relied on by the Government), the *ad hoc* Committee concluded (by reference to the decision in *Orinoco Steamship*) that:

“It is clear that ‘error in judicando’ could not in itself be accepted as a ground for annulment without indirectly reintroducing an appeal against the arbitral award, and the ad hoc Committee under Article 52 of the Convention does not, any more than the Permanent Court of Arbitration in the *Orinoco* case, have the ‘duty ... to say if the case has been well or ill judged, but whether the award must be annulled.’”<sup>672</sup>

582. In another of the authorities relied on by the Government in the *Soufraki* award the ICSID *ad hoc* Committee reasoned as follows:

“a distinction must be made between the failure to apply the proper law, which can result in annulment, ***and an error in the application of the law, which is not a ground for annulment.***”<sup>673</sup>

583. Commentators have also declared that:

“ICSID ad hoc committees have moved towards a narrower interpretation of the manifest excess of powers ground. Committees have consistently concluded that their role is to conduct procedural and not substantive review, and that ***an annulment proceeding based on manifest excess of powers does not present an opportunity to the parties to relitigate the issues. Manifest excess of powers has to be clear, obvious and evident.***”<sup>674</sup>

584. National courts have reached precisely the same conclusions under Article V(1)(c) of the New York Convention.<sup>675</sup> As the English House of Lords has explained:

“Article V(1)(c) relates to matters beyond the scope of the submission to arbitration. It deals with cases of excess of power or authority of the arbitrator. ***It is well***

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<sup>671</sup> Judgment of 22 December 1989 of the ad Hoc Committee On the Application for Annulment Submitted by *Guinea* Against the Arbitral Award Rendered on 6 January 1988 in the *MINE v. Government of Guinea Case* (ARB/84/4), ¶¶4.04-4.05 (1988), **Exhibit-LE 26/24** (emphasis added).

<sup>672</sup> Judgment of 3 May 1985 of the Ad Hoc Committee On the Application for Annulment Submitted by *Klöckner* Against the Arbitral Award Rendered on 21 October 1983 in the *Klöckner v. Cameroon Case*, (ARB/81/2) ICSID Review – Foreign Investment Law Journal, 90, 110 (1986), **Exhibit-LE 23/7**.

<sup>673</sup> See GoS Memorial, at para. 149 (quoting “*Soufraki v. UAE*, [Decision on Annulment 5 June 2007.] para. 85”) (emphasis added).

<sup>674</sup> Petrova, *The ICSID Grounds for Annulment in a Comparative Perspective: Analysis and Recommendations for the Future*, 10 Vind. J. Int’l Comm. L. & Arb. 287, 304 (2006), **Exhibit-LE 23/10** (emphasis added).

<sup>675</sup> A. van den Berg, *The New York Arbitration Convention of 1958* 269, 313 (1981) (“It is a generally accepted principle of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award.”) and at 313 (“[T]he question whether the arbitrator has exceeded his authority should not lead to a re-examination of the merits of the award.”), **Exhibit-LE 24/13**; J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶26-66 (2003) (“A re-examination of the merits of the award is not allowed by [Article V(1) of] the Convention”), **Exhibit-LE 23/17**; see also SPLM/A Memorial at para. 780.

*established that article V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award.*<sup>676</sup>

585. Indeed, the Government itself effectively acknowledges the rule that an error of law, or the misinterpretation of an applicable treaty or contract, is not an excess of mandate. According to the Government:

“This does not mean that an award can be annulled simply because a party disagrees with the reasoning of a tribunal on a point of fact or law, *even if the Tribunal was in error in its reasoning on a point of fact or law*. Annulment is to be distinguished from appeal.”<sup>677</sup>

586. Applied to the present case, the (concededly applicable) rule that an error of law or treaty interpretation is not an excess of mandate is fatal to the Government’s case. Here, as discussed above, the Government’s three purported excess of substantive mandate claims all rest upon the (unstated) premise that the ABC Experts misinterpreted the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol.<sup>678</sup> An alleged misinterpretation, even if proved, is not an excess of mandate. Rather, it would merely be what the Government terms an “*error in [the ABC Experts’] reasoning on a point of law*” or what the authorities term “*an error of law or of fact, [or] an essential error.*”

(3) The Government Misinterprets Article 5.1 of the Abyei Protocol

587. Indeed, it is for the foregoing reason that the Government goes to some lengths to obscure both the source of the definition of the Abyei Area in the parties’ agreements and the true basis for its excess of substantive mandate claims. Reading the Government’s Memorial, one finds virtually no mention of the definition of the Abyei Area in **Article 1.1.2 of the Abyei Protocol** – notwithstanding the central role of that provision in the parties’ peace agreements. Instead, what one finds in the GoS Memorial is only the inaccurate statement that “the ‘Abyei Area’ was defined by **Article 5.1 [of the Abyei Protocol]** as “the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.”<sup>679</sup>

588. The Government’s (inaccurate and incomplete) quotation of Article 5.1 serves only to obscure the basic point that the definition of the Abyei Area in Article 1.1.2 was a substantive agreement of the parties, which Article 5.1 then granted the ABC the mandate of defining. Thus, the complete and correct language of Article 5.1 is “*to define and demarcate* the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.”<sup>680</sup> By its plain terms, then, the ABC Experts’ mandate was thus to “*define*” and “*demarcate*” the Abyei Area, as it had been defined by the parties’ substantive agreement in Article 1.1.2.

589. The reason for the Government’s omission from its Memorial of discussion of Article 1.1.2 of the Abyei Protocol is not difficult to see. Recognition of Article 1.1.2’s definition of

<sup>676</sup> *Lesotho Highlands Development Authority v. Impreglia SpA* [2006] 1 AC 221, 236 (2006), **Exhibit-LE 14/1** (emphasis added).

<sup>677</sup> GoS Memorial, at para. 160 (emphasis added).

<sup>678</sup> See above at paras. 488, 571-572.

<sup>679</sup> GoS Memorial, at para. 9. The Government’s references are consistently to Article 5.1. See GoS Memorial, at paras. 121, 383(5) (“The definition of the ‘Abyei Area’ in Section 5.1 of the Abyei Protocol...”).

<sup>680</sup> Abyei Protocol, Art. 5.1, **Appendix C to SPLM/A Memorial** (emphasis added).

the Abyei Area makes it clear that the Government's complaints are in fact grounded on a disagreement with the ABC Experts' substantive interpretation of the definition of the "area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905" – a disagreement that is not admissible as an excess of mandate claim.

(4) The Government's Own Memorial Treats the Definition of the Abyei Area as a Substantive Issue of Interpretation

590. Equally, nowhere in the Government's 400 plus paragraphs of discussion is there any serious effort to provide a reasoned interpretation of Article 1.1.2 of the Protocol (or the definition of the Abyei Area). Rather, there are only occasional assumptions as to what the definition supposedly means,<sup>681</sup> without any analysis.

591. It is revealing, however, that the place in its Memorial where the Government discusses the meaning and application of the definition of the Abyei Area is in its "**Chapter 6,**" dealing with the substantive and evidentiary question of "the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905,"<sup>682</sup> and not in Chapters 4 or 5, dealing with "excess of mandate." The GoS's treatment of the definition of the Abyei Area as a question of substance – and not of mandate – is appropriate and logical. But that treatment again demonstrates that the ABC Experts' alleged misinterpretation of that definition is not admissible as an excess of mandate claim.

592. This is not a case where the decision-maker decided a dispute not submitted to it. Here, the ABC Experts did not purport to decide the boundary between the North and South of Sudan or the division of natural resources between the North and South. Nor did they purport to decide the boundaries or rights of the Twic Dinka or of tribes in Darfur or Upper Nile.

593. Rather, the ABC Experts indisputably defined the Abyei Area by interpreting Article 1.1.2's definition of "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905." That was precisely what they were mandated to do, and the Government's disagreement with the substance of their decision is no grounds for claiming that the ABC Experts exceeded their mandate.

(5) The Government's Position Would Produce Absurd Results for this Tribunal's Mandate

594. The Government's apparent contention that a misinterpretation of the definition of the Abyei Area constitutes an excess of mandate is wholly implausible. That can be demonstrated by considering this Tribunal's mandate under Article 2(c), which is to "**define (i.e., delimit)** on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."

595. If the ABC Experts' misinterpretation of this formula was an excess of substantive mandate – as the Government suggests – ***then the same would be true of an alleged***

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<sup>681</sup> GoS Memorial, at paras. 19, 40, 229.

<sup>682</sup> GoS Memorial, at p. 99, (Heading for Chapter 6); *see also* GoS Memorial, at para. 279(b) ("[T]he territories of the Ngok Dinka under Sultan Arob and Sultan Rihan Wogkwei (which territories were to the south of the Bahr el Arab at this time) were transferred administratively to Kordofan in 1922"), at paras. 325, 331(c), 371, 372-383, 401.

***misinterpretation by this Tribunal.*** If the ABC Experts exceeded their mandate by adopting the “wrong” definition of the Abyei Area, then this Tribunal would be subject to exactly the same attack, with only the identity of the party making the challenge to be determined.

596. That result is no less (or more) absurd than the Government’s claim that the ABC Experts’ misinterpretation of the definition of the Abyei Area is an excess of mandate. Rather, in each case, the decision-maker’s interpretation of what is meant by “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” is merely a substantive interpretation of law, or a factual assessment, not subject to review or challenge as an excess of mandate. Indeed, it is precisely to avoid such absurd, never-ending possibilities of challenge, that an alleged error of substance is not grounds for claiming an excess of mandate.

597. At bottom, the Government’s claim is no different from an argument that, since an arbitral tribunal supposedly misapplied the applicable substantive law or incorrectly interpreted the parties’ contract, it “exceeded its mandate.” That argument is scarcely serious, yet it is what the Government’s three claims of an excess of “substantive mandate” amount to.

598. For this reason, none of the Government’s three purported excess of substantive mandate claims is admissible. All three of those claims arise from different aspects of the Government’s substantive disagreement with the ABC Experts’ interpretation of the definition of the Abyei Area, or with the ABC Experts’ assessment of the historical documents, which are not grounds for disregarding the ABC Report.

- b) The Government’s Complaints About the ABC Experts’ Supposed Failure to Fulfill Their Mandate are Merely Inadmissible Substantive Objections to the ABC Experts’ Evaluation of the Historical Evidence

599. Even if one ignored the inadmissibility of the Government’s substantive disagreement with the ABC Experts’ interpretation of the definition of the Abyei Area, the GoS’s purported excess of substantive mandate claims would still be inadmissible. That is because an independent and alternative basis for the ABC Experts’ decision was its factual assessment of the historical record. Even if that evidentiary evaluation were wrong (which, as discussed below, it is not), it plainly would not be the basis for an excess of mandate claim.

600. As discussed in detail in the SPLM/A Memorial, the ABC Experts very carefully applied their historical expertise to an evaluation of the Condominium and other documentation that was presented to them by the parties and which they independently gathered from various archival sources.<sup>683</sup> It was precisely in order to obtain an expert historical evaluation that the ABC Experts were chosen in the manner, and with the qualifications, that they were.<sup>684</sup>

601. One of the issues that the ABC Experts considered was the extent of the area that was the subject of the Condominium’s 1905 transfer of the Ngok Dinka Chiefdoms.<sup>685</sup> The resolution of this question – of course – depended upon the ABC Experts’ evaluation of the documents from 1905 that effected and recorded the transfer of “Sultan Rob” and his people.

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<sup>683</sup> SPLM/A Memorial, at paras. 511-531.

<sup>684</sup> See above at paras. 236, 529; SPLM/A Memorial, at paras. 594-601.

<sup>685</sup> See above paras. 497-502 & below paras. 609-612; SPLM/A Memorial, at paras. 526-531.



(Consequently, those 1905 documents are discussed in detail in the Memorials of both the Government (see GoS Memorial, paragraphs 356 to 371) and the SPLM/A (see SPLM/A Memorial, paragraphs 346-358, 904-944), as well as in Professor Daly's Expert Report.)<sup>686</sup>

602. After a thorough evaluation of the Condominium's historical records, the ABC Experts reached factual conclusions about what territory the Anglo-Egyptian administrators transferred from Bahr el Ghazal to Kordofan. Specifically, the ABC Experts found that "***the Ngok people were regarded as part of the Bahr el-Ghazal Province until their transfer in 1905,***"<sup>687</sup> and "the government's claim that ***only the Ngok Dinka territory south of the Bahr el Arab was transferred to Kordofan in 1905 is therefore found to be mistaken.***"<sup>688</sup> Instead, the ABC Experts concluded that the Anglo-Egyptian administrators had transferred all of the territory of the Ngok Dinka to Kordofan, and the Experts then delimited the boundaries of that territory.<sup>689</sup>

603. The Government devotes considerable effort in Chapter 6 of its Memorial to arguing why the ABC Experts were wrong ("willfully blind") in their assessment of the Anglo-Egyptian documents and maps.<sup>690</sup> According to the Government's Memorial, these documents and other historical evidence demonstrates that "part of the Bahr el Ghazal Province was transferred into the Province of Kordofan in 1905"<sup>691</sup> and that "area is the area south of the Bahr el Arab down to the provincial boundaries of Kordofan as defined by 1931."<sup>692</sup>

604. The Government's interpretation of the Anglo-Egyptian documentation and the putative Kordofan/Bahr el Ghazal boundary in Chapter 6 of its Memorial is substantively wrong (as discussed in detail below).<sup>693</sup> More fundamentally, the Government's disagreement with how the ABC Experts evaluated and interpreted the Condominium documentation is simply not the basis for an excess of mandate claim. It is instead a substantive disagreement about what the documentary evidence shows, which was precisely what was committed to the historian-experts on the ABC and not to this Tribunal.

605. Even the Government acknowledges this rule. The Government concedes in its Memorial, as it must, that "[i]t is not the case that ***a mere disagreement, however justified, with the Experts' appreciation of the facts is sufficient to indicate an excess of mandate.***"<sup>694</sup> That acknowledgment is entirely appropriate (and necessary). As discussed in the SPLM/A's Memorial, it is fundamental that the evidentiary evaluations of an arbitral tribunal (or other adjudicatory body) cannot be grounds for claiming an excess of mandate.<sup>695</sup>

606. Here, the ABC Experts found as a matter of fact that the Anglo-Egyptian administrators had – whatever the location of any general Bahr el Ghazal/Kordofan boundary in 1905 – regarded "***the Ngok people ... as part of the Bahr el-Ghazal Province until their transfer in 1905.***"<sup>696</sup> The ABC Experts thus reached a different factual conclusion from that urged by the Government about where the Ngok people and their territory had been located

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<sup>686</sup> Daly Expert Report, at p. 38-42.

<sup>687</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial.**

<sup>688</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>689</sup> ABC Report, Part I, at p. 39 & Map 1, **Appendix B to SPLM/A Memorial.**

<sup>690</sup> GoS Memorial, at paras. 356-371, 383(3), (5).

<sup>691</sup> GoS Memorial, at para. 371.

<sup>692</sup> GoS Memorial, at para. 383(6).

<sup>693</sup> See below at paras. 869-1487.

<sup>694</sup> GoS Memorial, at para. 161 (emphasis added).

<sup>695</sup> See SPLM/A Memorial, at paras. 771-791.

<sup>696</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial.**

prior to the 1905 transfer, concluding that they had been located in Bahr el Ghazal, regardless of where the provincial boundary might have been located. The ABC Experts concluded, as a matter of fact, that the Ngok and their territory had – as the relevant 1905 records stated – been part of Bahr el Ghazal prior to the transfer.

607. The evidentiary and historical discussion in Chapter 6 of the Government’s Memorial is replete with scathing attacks on this conclusion by the ABC Experts, and repeated protestations that the Condominium documents and maps show that only an “area *south of the Bahr el Arab* down to the provincial boundaries of Kordofan” was transferred.<sup>697</sup> According to the Government, since the Kordofan/Bahr el Ghazal provincial boundary was supposedly the Kiir/Bahr el Arab, only the Ngok Dinka and their territory located south of that river could have been transferred to Kordofan by the Condominium authorities.

608. Putting aside the incorrectness of its criticisms, the Government’s factual and evidentiary disagreement with the ABC Experts’ conclusions about what territory the Anglo-Egyptian administrators transferred in 1905 are simply not grounds for an excess of mandate claim. Even if the Government’s explanation of the Anglo-Egyptian documentation were correct (which it emphatically is not), the ABC Experts’ different evidentiary evaluation of that documentation is not an excess of mandate. Even apart from the ABC Experts’ substantive interpretation of the definition of the Abyei Area, the Government’s complaints about the ABC Experts’ assessment of the Condominium documentation are merely disagreements with the ABC Experts’ “appreciation of the facts,” which are inadmissible in this proceeding.

5. In Any Event, the ABC Experts’ Interpretation of Article 1.1.2 of the Abyei Protocol Was Plainly Correct

609. Third, even if the Government’s objections to the ABC Experts’ interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol were admissible as an excess of mandate claim, those objections are baseless. Rather, the ABC Experts’ interpretation of what is meant by “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” was exactly right.

610. As noted above, the Government claims (without attempting to explain) that the Abyei Area must be defined as “the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905,”<sup>698</sup> and in particular as “the area which was not within Kordofan prior to 1905 but which falls within Kordofan now by reason of the transfer of 1905.”<sup>699</sup> In the Government’s view, the “areas which were already part of Kordofan in 1905 could not have been transferred to it.”<sup>700</sup>

611. As discussed in greater detail below, the ABC Report rejected this interpretation and application of Article 1.1.2 of the Abyei Protocol on two separate grounds, one legal and one essentially factual. Instead, the ABC Experts concluded that (a) the Abyei Area was defined as “*the area of the nine Ngok Dinka Chiefdoms as it was in 1905*”<sup>701</sup> or, as alternatively phrased in the Report, “*the territory occupied and used by the nine Ngok Dinka*

<sup>697</sup> GoS Memorial, at para. 371; *see also* GoS Memorial, at para. 371 (“[P]art of the Bahr el Ghazal Province was transferred into the Province of Kordofan in 1905,”) para. 383(3) (“[A]n area was transferred from Bahr el Ghazal Province to Kordofan Province”), at paras. 398-399, 401.

<sup>698</sup> GoS Memorial, at para. 19.

<sup>699</sup> GoS Memorial, at para. 401.

<sup>700</sup> GoS Memorial, at para. 19.

<sup>701</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

*Chiefdoms*;<sup>702</sup> and (b) in any event, “*the Ngok people were regarded as part of the Bahr el-Ghazal Province until their transfer in 1905*,”<sup>703</sup> and “the government’s claim that only the Ngok Dinka territory south of the Bahr el Arab was transferred to Kordofan in 1905 is therefore found to be mistaken.”<sup>704</sup>

612. Each of these separate grounds justifying the ABC Experts’ interpretation is correct. The proper interpretation of the definition of the Abyei Area, set forth in both Article 1.1.2 of the Abyei Protocol and elsewhere in the parties’ agreements, is discussed in detail in the SPLM/A’s Memorial<sup>705</sup> and in Part III(C) of this Reply Memorial.

6. The ABC Experts’ Interpretation of Their Mandate Is Entitled to Substantial Deference and Could Only Be Invalidated in Rare and Exceptional Cases

613. If one assumed (contrary to fact) that the ABC Experts’ interpretation of the definition of the Abyei Area involved a potential excess of substantive mandate, then that interpretation would at a minimum be entitled to a substantial presumption of correctness and could only be invalidated in rare and exceptional cases. As discussed in the SPLM/A’s Memorial, it is well-established that the party seeking to challenge an arbitral award or other adjudicative decision bears a heavy burden of proving the applicability of one of the defined exceptions to the presumptive validity of such decisions. As Judge Weeramantry describes the rule:

“The burden of displacing [the] presumption [that an arbitral award is valid] lies on [the party challenging the award]. ... *[T]he party impugning the award is at all times under the burden of proving that sufficiently weighty circumstances exist to support its contention that the award is invalid.*”<sup>706</sup>

614. Similarly, Article V(1) of the New York Convention “provides that the party opposing enforcement has the burden to prove that the arbitral award, for instance, deals with a difference not contemplated by the arbitration agreement.”<sup>707</sup> Thus:

“The main feature that *the respondent has the burden of proof to show the existence of the grounds for refusal enumerated in Article V(1)* ... has been unanimously confirmed by the courts. They frequently explicitly state that the respondent, having the burden of proving the existence of one of the grounds for refusal mentioned in Article V(1), has failed to supply evidence of their existence.”<sup>708</sup>

615. In the words of one national court considering the same issues: “The burden of proving any excess of jurisdiction lies on the person seeking to resist the enforcement of the

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<sup>702</sup> ABC Report, Part I, at p. 18 (Proposition 8), **Appendix B to SPLM/A Memorial**.

<sup>703</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial**.

<sup>704</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial**.

<sup>705</sup> See SPLM/A Memorial, at paras. 1095-1197.

<sup>706</sup> *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (Weeramantry, J., dissenting), [1991] I.C.J. Rep. 152 (I.C.J.), **Exhibit-LE 11/11** (emphasis added); Report of G. Scelle, special rapporteur on arbitral procedure to the ILC Commission, *Yearbook of the International Law Commission 1950* (UN Doc. A/CN.4/18) (“[I]n the same manner as in domestic law, *it is for the losing party [under an award] to either bring action, as applicant in the new instance, or, to conform to the award.*”), Vol. II., 114, 146, **Exhibit-LE 12/2** (emphasis added); see also SPLM/A Memorial, at paras. 748-761.

<sup>707</sup> *Judgment of 17 July 2003*, XXIX Y.B. Comm. Arb. 819, 825 (Obergericht Zürich) (2004), **Exhibit-LE 12/15**.

<sup>708</sup> A. van den Berg, *The New York Arbitration Convention of 1958* 264 (1981), **Exhibit-LE 5/11** (emphasis added).

award.”<sup>709</sup> Further, “*the burden of proving that the arbitrators exceeded their powers is very great.*”<sup>710</sup>

616. Similarly, a number of decisions specifically emphasize the deference that is to be afforded an arbitral tribunal’s (or other adjudicatory authority’s) interpretation of its own mandate. As stated by the Singapore High Court:

“the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced *unless exceptional circumstances exist.*”<sup>711</sup>

617. Other court decisions confirm this view:

“if there has been a Convention award under the New York Convention, *there is a presumption that the tribunal acted within its power and that the award is valid and regular.* They also indicate that *the burden of discharging the presumption resting on the defendant is a heavy one.* The American cases further affirm that not only are the defences under the New York Convention exhaustive, but that they must be narrowly construed so as to favour the enforcement of the award.”<sup>712</sup>

618. Similarly, it has been held, in the English House of Lords that:

“Article V(1)(c) relates to matters beyond the scope of the submission to arbitration. It deals with cases of excess of power or authority of the arbitrator. *It is well established that article V(1)(c) must be construed narrowly* and should *never lead to a re-examination of the merits of the award.*”<sup>713</sup>

619. Leading commentators concur, noting that Article V(1)(c):

“has also rarely been successfully invoked; there *is a strong presumption that arbitrators have not exceeded their authority.* Courts have looked beyond the

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<sup>709</sup> *Judgment of 24 March 1987*, XIII Y.B. Comm. Arb. 522, 529 (London Court of Appeal) (1988), **Exhibit-LE 13/6**.

<sup>710</sup> *Federated Dep’t Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990), **Exhibit-LE 13/7**.

<sup>711</sup> *Judgment of 10 May 2006, Aloe Vera of Am., Inc. v. Asianic Food (S) Pte Ltd*, XXXII Y.B. Comm. Arb. 489, 504 (S. Ct. Singapore, High Court) (2007), **Exhibit-LE 24/8** (emphasis added).

<sup>712</sup> *Judgment of 7 July 1989, Sojuznefteexport (SNE) v. Joc Oil Ltd*, XV Y.B. Comm. Arb. 384, 397 (Bermuda Court of Appeal) (1990), **Exhibit-LE 28/18** (emphasis added); *see also Mgt & Tech. Consultants SA v. Parsons-Jurden Int’l Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987) (“[U.S.] [f]ederal arbitration law has established *a presumption that an arbitral body has acted within its powers*”), **Exhibit-LE 28/18**; *Parsons & Whittemore, Overseas Co.*, 508 F.2d 969, 976 (2d Cir. 1974) (“*powerful presumption* that the arbitral body acted within its powers;” rejecting argument that tribunal improperly exceeded authority by awarding consequential damages), **Exhibit-LE 13/18** (emphasis added).

<sup>713</sup> *Lesotho Highlands Development Authority v. Impreglia SpA* [2006] 1 AC 221, 236, **Exhibit-LE 14/1** (emphasis added); *Judgment of 16 December 1999, Joint Venture Partner A v. Joint Venture Partner B*, XXV Y.B. Comm. Arb. 761, 762 (Russian S.Ct.) (2000) (rejecting claim that arbitral tribunal exceeded authority and noting that “an arbitration tribunal shall be entitled to determine the scope of its own competence on a case-by-case basis”), **Exhibit-LE 30/7**.

wording of the claims submitted to establish whether tribunals awarded more than requested.”<sup>714</sup>

620. It bears emphasis that the ABC Experts had unique exposure to the parties’ delegations, who had played a decisive role in the negotiation, drafting and implementation of the Abyei Protocol.<sup>715</sup> That exposure entitles the ABC Experts’ interpretation of the Protocol to particular deference.

621. Applying these standards, it is impossible to conclude that the Government has carried its “*very great*” burden of proof necessary to overcome the “*strong presumption that arbitrators have not exceeded their authority*,” or demonstrated “sufficiently weighty circumstances” to justify invalidating the ABC Report. On the contrary, as discussed in detail below, the ABC Experts’ interpretation is consistent with not only the language, grammar and structure of the definition of the Abyei Protocol, but with the purposes of both the Protocol and the broader CPA.<sup>716</sup>

7. If the ABC Experts Were Assumed (Contrary to Fact) to Have Overstepped Their Substantive Authority, Any Such Excess Could Not Be Regarded as “Flagrant,” “Glaring” or “Manifest”

622. Fourth, even if the ABC Experts were considered (contrary to fact) to have incorrectly interpreted the definition of the Abyei Area and if this were considered (again contrary to fact) to concern the ABC Experts’ substantive mandate, this would still not constitute an excess of mandate. As discussed in the SPLM/A’s Memorial, and summarized above, an excess of mandate will be found only where the adjudicatory authority purported to act beyond its authority in a “*glaring*,” “*manifest*” or “*flagrant*” manner.<sup>717</sup>

623. Here, it is impossible to characterize any purported misinterpretation of the Abyei Protocol as a “flagrant,” “glaring” or “manifest” excess of mandate. Rather, the ABC Experts adopted a carefully considered interpretation of the definition of the Abyei Area – which is shared by both the author and presenter of the proposal (Mr. Millington) and by the IGAD’s chief mediator of the Abyei dispute (General Sumbeiywo).<sup>718</sup> Moreover, the Government itself raised no objections to the ABC Experts’ multiple references during the ABC proceedings to their understanding of the meaning of the definition of the Abyei Area – something it would no doubt have done if it had considered the references to be wrong (much less “glaringly” or “flagrantly” wrong).<sup>719</sup>

624. In the circumstances, it is implausible in the extreme to suggest that the ABC Experts “flagrantly” or “glaringly” or “manifestly” exceeded their mandate. In fact, the

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<sup>714</sup> J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶26-93 (2003), **Exhibit-LE 5/12** (emphasis added); da Silveira & Lévy in E. Gaillard & D. Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice* 642 (2008) (“Recognition and enforcement of an award may be refused, on the basis of Article V (1) (c) of the New York Convention, only if the party against whom enforcement is sought alleges and proves that the arbitrators have transgressed the boundaries of their authority. *In the absence of such proof, the arbitrators shall be presumed to have acted within the scope of their powers*”), **Exhibit-LE 12/13** (emphasis added); A. van den Berg, *The New York Arbitration Convention of 1958* 313 (1981) (“[A]rticle V(1)(c) is to be construed narrowly. In any case, the question whether an arbitrator has exceeded his authority should not lead to a re-examination of the merits of the award.”), **Exhibit-LE 24/13**.

<sup>715</sup> See above at para. 124.

<sup>716</sup> See below at paras. 1503-1514, 1515-1529.

<sup>717</sup> See SPLM/A Memorial, at paras. 762-770; see also above at paras. 105, 114, 140.

<sup>718</sup> See below at paras. 1558-1559; see also SPLM/A Memorial, at paras. 1140-1141.

<sup>719</sup> See below at paras. 1560-1564; see also SPLM/A Memorial, at paras. 626-631.

Government's purported excess of substantive mandate claims are nothing more than thinly concealed efforts to relitigate the substance of the parties' dispute in a new proceeding, before a different decision-maker. That is precisely what well-settled principles of law in all developed legal systems forbid as an abusive and disruptive misuse of the legal process.

*E. The ABC Experts Did Not Allocate Grazing Rights Beyond the Abyei Area*

625. The Government also claims that the ABC Experts exceeded their mandate by "allocating grazing rights beyond and limiting them within the 'Abyei Area.'"<sup>720</sup> According to the GoS Memorial, the ABC Report did this in two ways: (a) "in seeking to confer on the Ngok grazing rights outside the 'Abyei Area,'" and (b) in seeking to limit within the Abyei Area the exercise of rights conferred by Article 1.1.3 of the Abyei Protocol."<sup>721</sup> Both of these claims are baseless, resting on strained and artificial misreadings of the ABC Report.

1. The ABC Experts Did Not Commit An Excess of Mandate by Purporting to Confer Rights on the Ngok Dinka Outside the Abyei Area

626. First, there is no substance to the Government's claim that the ABC Experts attempted to "confer on the Ngok grazing rights outside the 'Abyei Area.'" The GoS's argument rests on a sentence in the ABC Report that states: "North of latitude 10°10' N, through the Goz up to and including Tebeldia (north of latitude 10°35' N) the Ngok and Misseriya share isolated occupation and use rights, dating from at least the Condominium period."<sup>722</sup> The Government pretends to interpret this sentence to confer rights on the Ngok Dinka "to the north and east of what [the ABC Experts] held to constitute the Abyei Area, i.e., north of 10°22'30' N."<sup>723</sup>

627. The Government's interpretation unhelpfully ignores the context of the ABC Experts' statement and deliberately distorting or misquoting the ABC Report in order to manufacture an alleged error on which to base their complaint. That tactic is illegitimate and provides no basis for challenging the ABC Experts' decision. This is true for a number of separate and independently sufficient reasons.

a) The ABC Experts Did Not "Confer" Rights on the Ngok Dinka Outside the Abyei Area

628. Most fundamentally, the ABC Experts did not purport to confer rights on the Ngok Dinka outside of the Abyei Area; rather, the ABC Experts merely sought to make clear, for the avoidance of doubt, that their decision only defined the Abyei Area's boundaries and did not affect any other rights of the Ngok Dinka or Misseriya. This was not an excess of mandate, but the opposite: an effort to ensure that the ABC Report addressed only the issues presented to the ABC Experts and that no excess of mandate could be alleged.

629. It is helpful to read in its full context the sentence that the GoS Memorial cherry-picks out of the ABC Report (in italics below). That context is as follows:

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<sup>720</sup> GoS Memorial, at p. 84, Heading (iv).

<sup>721</sup> GoS Memorial, at para. 249.

<sup>722</sup> ABC Report, Part I, at pp. 21-22, **Appendix B to SPLM/A Memorial.**

<sup>723</sup> GoS Memorial, at para. 251.

“1. The Ngok have a legitimate dominant claim to the territory from the Kordofan-Bahr el Ghazal boundary north to latitude 10°10’ N, stretching from the boundary with Darfur to the boundary with Upper Nile, as they were in 1956;

2. *North of latitude 10°10’ N, through the Goz up to and including Tebeldia (north of latitude 10°35’N) the Ngok and Misseriya share isolated occupation and use rights, dating from at least the Condominium period.* This gave rise to the shared secondary rights for both the Ngok and Misseriya;

3. The two parties lay equal claim to the shared areas and accordingly it is reasonable and equitable to divide the Goz between them and locate the northern boundary in a straight line at approximately latitude 10°22’30’’ N. The western boundary shall be the Kordofan Darfur boundary as it was defined on 1 January 1956. The southern boundary shall be the Kordofan-Bahr el Ghazal-Upper Nile boundary as it was defined on 1 January 1956. The eastern boundary shall extend the line of the Kordofan-Upper Nile boundary at approximately longitude 29.32’15’’ E northwards until it meets latitude 10°22’30’’ N; ...

5. The Ngok and Misseriya shall retain their established secondary rights to the use of the land north and south of this boundary.”<sup>724</sup>

630. Particularly when read in context, it is evident that the ABC Experts did not purport to “**confer rights to the use of land outside the Abyei Area,**” as the Government alleges.<sup>725</sup> The sentence that is selectively cited in the GoS Memorial was part of a summary of the reasoning of the ABC Experts, which explained (as developed in Propositions 8 and 9 of the ABC Report) that the Ngok Dinka and Misseriya had both historically enjoyed equal shared secondary rights to the *goz*.<sup>726</sup> This sentence, together with the first clause of the first sentence of the next numbered paragraph quoted above (paragraph number 3), provided a summary explanation of the reasoning for the ABC Experts’ boundary determination (i.e., the line at latitude 10°22’30’’N).

631. The ABC Experts did not therefore purport to confer secondary rights on the Ngok Dinka (or the Misseriya) outside the Abyei Area. Rather, the ABC Experts explained that, because the Ngok Dinka and Misseriya had historically shared occupation and use of the *goz* “from at least the Condominium period, this **gave** rise to the shared secondary rights for both the Ngok Dinka and the Misseriya.” This was clearly expressed as the summary of an historical finding (“**gave** rise,” in the past tense), which had been explained in the body of the ABC Report (specifically, at pages 19 to 20 and 43 to 45).

632. Based on that historical finding, the ABC Experts then went on in the next sentence of the ABC Report (unhelpfully omitted from the quotation in the Government’s Memorial) to delimit the Abyei Area, by dividing the area of historically shared secondary rights equally between the Ngok Dinka and the Misseriya: “The two parties lay equal claim to the shared areas and accordingly it is reasonable and equitable to divide the Goz between them **and locate the northern boundary in a straightline at approximately latitude 10°22’30’’ N.**”<sup>727</sup> It

<sup>724</sup> ABC Report, Part I, at pp. 21-22, **Appendix B to SPLM/A Memorial.**

<sup>725</sup> GoS Memorial, at paras. 249, 252.

<sup>726</sup> See ABC Report, Part I, at pp. 17-20, 41-45, **Appendix B to SPLM/A Memorial.** The ABC Experts’ treatment of these two Propositions, and of the *goz*, is discussed in greater detail below. See below at paras. 778-784, 791-797.

<sup>727</sup> ABC Report, Part I, at p. 22, **Appendix B to SPLM/A Memorial** (emphasis added).

is this sentence, which the Government fails to mention, in which the ABC Experts defined the Abyei Area; the preceding sentence, cited by the Government, provides only the rationale for the ABC Experts' boundary delimitation and does not purport to "confer" rights on either party.

633. This is confirmed by the final point of the ABC Experts' decision, which the Government also unhelpfully omits to either quote or mention in its Memorial. That sentence (noted in point 5 quoted above) provides "The Ngok and Misseriya *shall retain* their established secondary rights to the use of the land north and south of this boundary."

634. Presumably, the Government omitted reference to this sentence because the sentence makes it clear that the ABC Experts had no intention to "confer" rights outside the Abyei Area on either the Ngok Dinka or the Misseriya. Rather, consistent with the Abyei Protocol, the ABC Experts merely included a savings provision that made it clear that their definition of the Abyei Area did not prejudice the parties' other existing rights, whether under the Comprehensive Peace Agreement or otherwise. Hence, far from purporting to "*confer*" rights, the ABC Experts' savings clause merely provided that, notwithstanding the delimitation of the Abyei Area, the Ngok Dinka and the Misseriya "*shall retain*" their existing rights of usage in other areas.

635. The ABC Experts' statement was perfectly consistent with Article 1.1.3 of the Abyei Protocol, which provides that "[t]he Misseriya and other nomadic peoples *retain* their traditional rights to graze cattle and move across the territory of Abyei." The ABC Experts did nothing more in the ABC Report than make clear, for the avoidance of doubt, that their decision did not alter the pre-existing rights of the Ngok Dinka and the Misseriya. The ABC Experts did not purport to create or confer any rights, but merely to leave untouched whatever rights the Ngok Dinka had north of the Abyei Area and whatever rights the Misseriya had south of the boundary of the Abyei Area, and confirmed where the boundary itself lay. The ABC proceedings were not the forum for pursuing any other Misseriya rights and the ABC Experts did nothing to prejudice those rights.

636. One of the reasons that the ABC Experts took pains to confirm that their decision only affected the boundary of the Abyei Area, and not other rights of the Ngok Dinka and Misseriya, was identified early in the ABC Report. There, the ABC Experts noted that they "found in their meetings with people in the Abyei Area that there was considerable misunderstanding about the effect that setting a boundary for the area will have," referring to concerns that the ABC Report could affect traditional grazing rights and interaction between the Ngok Dinka and Misseriya.<sup>728</sup>

637. The ABC Experts went on therefore to note that they "want to stress that the boundary that is defined and demarcated will not be a barrier to the interaction between the Misseriya and Ngok Dinka communities" and that "[t]he decision should have no practical effect on the traditional grazing patterns of the two communities."<sup>729</sup> Again, the ABC Experts were not purporting to confer new rights, but instead noting the limited scope of their ruling in order to assuage popular misconceptions.

638. Nor does the fact that the ABC Experts referred specifically to the Ngok Dinka and Misseriya's "secondary rights to the use" of territory imply that any other rights outside the

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<sup>728</sup> ABC Report, Part I, at p. 9, **Appendix B to SPLM/A Memorial.**

<sup>729</sup> ABC Report, Part I, at p. 9, **Appendix B to SPLM/A Memorial.**



Abyei Area were limited. Rather, this was simply descriptive of Misseriya nomadic land use north of the Abyei Area, not prescriptive of Misseriya land rights. Given the ABC Experts' reliance on the parties' secondary rights of usage as a basis for establishing the Abyei Area's northern boundary, the ABC Experts were at pains to dispel any doubt that the boundary line which they defined for the Abyei Area did not prejudice whatever land rights the Ngok Dinka and Misseriya might enjoy.

639. The ABC Experts' clarification was not an excess of their mandate but rather an expression that no excess of mandate could be inferred from their decision. In particular, the ABC Experts merely made explicit the fact that they had delimited the Abyei Area's boundaries without purporting to affect the other rights of usage of the Ngok Dinka or the Misseriya. This is a simple and complete answer to the Government's claim.

- b) The Government's Interpretation of the ABC Experts' Decision Ignores the Principle that Adjudicative Decisions Must Be Interpreted to Preserve, Not to Destroy, Them

640. Second, although unnecessary to the Tribunal's decision here, it is well-settled that an arbitral award is to be construed with a view to giving it effect, not to finding fault with it. This principle is common to all developed international and national legal systems and is discussed in detail below.<sup>730</sup>

641. In the words of one leading English authority, summarizing this rule:

*“As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavoring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it.”*<sup>731</sup>

642. A like approach is adopted in other leading jurisdictions. In the U.S., for example, courts construe all doubts in favor of upholding an arbitrator's award:<sup>732</sup>

*“The opinion of the arbitrator in this case...is ambiguous, and could be read to mean] that he exceeded the scope of the submission.... A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.... Moreover, we see no reason to assume that this arbitrator has abused the trust the*

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<sup>730</sup> See below at paras. 641-644.

<sup>731</sup> *ABB AG v. Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1, 23 (Q.B.), (quoting *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 (Comm.) (Q.B.)), **Exhibit-LE 23/12** (emphasis added); see also *Aloe Vera of Am., Inc. v. Asianic Food (S) Pte Ltd*, XXXII Y.B. Comm. Arb. 489, 495 (S. Ct. Singapore, High Court) (2007) (“[T]here is the principle of international comity enshrined in the Convention that **strongly inclines the courts to give effect to foreign arbitration awards.**”), **Exhibit-LE 24/8** (emphasis added).

<sup>732</sup> See, e.g., *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 385 (5th Cir. 2004) (“Uncertainty about arbitrators' reasoning cannot justify vacatur, for **a court must resolve all doubts in favor of arbitration.**”), **Exhibit-LE 30/9** (emphasis added); *Walsh v. Union Pacific R. Co.*, 803 F.2d 412, 414 (8th Cir. 1986) (“[I]n determining whether an arbitrator has exceeded his authority, the agreement must be broadly construed **with all doubts resolved in favor of the arbitrator's award.**”), **Exhibit-LE 31/1** (emphasis added); *Arch of Illinois v. District 12, United Mine Workers of Am.*, 85 F.3d 1289, 1294 n.4 (7th Cir. 1996) (“What is clear ... is that **we resolve any reasonable doubts in favor of enforcing the arbitrator's award.**”), **Exhibit-LE 31/2** (emphasis added).

*parties confided in him and has not stayed within the areas marked out for his consideration.*”<sup>733</sup>

643. Other national courts also confirm that mere inconsistencies or ambiguities in an arbitrator’s reasoning are not grounds for challenging an award.<sup>734</sup> As the German Supreme Court has explained, inconsistencies in a decision must be resolved “also in consideration of the reasons” in order to give it effect.<sup>735</sup> Only if the “decision cannot be upheld by [an] interpretation” because the “operative part is unresolvably inconsistent, may [the decision] be invalidated.”<sup>736</sup>

644. Thus, even if there were some ambiguity as to the meaning of the ABC Report or its treatment of the issue of grazing rights, the ABC Experts’ statements regarding the Ngok Dinka’s retention of their rights are to be interpreted consistently with the ABC Experts’ mandate, and not as overstepping that mandate. In the circumstances, there is no justification for laboring – as the Government does – in an attempt to interpret the ABC Report as granting the Ngok Dinka new rights. Rather, even if there were some doubt about the language of the ABC Report (which there is not), the appropriate interpretation of the sentence that the Government criticizes is as a savings clause, simply confirming that the ABC Experts’ decision did nothing but define the boundaries of the Abyei Area and did not purport to alter or affect the other rights of the Ngok Dinka or Misseriya.

c) The ABC Experts Would Have Possessed Incidental Jurisdiction to Grant the Ngok Dinka Grazing Rights

645. Third, even if the ABC Experts were considered (contrary to fact) to have attempted to confer rights on the Ngok Dinka outside of the Abyei Area proper, this would not constitute an excess of mandate. Rather, it would have constituted an exercise of incidental or ancillary authority, which was included in the ABC Experts’ primary mandate.

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<sup>733</sup> *United Steel Workers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597-598 (U.S. S.Ct. 1960), **Exhibit-LE 31/3** (emphasis added).

<sup>734</sup> *St. Mary Home, Inc. v. Serv. Employees Int’l Union*, 116 F.3d 41, 44-45 (2d Cir. 1997) (“**Internal inconsistencies in the [arbitrator’s] opinion are not grounds to vacate the award...**”), **Exhibit-LE 31/4**; *Johnson Controls, Inc. v. United Assoc. of Journeymen*, 39 F.3d 821, 824-825 (7th Cir. 1994) (“[W]e resolve reasonable doubts concerning the arbitrator’s analysis in favor of enforcing the award. . . . **The possible inconsistency of one paragraph of the arbitrator’s opinion does not justify vacating the arbitrator’s award.**”), **Exhibit-LE 31/5** (emphasis added); *Judgment of 14 November 1990*, DFT 116 II 634, 637 (generally rejected setting aside of an award on the basis of public policy which was held to be “illogical, nonsensical, inexplicable, arbitrary, untenable, completely incorrect, inequitable, absurd, abstruse, boundlessly unenlightened, unreasonable, in violation of common sense, inconsistent to the files and with elementary notions of justice.”) (Swiss Federal Tribunal), **Exhibit-LE 31/6**; *Judgment of 6 May 1988, Unijet SA v SARL International Business Relations Ltd (IBR)*, *Judgment of 6 May 1988* (Paris Court of Appeal) (“[I]t is accurate to state that an arbitral award based on contradictory reasons cannot be considered as an infringement of public policy where it is not established that the arbitral proceedings were not governed by a law requiring that grounds be stated.”), **Exhibit-LE 31/7**.

<sup>735</sup> *Judgment of 22 February 2001*, NJW-RR 2001, 1351, 1352 (German Bundesgerichtshof), **Exhibit-LE 31/8**; see also *Judgment of 6 March 1952*, BGHZ 5, 240 (German Bundesgerichtshof) (“A judgment whose operative part is so inconsistent or unclear that it does not show in how far a rejected claim has actually been rejected, **has no legal effects if the inconsistency may not be resolved per interpretation**, also taking into account the reasons.”), **Exhibit-LE 31/9** (emphasis added); N. Pitkowitz, *Die Aufhebung von Schiedssprüchen* ¶47 (2008) (“**If unresolvable inconsistencies remain even after interpretation, the decision does not have the function of a title.**”), **Exhibit-LE 31/10**.

This principle applies in the same manner to arbitral awards. Section 1055 of the German Code of Civil Procedure, generally equating judgment and arbitral award (“The arbitral award has the same effect between the parties as a final and binding court judgment.”), **Exhibit-LE 26/3**; see also W. Rechberger, *Die Widersprüchlichkeit eines Schiedsspruchs als Aufhebungsgrund nach österreichischem Recht*, SchiedsVZ 2006, 169, 171 (“[A]rbitral awards are not to be interpreted differently from court decisions.”), **Exhibit-LE 31/11**.

<sup>736</sup> *Judgment of 22 February 2001*, NJW-RR 2001, 1351, 1352 (German Bundesgerichtshof), **Exhibit-LE 31/8**.

646. It is well-settled that an adjudicatory body’s mandate must be interpreted sensibly, in order to enable it to resolve the parties’ dispute effectively. As one leading author has noted, by agreeing to consensual dispute resolution “the parties give the tribunal the powers necessary to settle their dispute.”<sup>737</sup> Similarly, another leading author notes that “[w]here a tribunal has jurisdiction in a particular matter, *it is also competent with regard to all relevant incidental questions, subject to express provision to the contrary.*”<sup>738</sup>

647. Thus, the tribunal in the case of *Compagnie pour la Construction du Chemin de Fer d’Ogulin à la Frontière, S.A.* held that:

“*Incidental questions arising in the decision of a case* ought to be examined by the judge competent to decide on the principal issue, unless the law provides otherwise  
...”<sup>739</sup>

648. Similarly, the PCIJ in the *German Interests* case held that the interpretation of various treaty provisions was merely incidental and that the Court had jurisdiction to entertain them. Poland had contended that the Court did not have jurisdiction to consider the Treaty of Versailles and that as a result, the main question in dispute (expropriation of an undertaking) did not arise. The Court adopted the following response:

“It is true that the application of the Geneva Convention is hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and other international stipulations cited by Poland. But these matters constitute *merely questions preliminary or incidental to the application of the Geneva Convention.* Now the interpretation of other international agreements is indisputably within the

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<sup>737</sup> J. Lew, L. Mistelis & S. Kröll, *International Comparative Commercial Arbitration* ¶23-30 (2002), **Exhibit-LE 23/17**.

<sup>738</sup> B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 266 (1953, reprint 2006), **Exhibit-LE 31-12** (emphasis added); see also Merrills, *Reflections on The Incidental Jurisdiction of the International Court of Justice* in M. Evans (ed.), *Remedies in International Law* 51-70 (1998) (discussing just three aspects of the incidental jurisdiction of the ICJ: provisional measures, under Article 41, intervention under Articles 62 and 63 and interpretation and revision under Articles 60 and 61.”), **Exhibit-LE 31/13**.

<sup>739</sup> *Judgment of 12 July 1926, Compagnie pour la Construction du Chemin de Fer d’Ogulin à la Frontière, S.A.* 6 T.A.M. 505, 507 (1926), **Exhibit-LE 27/22** (emphasis added).

competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction ...”<sup>740</sup>

649. The International Court of Justice has approved the same view, emphasizing that:

“[T]he Court possesses *an inherent jurisdiction* enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, *to provide for the orderly settlement of all matters in dispute* ... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of states, *and is conferred upon it in order that its basic judicial functions may be safeguarded.*”<sup>741</sup>

650. Indeed, as a leading commentator points out:

“The ICJ is not the only adjudicatory body applying the theory of implied powers, since *this method of interpretation is valid for any international organization or adjudicatory body.*”<sup>742</sup>

651. The purpose of incidental or ancillary powers is to provide for the full and orderly settlement of the disputes submitted by the parties. The nature of the incidental jurisdiction of the ICJ and other similar international adjudicatory bodies has been explained by Judge Fitzmaurice in the context of the Court’s power to order interim measures as follows:

“Thus in the jurisdictional field, there is the substantive or basic jurisdiction of the Court (i.e. to hear and determine the ultimate merits), and there is the possibility of (preliminary) objections to the exercise of that jurisdiction. But also, there is the Court’s preliminary or ‘incidental’ jurisdiction (e.g. to decree interim measures of protection, admit counterclaims or third-party interventions, etc.) which it can exercise even in advance of any determination of its basic jurisdiction as to the

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<sup>740</sup> *Case concerning certain German Interests in Polish Upper Silesia (Preliminary Objections) Judgment of 25 August 1925* PCIJ Series A, No. 6, 18 (P.C.I.J. 1925), **Exhibit-LE 31/15** (emphasis added). This point was repeated in the merits judgment, in which the Court said “the interpretation of the Treaty of Versailles and other international instruments ... must be regarded as a question preliminary or incidental to the application of the Geneva Convention...” *Case concerning certain German Interests in Polish Upper Silesia (Merits) Judgment of 25 May 1926* PCIJ Series A, No. 7, 25 (P.C.I.J. 1926), **Exhibit-LE 31/16**; see also *Case concerning the Mavrommatis Palestine Concessions, Judgment of 30 August 1924*, PCIJ Series A, No. 2, 28, (P.C.I.J. 1924) (“Though it is true that for the purpose of the settlement of a dispute of this kind the extent and effect of the international obligations arising out of Protocol XII must be ascertained, it is equally the fact that the Court is not competent to interpret and apply, upon a unilateral application, that Protocol as such, for it contains no clause submitting to the Court disputes on this subject. **On the other hand, the Court has jurisdiction to apply the Protocol of Lausanne in so far as this is made necessary by Article 11 of the Mandate.**”), **Exhibit-LE 31/17** (emphasis added); *Case of the Free Zones of Upper Savoy and the District of Gex, Judgment of 7 June 1932*, PCIJ Series A/B, No. 46, 114, 155 *et seq.* (P.C.I.J. 1932) (“During the successive phases of the procedure, both Parties have, independently of their submissions properly so-called, requested the Court to decide, in one sense or another, on a number of incidental points. In so far as these points fall within the ambit of the Special Agreement, the Court will take them up and deal with them below.”) and at 155-156 (“[b]oth Parties have repeatedly insisted on the essential importance of all points at issue between them on the present submission being, as far as possible, settled by the Court. For this reason, and also because the decision of an international dispute of the present order should not mainly depend on a point of procedure, the Court thinks it preferable not to entertain the plea of inadmissibility and to deal on their merits with such of the new French arguments as may fall within its jurisdiction in so far as they may raise questions incidental to the main issue.”), **Exhibit-LE 19/2**.

<sup>741</sup> *Case concerning Nuclear Tests (New Zealand v. France)*, [1974] I.C.J. Rep. 457, 473 (I.C.J.), **Exhibit-LE 18/1** (emphasis added).

<sup>742</sup> P. Daillier & A. Pellet, *Droit International Public* ¶390 (7th ed. 2002), **Exhibit-LE 32/1** (emphasis added).

ultimate merits; even though the latter is challenged; and even though it may ultimately turn out that the Court lacks jurisdiction as to the ultimate merits. Although much (*though not all*) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, *it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court - or of any court of law - being able to function at all.*<sup>743</sup>

652. The foregoing principles are but commonsense propositions that aim to ensure that the parties' chosen dispute resolution mechanism is capable of achieving its contemplated goal – to resolve the parties' dispute. In this case, even if the ABC Experts were considered (contrary to fact) to have attempted to confer rights on the Ngok Dinka in the area between latitudes 10°22'30"N and 10°35'N – lying just outside of and abutting the Abyei Area proper – this would have been a permissible exercise of incidental jurisdiction. As described elsewhere, the Ngok Dinka claimed that all areas south of latitude 10°35'N were the historic territory of their tribe and that this territory should be included in the Abyei Area.<sup>744</sup> The ABC Experts acknowledged that the Ngok Dinka had historically exercised shared secondary rights to the area between latitudes 10°22'30"N and 10°35'N, but refused to include that area within the Abyei Area.<sup>745</sup>

653. As detailed in the SPLM/A Memorial, the SPLM/A considers that the ABC Experts' failure to include the full territory where the Ngok Dinka exercised shared secondary rights within the Abyei Area was incorrect.<sup>746</sup> For present purposes, however, the critical point is that the ABC Experts would have been within their authority if they had (as the GoS Memorial claims they did) affirmatively granted the Ngok Dinka grazing rights within the area between latitudes 10°22'30"N and 10°35'N. If the ABC Experts had done so, that would have been an exercise of incidental jurisdiction, closely related and ancillary to their resolution of the parties' respective claims regarding the Abyei Area, and would not have been an excess of mandate. That is another complete and independently sufficient basis for rejecting the Government's complaint.

d) Any Excess of Mandate by the ABC Experts Could Not Be Regarded as “Flagrant,” “Glaring” or “Manifest”

654. Fourth, even if the ABC Experts were considered (contrary to fact) to have attempted to confer rights on the Ngok Dinka beyond the authority granted under the Abyei Protocol, this would not constitute an excess of mandate warranting disregard for the ABC Report and the ABC Experts' definition of the Abyei Area. As discussed in the SPLM/A's Memorial, and summarized above, an excess of mandate will be found only where the adjudicatory authority purported to act beyond its authority in a “glaring,” “manifest” or “flagrant” manner.<sup>747</sup>

655. Here, it would be impossible to regard any findings by the ABC Experts in relation to Ngok Dinka grazing rights as a “flagrant,” “glaring” or “manifest” excess of mandate. At most, one might conclude (wrongly) that the ABC Experts had erred by purporting

<sup>743</sup> *Separate Opinion of Judge Sir Gerald Fitzmaurice in Case Concerning The Northern Cameroons (Cameroon v. United Kingdom) Preliminary Objections* [1963] I.C.J. Rep. 15, 93, 103 (I.C.J.), **Exhibit-LE 32/2** (emphasis added).

<sup>744</sup> SPLM/A Memorial, at paras. 526(i); *see also above* at paras. 495, 554.

<sup>745</sup> ABC Report, Part I, at pp. 21, 44-45.

<sup>746</sup> SPLM/A Memorial, at paras. 1190-1197; *see also below* at paras. 1590-1600.

<sup>747</sup> *See* SPLM/A Memorial, at paras. 762-770; *see also above* at paras. 105, 114, 140, 723.

affirmatively to confer rights that, although claimed by the parties, ultimately lay outside of the Experts' definition of the Abyei Area. Even if that had occurred (which it did not) it would have been an unintentional exercise of incidental authority that the ABC Experts lacked – but was in no way a “flagrant,” “manifest” or “glaring” excess of mandate.

656. Further, it is also important that the rights which the ABC Experts supposedly conferred outside of their authority, would have affected only a very specific and limited right of usage. The Ngok were settled above 10°22'30"N, but those areas of settlement were localized (some in the lower reaches of the *goz* and some toward Lake Keilak in the northeast of the Abyei Area), and the majority of Ngok usage of this area was for wet season grazing.

657. At the same time, the ABC Experts' purportedly wrongful grant of even these very limited rights applied only in an even more limited area. Specifically, the area was a thin strip between latitudes 10°22'30"N and 10°35'N of land which was generally harsh and arid.

658. Thus, even if one assumed, implausibly, that the ABC Experts somehow exceeded their mandate by granting some sort of unauthorized grazing rights in this sliver of arid land, it was an entirely unintentional, incidental and minor excess. It is precisely to avoid invalidation of arbitral awards and other adjudicative decisions in these sorts of circumstances that general principles of law hold firmly that an excess of mandate must be “glaring,” “flagrant” or “manifest.”

659. The law does not treat the ABC Experts' exercise of their authority as a vessel of nitroglycerine, which will explode and destroy their report and the parties' agreed dispute resolution mechanism if the slightest error is made. That would be nonsense.

660. Instead, the law treats the ABC Experts' exercise of their authority as a presumptively final and binding decision which is to be preserved if at all possible. That is true for the reasons set forth in the SPLM/A's Memorial and as further summarized above.<sup>748</sup> This is another independent reason that the Government's spurious complaints about grazing rights are no basis for invalidating the ABC Experts' decision.

- e) Even if the ABC Report Purported to Grant the Ngok Dinka Grazing Rights Beyond the Experts' Authority, Any Such Grant Would Not Affect the Remainder of the Report

661. Fifth, although irrelevant to this dispute, even if one assumed that the ABC Experts had exceeded their mandate by purporting to confer grazing rights that they were not permitted to grant, the only consequence would be to treat the “excessive” grant of rights as a nullity but to leave the remainder of the ABC Report intact. If, in reality, the ABC Experts inadvertently granted a right that exceeded their mandate, then that grant was a nullity. If the grant of that right did not implicate the ABC Experts' other determinations, then the necessary consequence is that the nullified grant of rights is to be disregarded as void *ab initio* and the remainder of the ABC Report treated as valid and within the ABC Experts' mandate.

662. This result is consistent with well-settled general principles of law, which provide for recognition and enforcement of arbitral awards even where some aspect of the award exceeded the arbitral tribunal's mandate. Thus, Article V(1)(c) of the New York Convention

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<sup>748</sup> See SPLM/A Memorial, at paras. 700-745; see above at paras. 131-136.

(paralleled by Article 5(1)(c) of the Inter-American Convention) provides for the non-recognition of an award if:

“the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, *provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.*”<sup>749</sup>

663. Similarly, Article 52(3) of the ICSID Convention provides that an annulment committee has the power “to annul the award *or any part thereof* on any one of the grounds set forth in paragraph (1).”<sup>750</sup> Committees in ICSID annulment cases have regularly used this power to uphold only parts of an award (including in some of the Government’s own authorities).

664. For example, in the *MINE* case (relied on by the GoS), the *ad hoc* Committee rejected the Government of Guinea’s request for annulment of the portion of the award relating to breach, but granted its request for annulment in relation to that part of the award dealing with damages (including interest on those damages).<sup>751</sup> Similarly, in *Vivendi v. Argentina* (again, relied on by the GoS), the Committee noted its authority to annul only part of an award under Article 52(3) in response to Vivendi’s claim for annulment of the part of the award relating only to merits (and not to jurisdiction).<sup>752</sup>

665. Precisely the same formula is contained in Articles 34(1)(a)(iii) and 36(1)(a)(iii) of the UNCITRAL Model Law:

“the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, *if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.*”<sup>753</sup>

666. This rule is recognized more generally in international and national authority, for the commonsense reason that it makes no sense to discard an otherwise valid and binding arbitral or other adjudicatory decision on one matter, merely because the tribunal overstepped its mandate on another matter. Commenting on the New York Convention, a leading author notes that Article V(1)(c) “offers the possibility to grant an unfettered enforcement of *that*

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<sup>749</sup> New York Convention, Art. V(1)(c), **Exhibit-LE 5/1** (emphasis added); Inter-American Convention on International Commercial Arbitration 1975, Art. 5(1)(c), **Exhibit-LE 5/10**.

<sup>750</sup> ICSID Convention, Art. 52(3), **Exhibit-LE 14/3** (emphasis added).

<sup>751</sup> Judgment of 22 December 1989 of the ad Hoc Committee On the Application for Annulment Submitted by *Guinea* Against the Arbitral Award Rendered on 6 January 1988 in the *MINE v. Government of Guinea Case* (ARB/84/4), 95, 127 (1988), **Exhibit-LE 26/24**, referred to in GoS Memorial, at para. 163.

<sup>752</sup> Judgment of 3 July 2002 of the Ad Hoc Committee On the Application for Annulment Submitted by CAA Against the Arbitral Award Rendered on 21 November 2000 in the *CAA and CGE v. Argentine Republic Case* (ARB/97/3), 6 ICSID Rep. 340, 359 (2002) **Exhibit-LE 32/3**.

<sup>753</sup> UNCITRAL Model Law, Arts. 34(1)(a)(iii) and 36(1)(a)(iii), **Exhibit-LE 23/20** (emphasis added).

*part of the award which contains decisions on matters which were submitted to the arbitrator's decision.*<sup>754</sup>

667. In a recent decision by the English Court of Appeal, it was held that partial enforcement of a New York Convention award would be permitted even where the award was the subject of a challenge in the jurisdiction in which it was rendered. The Court held that:

“the purpose of the Convention is to ensure the effective and speedy enforcement of international arbitration awards. *An all or nothing approach to the enforcement of an award is inconsistent with this purpose and unnecessarily technical. I can see no objection in principle to enforcement of part of an award provided the part to be enforced can be ascertained from the face of the award and judgment can be given in the same terms as those in the award.*”<sup>755</sup>

668. This result is consistent with the Abyei Arbitration Agreement. Article 2(a) and 2(c) of the Arbitration Agreement only provide for this Tribunal to delimit the Abyei Area if it first makes a declaration that the ABC Experts exceeded their mandate. The Tribunal's grant of a declaration that the ABC Experts exceeded their mandate is an exercise of remedial authority and power by this Tribunal, subject to general principles of law (as provided for by Article 3 of the Arbitration Agreement).

669. The general principles of law applicable to this Tribunal's remedial powers include the principles reflected in Article V(1)(c) of the New York Convention, Articles 34(1)(a)(iii) and 36(1)(a)(iii) of the UNCITRAL Model Law and the other authorities noted above. Those principles in turn provide for the recognition of those parts of an award which are separable from and untainted by an excess of mandate by the arbitral tribunal. This general principle of law is supported by common sense considerations and there is no reason to conclude that it was not also intended to apply to this Tribunal's authority.

670. The Government's Memorial suggests in passing that “if the Experts exceeded their mandate *in any respect*, this is sufficient to trigger Article 2(c) of the Arbitration Agreement.”<sup>756</sup> That proposition is implausible. It makes no sense to believe that the parties would have intended that the entire effort before the ABC, and the ABC Experts' expertise, be thrown away, merely because of a separable and limited excess of mandate on an ancillary issue (such as grazing rights in a narrow strip of the *goz*). Rather, Article 2 of the Arbitration Agreement is to be interpreted in light of the well-settled general principles of law (discussed above) aimed at upholding adjudicative decisions.

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<sup>754</sup> A. van den Berg, *The New York Arbitration Convention of 1958* 319 (1981), **Exhibit-LE 24/13** (emphasis added).

<sup>755</sup> *Nigerian National Petroleum Corp. v. IPCO (Nigeria) Ltd.* [2008] 2 C.L.C. 550, 557 *et seq.* (English Court of Appeal), **Exhibit-LE 32/4** (emphasis added); *see also Judgment of 26 January 2005*, XXX Y.B. Comm. Arb. 421, 435 (Austrian Oberster Gerichtshof) (2005) (Permitting partial enforcement in a context other than under Article V(1)(c), the Austrian Court of Appeal “deemed in principle that a foreign arbitral award may be enforced only in part.”), **Exhibit-LE 32/5**; *Judgment of 14 January 1981, Syria v S.p.a. SIMER*, VIII Y.B. Comm. Arb. 386, 388 (Trento Corte di Appello) (1983) (“If the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions submitted to arbitration may be recognized and enforced.”), **Exhibit-LE 32/6**; Chang, *Article V of the New York Convention and Korea*, 25(6) J. Int'l Arb. 865, 868 (2008) (referring to a decision of the Seoul High Court, in which it “held that a partial enforcement is possible not only under this proviso, but also in other contexts under Article V(1) and (5)(2) in general.”), **Exhibit-LE 32/7**.

<sup>756</sup> GoS Memorial, at para. 95 (emphasis in original).



## 2. The ABC Experts Did Not Limit the Misseriya's Traditional Rights

671. Second, the Government is equally wrong in claiming that the ABC Experts “limited the Misseriya’s traditional rights of grazing and transit to the southern part of the ‘shared area,’ i.e., the area between 10°10’N and 10°35’N.”<sup>757</sup> Again, the Government’s Memorial can only even superficially make this claim by ignoring the actual text of the ABC Report and instead distorting selective quotations from the ABC Experts’ reasoning.

672. In particular, the Government simply ignores the ABC Experts’ statement that “[t]he Ngok and Misseriya *shall retain* their established secondary rights to the use of the land north and south of this boundary” (at point 5, quoted above<sup>758</sup>). This sentence in no way limits the Misseriya’s rights to “the southern part of the ‘shared area,’ i.e., the area between 10°10’N and 10°35’N.”<sup>759</sup> To the contrary, it confirms that the Misseriya retain their rights “south of this boundary” (i.e., the northern boundary of the Abyei Area). Again, the ABC Experts’ language was, explicitly, a savings clause that assured both parties that the ABC Report did not affect the parties’ other rights under the Comprehensive Peace Agreement.

673. The sentence cherry-picked by the Government’s Memorial (stating that the Misseriya and Ngok Dinka both possessed “shared secondary rights” in the *goz*) did not purport to define the full extent of the Misseriya’s rights of usage in other areas. As discussed above, the ABC Experts’ sentence was merely the basis for the boundary which was drawn bisecting the *goz*.<sup>760</sup> That is made crystal clear by the extensive and very specific discussions in the ABC Report of the fact that the Misseriya enjoyed substantial rights of usage to the south of the *goz*:

*“the Misseriya have clear ‘secondary’ (seasonal) grazing rights to specific locations north and south of Abyei Town”*<sup>761</sup>

*“the Misseriya enjoyed established secondary rights of use in the same region [along the Ragaba ez-Zarga and the area to its north]”*<sup>762</sup>

*“The Commission finds that the Ngok have dominant rights to Chigei/Thegei, the Ragaba Lau and Ragaba ez/Zarga Ngol, while **the Misseriya have established secondary rights to those areas.** The Ngok and Misseriya have shared secondary rights to the Nyama area.”*<sup>763</sup>

*“The Misseriya have established secondary rights through the Goz belt to the area south of it.”*<sup>764</sup>

674. Each one of these statements made very clear that the ABC Experts had concluded that the Misseriya had historically exercised secondary rights of usage well south of the *goz* (extending to locations south of Abyei Town). It was in the context of these conclusions that the ABC Experts observed, for the avoidance of doubt, that the “Misseriya *shall retain* their established secondary rights to the use of the land north and south of this boundary [i.e., the

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<sup>757</sup> GoS Memorial, at para. 252.

<sup>758</sup> ABC Report, Part I, at p. 22, **Appendix B to SPLM/A Memorial**.

<sup>759</sup> GoS Memorial, at para. 252.

<sup>760</sup> See above at paras. 628-633.

<sup>761</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>762</sup> ABC Report, Part I, at p. 19, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>763</sup> ABC Report, Part I, at p. 35, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>764</sup> ABC Report, Part I, at p. 44, **Appendix B to SPLM/A Memorial** (emphasis added).

northern boundary of the Abyei Area].”<sup>765</sup> Indeed, it would have been difficult for the ABC Experts to have been much clearer in saying that – contrary to what the Government claims – they were not purporting to affect the existing secondary rights of the Misseriya.

675. The foregoing is a complete answer to the second aspect of the Government’s complaint about the ABC Experts’ purported limitation of the Misseriya’s grazing rights. No further discussion is necessary to dispose of the claim. In addition, and for the avoidance of doubt, all of the grounds set out in paragraphs 661 to 670 with regard to the alleged grant of excessive grazing rights to the Ngok Dinka also apply *mutatis mutandi* to the alleged limitation of the Misseriya’s grazing rights and exclude any possibility of invalidating the ABC Report on this ground.

*F. The Four Violations of “Mandatory Criteria” Alleged by the Government Were Not Excesses of Mandate and Were Instead Entirely Appropriate Aspects of the ABC Experts’ Reasoning*

676. The Government alleges that the ABC Experts committed four violations of “mandatory criteria.” These violations are allegedly: (a) “failure to state reasons capable of supporting the decision;”<sup>766</sup> (b) reaching a decision “on the basis of an equitable division or ... *ex aequo et bono*;”<sup>767</sup> (c) “apply[ing] unspecified ‘legal principles in determining land rights’;”<sup>768</sup> and (d) “attempt[ing] to allocate oil resources.”<sup>769</sup> The Government states more generally that “it is a general principle of law, confirmed in practice, that the failure of a panel charged with deciding a dispute to state any reason on the basis of which its decision can be supported constitutes an excess of mandate,” and then recites the four alleged violations of “mandatory criteria in carrying out the mandate.”<sup>770</sup>

677. There is no basis for any of these alleged violations of the Government’s purported “mandatory criteria.” Even assuming that there was some legal basis for these so-called mandatory rules (which there is not), or for the application of such rules to the ABC proceedings (which there also is not), the ABC Experts did not violate any of them.

1. The Violations of “Mandatory Criteria” Alleged by the Government Do Not Fall Within the Definition of An Excess of Mandate

678. Preliminarily, as discussed above, none of the violations of supposed “mandatory criteria” alleged by the Government falls within the definition of an excess of mandate.<sup>771</sup> The Government purports to derive its “mandatory criteria” from sources external to the parties’ agreements – as reflected in the Government’s invention of the epithet “mandatory criteria” – and none of these purported rules concern the scope of the disputes submitted to the ABC Experts. Even if these alleged mandatory rules existed, and had been violated – neither of which is true – those violations would not constitute an “excess of mandate” as defined by Articles 2(a) and 2(b) of the Abyei Arbitration Agreement and would therefore not be grounds for disregarding the ABC Report.

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<sup>765</sup> ABC Report, Part I, at p. 22, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>766</sup> GoS Memorial, at p. 56, Heading (ii).

<sup>767</sup> GoS Memorial, at p. 60, Heading (iii); at p. 88, Heading (ii).

<sup>768</sup> GoS Memorial, at p. 89, Heading (iii).

<sup>769</sup> GoS Memorial, at p. 90, Heading (iv).

<sup>770</sup> GoS Memorial, at para. 254 & p. 85, Heading C.

<sup>771</sup> See above at paras. 99-100, 154.

679. In any event, however, even putting aside this fatal jurisdictional defect, there is simply no basis in fact, law or the parties' agreements for the Government's purported complaints regarding "mandatory criteria." That is true for each of the independent reasons set forth below.

2. The Government Ignores or Distorts the Legal Standards Applicable to Claims of Violations of Mandatory Law

680. The Government purports to derive its "mandatory criteria" from an assortment of international arbitration authorities, including the ICSID Convention, UNCITRAL Model Law and various institutional arbitration rules, which supposedly represent "general principles of law and practice."<sup>772</sup> Relying on these international investment and commercial arbitration authorities, the Government constructs a series of "mandatory" rules, akin to notions of public policy, that the ABC Experts were required to comply with, even though they are not contained in the parties' agreements.

681. Even if one were to look only to the selectively cited sources of mandatory rules that the Government proffers, its analysis is fundamentally flawed. In particular, the Government fails to consider: (a) the well-settled rule that an arbitral award or other adjudicatory decision may be invalidated for a violation of mandatory law only in rare and exceptional cases; (b) the equally well-settled rule that violations of mandatory rules or public policies will only be found where there is a serious and direct violation of a fundamentally important, mandatory legal rule; and (c) the fact that an arbitral award must be interpreted to uphold, and not to find fault with, it. The Government ignores all of these rules, instead straining both to create mandatory legal rules (where none exist) and to twist the ABC Report's text to create flaws (again, where none exists).

a) An Adjudicatory Decision May Be Invalidated for Violations of Mandatory Law Only in Rare and Exceptional Cases

682. First, even the sources of authority on which the Government relies emphasize that arbitral awards may be invalidated for violations of mandatory law or public policy only in rare and exceptional cases. This is the corollary of the bedrock principle, discussed above, of the presumptive finality of arbitral awards and other adjudicative decisions.<sup>773</sup>

683. The New York Convention, invoked by the Government elsewhere, contains non-recognition provisions that encompass the GoS's reference to "mandatory criteria." These provisions are in Article V(2) of the Convention (and parallel provisions of national implementing legislation) and allow non-recognition of awards on public policy grounds. It

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<sup>772</sup> GoS Memorial, at paras. 151-176.

<sup>773</sup> See above at paras. 131-136.

is well-settled that Article V(2)(b)'s public policy exception is exceptional and may only rarely be invoked.<sup>774</sup>

684. One leading commentator has observed that the “courts have refused enforcement [under the public policy exception of Article V(2)(b)] in *very exceptional cases only*,<sup>775</sup> going on to note that at the time of publication (1981), out of 140 cases in which the public policy exception had been invoked, only five decisions refused recognition on account of public policy.<sup>776</sup>

685. Consistent with this trend, national courts have indeed been extremely reluctant to refuse enforcement on the ground of public policy, including in France,<sup>777</sup> England,<sup>778</sup> Germany,<sup>779</sup> Switzerland,<sup>780</sup> Austria,<sup>781</sup> the United States<sup>782</sup> and elsewhere.<sup>783</sup> It was noted in

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<sup>774</sup> Mayer & Sheppard, *Final ILA Report on Public Policy as A Bar to Enforcement of International Arbitral Awards*, in *ILA, A Committee on International Commercial Arbitration, Proceeding of London Conference* (2000), reprinted in, 19(2) *Arb. Int'l* 249, 252 (2003) (“**In limiting the scope of the public policy exception, the Committee is reflecting the pro-enforcement bias of many national courts.**”), **Exhibit-LE 23/14**; Paulsson, *The New York Convention in International Practice – Problems of Assimilation in New York Convention of 1958*, ASA Special Series No. 9, 100, 108 (1996) (“**In addition to being exhaustive, the grounds for refusal are meant to be interpreted narrowly.**” This means that the existence of the grounds in Article V (1) should be accepted in serious cases only and the public policy violation required by *Article V (2) should only be asserted by courts in extreme cases.*”), **Exhibit-LE 13/15** (emphasis added); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶¶26-114 (2003) (stating that the public policy defense is only available “where the enforcement would violate the forum’s state’s most basic notions of morality and justice” (quoting *Parsons and Whittemore Overseas Co v. RAKTA*)), **Exhibit-LE 23/17**.

<sup>775</sup> A. van den Berg, *The New York Arbitration Convention of 1958* 366 (1981), **Exhibit-LE 24/13** (emphasis added).

<sup>776</sup> A. van den Berg, *The New York Arbitration Convention of 1958* 366 (1981), **Exhibit-LE 24/13**.

<sup>777</sup> See *Judgment of 18 November 2004, SA Thalès Air Défense v. GIE Euromissile*, 3 *Rev. arb.* 751, 757, 759 (2005) (Paris Cour d’appel) (“The recourse to the clause pertaining to violations of international public policy considerations is **admissible only in the event where the performance of the award would constitute an unacceptable interference with the French legal order** ... [T]he breach of international public policy under Article 1502-5 of the Code of Civil Procedure must be flagrant, effective and concrete...”), **Exhibit-LE 32/8** (emphasis added); see also J.-L. Delvolvé, J. Rouche & G. Pointon, *French Arbitration Law and Practice* ¶455 (2003) (“[I]n the case of both domestic and international awards, the **courts limit their control of awards in matters of public policy to the minimum necessary** to ensure fulfillment of their duty.”), **Exhibit-LE 32/9** (emphasis added).

<sup>778</sup> *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v. Ras Al Khaimah Nat’l Oil Co. (sub nom DST v Rakoil)* [1987] 3 *WLR* 1023, 1032 (English Court of Appeal), *rev’d on other grounds*, [1988] 2 *All E.R.* 833 (House of Lords) (“**Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution.** As J. Burrough remarked in *Richardson v. Mellish* (1824) 2 *Bing.* 229, 252, ‘It is never argued at all, but when other points fail.’”), **Exhibit-LE 32/10** (emphasis added); see also A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* ¶10-51 (2004) (noting that “**the national courts of England are reluctant to excuse an award from enforcement on grounds of public policy**” describing cases in which the public policy ground is upheld as “**rare exceptions**”), **Exhibit-LE 23/15**.

<sup>779</sup> *Judgment of 15 May 1986*, BGHZ 98, 70, 74 (German Bundesgerichtshof) (“...**the notion of public policy ... only exists within tight limits.**”), **Exhibit-LE 27/14**; see Kröll & Kraft, in K.-H. Böckstiegel, S. Kröll & P. Nacimiento (eds.), *Arbitration in Germany* §1059, ¶80 (2007) (“The courts do not review whether the arbitral tribunal applied the law or at least its mandatory provisions correctly but merely whether the content of the award is such that its enforcement would be contrary to public policy. That may be the case **if the award is either contrary to those mandatory rules that protect the bases of German public and economic order, or contrary to fundamental principles of law or otherwise infringes public order or good morals.**”), **Exhibit-LE 32/11** (emphasis added). R. Kreindler, J. Schäfer & R. Wolff, *Schiedsgerichtsbarkeit Kompendium für die Praxis*, Chapter 13, ¶1138 (2006) (“**[A]n international award violates public policy, if at the time of the state court’s decision, it stands in an unbearable conflict with fundamentals of public and economic life or the idea of justice.**”), **Exhibit-LE 28/10** (emphasis added).

the 1990s that “there is no case in which this exception has been applied by the English court.”<sup>784</sup> Since then, very limited exceptions have arisen, but only where the courts have refused to enforce an award arising out of an arbitration which “conceal[ed] that [the parties],

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<sup>780</sup> *Judgment of 12 December 1975*, DFT 101 Ia 521, 526 (Swiss Federal Tribunal) (1975) (“**Public policy which applies restrictively** in particular in the context of exequatur, forbids the enforcement of a foreign arbitral award which shocks in an unbearable way the sense of justice as it stands in Switzerland and violates fundamental principles of the Swiss legal system.”), **Exhibit-LE 32/12** (emphasis added); *Judgment of 27 April 2005*, (4P.242/2004), cons. 7.1 (Swiss Federal Tribunal) (2005) (“**There is no violation of public policy merely because evidence has been assessed incorrectly, facts have been determined wrongly or there has been a clear infringement of a legal rule.** Nor will an erroneous contractual interpretation be sufficient to establish a violation of public policy...”), **Exhibit-LE 32/13** (internal citations omitted) (emphasis added); Berti & Schnyder, in H. Honsell, N. Vogt, A.-K. Schnyder & S. Berti (eds.), *Basler Kommentar, Internationales Privatrecht* Art. 190, ¶75 (2d ed. 2006) (“**The Federal Tribunal has further constated that in comparison to a challenge on the grounds of arbitrariness lit(e) must be interpreted more restrictively.** Thereafter, even clear violations of the law, or an assessment of facts that is obviously wrong are, for themselves, not sufficient for a violation of public order.”), **Exhibit-LE 32/14** (internal citations omitted) (emphasis added).

<sup>781</sup> *Judgment of 24 September 1998*, 6 Ob242/98a, pp. 2 *et seq.* of 3 (Austrian Oberster Gerichtshof) (“Because the public policy clause constitutes an exception that is against legal systematics, **it is commonly required that it is to be used only in the most hesitant way; simple inequitableness of the conclusions is just as insufficient as the mere contradiction to mandatory Austrian provisions.** Subject-matter of the violations must rather be fundamental principles of the Austrian legal order.”), **Exhibit-LE 32/15** (emphasis added); *Judgment of 26 April 2006*, 3Ob211/05h, pp. 5 *et seq.* of 6 (Austrian Oberster Gerichtshof) (“**The public policy clause constitutes an exception that is against legal systematics, it is therefore commonly required only to make use of it in the most hesitant way.** Simple inequitableness of the conclusions is just as insufficient as the mere contradiction to mandatory Austrian provisions.”), **Exhibit-LE 32/16** (emphasis added); Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, Vol. 4, Part 2, §611, ¶205 (2d ed. 2007) (“In examining the violation of public policy, **one must exercise great caution. The public policy clause represents an exceptional rule that may only be used in the most hesitant way.**”), **Exhibit-LE 23/19** (emphasis added).

<sup>782</sup> *See, e.g., United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (U.S. S.Ct. 1987) (finding that the public policy exception does not “sanction a broad judicial power to set aside arbitration awards as against public policy”), **Exhibit-LE 15/7**; *Henry v. Murphy*, 2002 WL 24307, at \*4 (S.D.N.Y. 2002) (“**[Article V(2)]’s very narrow public policy defense applies ‘only where enforcement would violate [the forum state’s] most basic notions of morality and justice’**”), **Exhibit-LE 32/17**; *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, 2000 U.S. Dist. LEXIS 8498, at \*37 (D. Conn. Mar. 14, 2000) (confirming arbitration award and noting that “**the public policy defense under Art. V(2)(b) of the Convention is an extremely narrow one**”), **Exhibit-LE 32/18**; *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F.Supp. 800, 819 (D. Del. 1990) (“**[T]he public policy defense ‘should be construed narrowly,’** and ... confirmation of a foreign award should be denied on the basis of public policy ‘only where enforcement would violate the forum state’s most basic notions of morality and justice.’”), **Exhibit-LE 32/19** (internal citations omitted) (emphasis added); *Fertilizer Corp. of India v. IDI Mgmt. Inc.*, 517 F.Supp. 948, 955 (S.D. Ohio 1981) (“**The Court of Appeals ... concluded that the Convention’s public policy defense should be narrowly construed.** ‘Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum’s state’s most basic notions of morality and justice.’”), **Exhibit-LE 32/20** (emphasis added).

<sup>783</sup> Chang, *Article V of the New York Convention and Korea*, 25(6) J. Int’l Arb. 865, 869 (2008) (“[T]he Korean courts have consistently interpreted the scope of ‘public policy’ within the meaning of Article V(2)(b) **very narrowly.**”), **Exhibit-LE 32/7** (emphasis added); *see also Hebei Import & Export Corp. v. Polytek Engineering Company Ltd* FCV No. 10 of 1998, ¶27 (Hong Kong Supreme Court of Appeal) (1998) (there must be “compelling reasons” and that “**the award must be so fundamentally offensive to that jurisdiction’s notions of justice**” before an award may be set aside on the basis of a violation of public policy), available at [www.hklii.org](http://www.hklii.org), **Exhibit-LE 29/11** (emphasis added); Nikiforov, *Interpretation of Article V of the New York Convention by Russian Courts – Due Process, Arbitrability, and Public Policy Grounds for Non-Enforcement*, 25(6) J. Int’l Arb. 787, 795 (2008) (“The application of the concept of public policy as a defense to enforcement of an arbitration award, particularly enforcement of a foreign arbitration award, are now **the exception rather than the rule.**”), **Exhibit-LE 32/21** (emphasis added); Magnusson, *Application of the New York Convention - A Report from Denmark, Finland, Norway, and Sweden*, 25(6) J. Int’l Arb. 681, 683 (2008) (“**The provision on public policy in section 39(1)(2)(b) [of the Danish Arbitration Act 2005] should be narrowly construed.** Danish case law appears to contain no practical examples. ... It has ... been suggested that the general principle prohibiting review of the merits of an arbitral award may be deviated from under “**exceptional circumstances,**” where “**an extremely serious mistake**” on the part of the arbitral tribunal entails that the recognition or enforcement of an award contravenes Danish public policy.”), 686-687 (“As is the prevailing principle for all jurisdictions presented in this report, **the rule relating to refusal of enforcement for reasons of public policy should also be strictly interpreted in Norway**” describing as “**extraordinary**” **the circumstances that would be required for an award to be refused recognition on the ground of public policy**) and at 689 (“Swedish law adopts a **restrictive approach to the interpretation of public policy.**”), **Exhibit-LE 32/22** (emphasis added).

<sup>784</sup> Kerr, *Concord and Conflict in International Arbitration*, 13(2) Arb. Int’l 121, 140 (1997), **Exhibit-LE 33/1**.

or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.”<sup>785</sup>

686. As a leading author explains, “**public policy must be interpreted in a restrictive manner** and obviously **does not extend to all mandatory provisions** of the state where the recognition and enforcement are requested.”<sup>786</sup> Other leading commentators also note that apart from “**rare exceptions**,” in most countries “the ‘pro-enforcement bias’ of the New York Convention has been faithfully observed. Indeed, this pro-enforcement bias is itself considered a matter of public policy.”<sup>787</sup> One Austrian scholar has reaffirmed this, stating that:

“In examining the violation of public policy, **one must exercise great caution**. The public policy clause represents **an exceptional rule that may only be used in the most hesitant way**. ... [T]he arbitral award may not be reviewed as to the law or the facts...; apart from the narrow scope of review under the violation of public policy, the grounds for a setting aside do not contain a basis for a review as to the question whether the arbitral tribunal in its award has correctly solved the procedural or substantive questions that have arisen throughout the procedures.”<sup>788</sup>

687. Austrian courts confirm that “[b]ecause the public policy clause constitutes an exception that is against the legal systematics, it is commonly required that it is to be used only in the most hesitant way; simple inequitableness of the conclusions is just as insufficient as the mere contradiction to mandatory Austrian provisions. **Subject-matter of the violations must rather be fundamental principles of the Austrian legal order**.”<sup>789</sup> U.S. courts similarly hold that, “the ‘public policy’ limitation on the Convention is to be **construed narrowly to be applied only where enforcement would violate the forum state’s most basic notions of morality and justice**.”<sup>790</sup>

688. Other jurisdictions adopt the same view, with the English Court of Appeal holding that:

“[c]onsiderations of public policy can never be exhaustively defined, **but they should be approached with extreme caution**. ... ‘It is never argued at all, but when other

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<sup>785</sup> *Soleimany v. Soleimany* [1999] QB 785, 800 (1999), **Exhibit-LE 33/2**. It has also been noted that there is a “clear distinction between what may be termed “international” public policy considerations (**the combat of fraud, corruption, drug trafficking and the like**) and domestic public policy concerns (all other grounds on which an English court may refuse to enforce **an English law contract**.”). Only the former considerations are grounds for refusing to enforce an award under the New York Convention. See Brown, *Illegality and Public Policy – Enforcement of Arbitral Awards in England*, 2000 Int’l Arb. L. Rev. 31, **Exhibit-LE 33/3**.

<sup>786</sup> J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* ¶933 (2d ed. 2002), **Exhibit-LE 23/1** (emphasis added).

<sup>787</sup> A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* ¶10-51 (2004), **Exhibit-LE 23/15**.

<sup>788</sup> Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozeßgesetzen*, Vol. 4, Part 2, §611, ¶205 (2d ed. 2007), **Exhibit-LE 23/19** (emphasis added); see also Pitkowitz, *Setting Aside Arbitral Awards under the New Austrian Arbitration Act* in C. Klausegger & P. Klein et al. (eds.), *Austrian Arbitration Yearbook 2007* 231, 250 (2007) (“[P]ublic policy, strictly speaking does not include any and all procedural law, **but only the fundamental basic standards of mandatory law**.”), **Exhibit-LE 30/3** (emphasis added).

<sup>789</sup> *Judgment of 24 September 1998*, 6 Ob242/98a, pp. 2 et seq. of 3 (Austrian Oberster Gerichtshof), **Exhibit-LE 32/15**.

<sup>790</sup> *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975), **Exhibit-LE 33/4** (emphasis added); see also, e.g., *Parsons and Whittemore Overseas Co., Inc. v. Societé generale de l’industrie du papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974) (stating that the public policy defense is only available “where the enforcement would violate the forum’s state’s most basic notions of morality and justice”), **Exhibit-LE 13/18**; Hwang & Chan, *Enforcement and Setting Aside of International Arbitral Awards – The Perspective of the Common Law Countries*, ICCA Congress Series No. 10, 145, 152, **Exhibit-LE 33/5**.

points fail.’ It has to be shown that there is some element of illegality or that the enforcement of the award would be *clearly injurious to the public good* or, possibly, that enforcement would be *wholly offensive* to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.”<sup>791</sup>

689. In sum, even in settings in which “mandatory criteria” are properly grounds for non-recognition or annulment of arbitral awards or similar adjudicative decisions under specific legislative provisions (Article V(2) of the New York Convention; Articles 34 and 36 of UNCITRAL Model Law), there are very demanding limits on the application of such exceptions. As a consequence, it is only in the most limited and exceptional circumstances that public policy or mandatory law grounds may be invoked to challenge the validity of a decision.

690. It is also important to note that the foregoing formulations apply in the context of national court proceedings pursuant to specific public policy exceptions in legislative instruments addressing matters of public policy. In the present proceeding, the only (and unarticulated) basis for the Government’s purported “mandatory criteria” is general principles of law derived from mandatory norms accepted in most legal systems.

691. Strikingly, however, the Government has made no effort to demonstrate or offer any further explanation as to the existence of such general principles, much less explain the basis for its assertion that they rise to the level of mandatory general principles of law that express the international system’s “*most basic notions of morality and justice*.” Absent such a showing, there is no basis for the GoS’s purported “mandatory criteria” claims.

- b) An Adjudicatory Decision May Be Invalidated for Violations of Mandatory Law Only Where There Is A Serious and Direct Violation of a Fundamentally Important Mandatory Legal Rule

692. Second, the Government’s own sources of authority for its supposed “mandatory criteria” emphasize that an arbitral award or other adjudicative decision can be annulled or denied recognition only where the unsuccessful party demonstrates that enforcement of the decision would result in a serious and direct violation of a fundamentally important mandatory legal rule. Conversely, less serious or direct violations of mandatory law, disagreements with a decision’s reasoning and violations of non-mandatory legal rules are not grounds for disregarding an award or adjudicative decision.

693. Thus, the European Court of Justice (“ECJ”) has explained that any breach of public policy must be “manifest” in order to be taken into account under the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters:

“Recourse to the public policy clause in Article 27(1) of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance *to an unacceptable degree* with the

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<sup>791</sup> *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v. Ras Al-Khaimah Nat’l Oil Co. (sub nom DST v Rakoil)* [1987] 3 W.L.R. 1023, 1035 (English Court of Appeal), **Exhibit-LE 32/10** (emphasis added); *see also Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.* [1999] 2 Lloyd’s Rep. 222, 223 (Q.B.) (“The public policy point invoked by OTV is that the agreement was unlawful in its place of performance. *It is however in my judgment necessary for OTV to go further, and establish that this infects the award as well.*”), **Exhibit-LE 33/6** (emphasis added).

legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. ... *[T]he infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.*"<sup>792</sup>

694. This interpretation has been followed in national courts in most developed jurisdictions. The Swiss Federal Tribunal has stated that:

"The substantive assessment of a claim *only violates public policy if it misinterprets fundamental principles* and is therefore *by all means irreconcilable with the commonly acknowledged moral order.*"<sup>793</sup>

695. German authors acknowledge that the breach of a fundamental rule must be "severe." As one author states:

"For substantive public policy, it is decisive if, in the particular case, the application of a foreign law stands in such a *severe conflict to the fundamentals of German law*, and its underlying concept of justice that its application must be seen as unbearable."<sup>794</sup>

The German Supreme Court has taken the same view, upholding a public policy objection only "if the result of the application of foreign law stands *in such stark contradiction to the fundamentals of German law and their underlying ideas of justice that we consider it unbearable.*"<sup>795</sup>

696. Likewise, the Austrian Supreme Court has held that:

"The relevant standard for the autonomous public policy review of the foreign arbitral award ... is whether the arbitral award is *irreconcilable with the fundamentals of the*

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<sup>792</sup> *Judgment of 28 March 2000, Bamberskii v. Krombach*, Case C-7/98, [2001] Q.B. 709, 730, (European Court of Justice), **Exhibit-LE 33/7** (emphasis added).

<sup>793</sup> *Judgment of 10 July 2006*, 4P.88/2006/zga, cons. 4.1 (Swiss Federal Tribunal), **Exhibit-LE 33/8** (internal citations omitted) (emphasis added); *see also Judgment of 18 October 2004*, 4P.104/2004/lma, cons. 6.1 (Swiss Federal Tribunal) ("The substantive assessment of a claim at dispute only violates public policy if it violates fundamental principles and is therefore *by all means irreconcilable* with the commonly acknowledged legal and moral order."), **Exhibit-LE 33/9** (emphasis added); B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* ¶1600 (2006) ("[A]s far as we know, up to the present, there has never been a setting aside of an award due to a violation of substantive public policy."), **Exhibit-LE 33/10** (emphasis added).

<sup>794</sup> J.-P. Lachmann, *Handbuch für die Schiedsgerichtspraxis* ¶2678 (3d ed. 2008), **Exhibit-LE 33/11** (emphasis added); R. Kreindler, J. Schäfer & R. Wolff, *Schiedsgerichtsbarkeit Kompendium für die Praxis*, Chapter 13 ¶1138 (2006) ("In Germany, this ground for denial under the New York Convention [Art. V (2) (b)] is understood very much in the same way as section 1059 (2) lit. 2(b) of the Code of Civil Procedure. Therefore, an international award violates public policy, if at the time of the state court's decision, *it stands in an unbearable conflict with fundamentals of public and economic life or the concept of justice.*"), **Exhibit-LE 28/10**.

<sup>795</sup> *Judgment of 17 September 1968*, BGHZ 50, 370, 376 (German Bundesgerichtshof), **Exhibit-LE 33/12** (emphasis added); *see also Judgment of 28 April 1988*, BGHZ 104, 240, 243 (German Bundesgerichtshof) ("...if the result of the application of foreign law stands *in such stark contradiction to the fundamentals of German law and their underlying ideas of justice that, from a German perspective, this seems unbearable.*"), **Exhibit-LE 33/13** (emphasis added); *Judgment of 16 September 1993*, BGHZ 123, 268, 270 (German Bundesgerichtshof) ("It is decisive [for a violation of public policy] if the result of the application [of foreign law] stands *in such stark contradiction to the fundamentals of German law and their underlying ideas of justice that, from a domestic perspective, this appears as unbearable.*"), **Exhibit-LE 33/14**.



***Austrian legal system because it is based on a foreign legal principle that is totally irreconcilable with the domestic legal system.***<sup>796</sup>

697. In a similar vein, a leading English decision in the Court of Appeal has held:

“Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. ... It has to be shown that there is some element of illegality or that the enforcement of the award would be ***clearly injurious to the public good or, possibly, that enforcement would be wholly offensive*** to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.”<sup>797</sup>

698. To similar effect, French courts have held that an award can be set aside only if:

“the performance of the award would constitute an unacceptable interference with the French legal order; ... ***the breach of international public policy must be flagrant, effective and concrete.***”<sup>798</sup>

699. In order for public policy to provide a basis for vacating an award under the Federal Arbitration Act, U.S. courts have found that the policy must be “explicit,” “well-defined and dominant.”<sup>799</sup> Once the requisite standard is established, “the violation of such a policy must be ***clearly shown*** if an award is not to be enforced.”<sup>800</sup> In particular, U.S. courts have made clear that “erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.”<sup>801</sup>

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<sup>796</sup> *Judgment of 26 January 2005*, XXX Y.B. Comm. Arb. 421, 428 (Austrian Oberster Gerichtshof) (2005), **Exhibit-LE 32/5** (emphasis added); see also Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, Vol. 4 Part 2, §611, ¶203 (2d ed. 2007) (“[The public policy exception] does not protect the individual rights of the parties but the domestic legal order which is being protected against the penetration of ***wholly incompatible legal notions*** and an unbearable violation of fundamental basic principles.”), **Exhibit-LE 23/19** (emphasis added).

<sup>797</sup> *Deutsche Schachtbau-und Tiefbohrergesellschaft mbH v Ras Al Khaimah National Oil Company (sub nom DST v Rakoil)* [1987] 3 W.L.R. 1023, 1035 (English Court of Appeal), **Exhibit-LE 32/10** (emphasis added). Other common law jurisdictions are similar. In Hong Kong, for example, the Supreme Court of Appeal has held that “the award must be ***so fundamentally offensive to that jurisdiction’s notions of justice*** that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection.” *Hebei Import & Export Corp. v. Polytek Engineering Company Ltd* FCV No. 10 of 1998, ¶31 (1998) (Hong Kong Supreme Court of Appeal), available at [www.hklii.org](http://www.hklii.org), **Exhibit-LE 29/11** (emphasis added).

<sup>798</sup> *Judgment of 18 November 2004*, *SA Thalès Air Défense v. GIE Euromissile*, 3 Rev. arb. 751, 757, 759 (2005) (Paris Cour d’appel), **Exhibit-LE 32/8** (emphasis added); *Judgment of 21 March 2000*, *Verhoeft v. Moreau*, Jurisdata No 2000-001195 p. 1 of 2 (French Cour de Cassation) (“According to the meaning of Article 1502-5 of the Code of Civil Procedure, ***a violation of public policy regarding the recognition or enforcement of the award must be flagrant, effective and concrete.***”), **Exhibit-LE 33/15** (emphasis added); *Judgment of 4 June 2008*, *Société SNF v. Société Cytec industries BV*, 2008 Bull. Civ. 1, No. 162 p. 2 of 4 (French Cour de Cassation, Civ. 1) (“[R]egarding the violation of public policy, the judge will restrict his judgment to the ***manifest, effective and concrete nature of the alleged infringement.***...”), **Exhibit-LE 33/16** (emphasis added).

<sup>799</sup> *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (U.S. S.Ct. 1983), **Exhibit-LE 33/17** (emphasis added).

<sup>800</sup> *United Paperworkers Int’l Union, AFL-CIO, et al. v. Misco, Inc.*, 484 U.S. 29, 43 (U.S. S.Ct. 1987), **Exhibit-LE 15/7** (emphasis added); *Mercy Hosp., Inc. v. Massachusetts Nurses Ass’n*, 429 F.3d 338, 347 (1st Cir. 2005) (rejecting public policy challenge to award because findings of fact did not establish violation of well-defined and dominant public policy), **Exhibit-LE 33/18**; *Prudential-Bache Secs. Inc. v. Tanner*, 72 F.3d 234, 241 *et seq.* (1st Cir. 1995) (rejecting challenge on grounds of insufficient showing that award violated asserted public policy), **Exhibit-LE 33/19**; *PaineWebber, Inc. v. Agron*, 49 F.3d 347, 351 (8th Cir. 1995) (rejecting public policy challenge to award), **Exhibit-LE 33/20**.

<sup>801</sup> *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004), **Exhibit-LE 12/3**. See also *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 308 (3d Cir. 2006) (“mistake of fact and manifest disregard of the law” are not grounds for refusing recognition of award), **Exhibit-LE 14/9**; *Coutinho Caro & Co., U.S.A., Inc. v. Marcus Trading Inc.*, 2000 U.S. Dist. LEXIS

700. That reasoning has been affirmed in other jurisdictions.<sup>802</sup> The Austrian Supreme Court has declared that the public policy exception only applies where recognition and enforcement “go completely against the Austrian legal order. ***Under no circumstances may this ground lead to a reexamination of a foreign title as to the facts and the law. It constitutes an exceptional rule that may be used only in the most hesitant way ...***”<sup>803</sup>

701. Elsewhere, courts have affirmed that “only where the ***concrete outcome*** of recognising such an award is contrary to the good morality and social order” of the country concerned will its recognition and enforcement be refused.”<sup>804</sup> Leading German commentators have also elaborated as follows:

“The courts do not review whether the arbitral tribunal applied the law or at least its mandatory provisions correctly but merely ***whether the content of the award is such that its enforcement would be contrary to public policy.*** That may be the case if the award is either contrary to those mandatory rules that protect the bases of German public and economic order, or contrary to fundamental principles of law or otherwise infringes public order or good morals.”<sup>805</sup>

702. In sum, to prevail on this ground (assuming it could persuade the Tribunal that the ground fell to be considered within an excess of mandate review), the Government must: (a) identify the mandatory international rule it claims to have been breached; (b) show that such rule expresses basic and fundamental aspects of international order: and (c) establish that the dispositive decision of the ABC Report directly and seriously contradicted that mandatory rule. The Government has not even begun to meet that burden, nor could it do so.

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8498, at \*37-38 (D. Conn. 2000) (“erroneous legal reasoning or misapplication of established legal principles by an arbitral panel should generally not be held to violate public policy...”), **Exhibit-LE 32/18**; *Brandeis Intsel Ltd v. Calabrian Chem. Corp.*, 656 F.Supp. 160, 165 (S.D.N.Y. 1987) (“‘manifest disregard’ of law, whatever the phrase may mean, does not rise to the level of contravening ‘public policy,’ as that phrase is used in Article V of the Convention”), **Exhibit-LE 33/21**.

<sup>802</sup> *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v. Ras Al-Khaimah Nat’l Oil Co. (sub nom DST v Rakoil)* [1987] 3 W.L.R. 1023, 1031 (English Court of Appeal) (rejecting the argument that “an award which holds that the rights and obligations of the parties are to be determined, not on the basis of any particular national law, but upon some unspecified, and possibly ill defined, internationally accepted principles of law” is unenforceable as a matter of public policy), **Exhibit-LE 32/10**; Kröll & Kraft, in K.-H. Böckstiegel, S. Kröll & P. Nacimientto (eds.), *Arbitration in Germany*, ZPO §1059 ¶80 (2007) (“***The courts do not review whether the arbitral tribunal applied the law or at least its mandatory provisions correctly*** but merely whether the content of the award is such that its enforcement would be contrary to public policy.”), **Exhibit-LE 32/11**; Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozeßgesetzen*, Vol. 4 Part 2, §611, ¶205 (2d ed. 2007) (“***[T]he arbitral award may not be reviewed as to the law or the facts***; apart from the narrow scope of review under the violation of public policy, the grounds for a setting aside do not contain a basis for a review as to the question whether the arbitral tribunal in its award has correctly solved the procedural or substantive questions that have arisen throughout the procedures.”), **Exhibit-LE 23/19**; *Judgment of 27 April 2005*, 4P.242/2004, cons. 7.1 (Swiss Federal Tribunal) (“***There is no violation of public policy merely because evidence has been assessed incorrectly, facts have been determined wrongly or there has been a clear infringement of a legal rule.*** Nor will an erroneous contractual interpretation be sufficient to establish a violation of public policy...”), **Exhibit-LE 32/13** (internal citation omitted) (emphasis added).

<sup>803</sup> *Judgment of 25 April 2001*, 3 Ob84/01a, p. 2 of 3 (Austrian Oberster Gerichtshof), **Exhibit-LE 33/22** (emphasis added).

<sup>804</sup> *Judgment of 14 February 1995, Adviso N.V. v. Korea Overseas Corp.* XXI Y. B. Comm. Arb. 612, 615 (Korean Supreme Court) (1996), **Exhibit-LE 33/23** (emphasis added).

<sup>805</sup> Kröll & Kraft, in K.-H. Böckstiegel, S. Kröll & P. Nacimientto (eds.), *Arbitration in Germany*, ZPO §1059 ¶81 (2007), **Exhibit-LE 32/11** (emphasis added).

c) An Adjudicatory Decision Must Be Interpreted to Uphold, and Not to Find Fault With, the Decision

703. Third, it is an elementary principle of public policy that an arbitral award or other adjudicative decision must be interpreted with every effort to uphold the decision. Conversely, and as discussed above, it is impermissible to nit-pick an adjudicative decision or to approach it with an eye towards finding fault.<sup>806</sup>

3. The Government's Complaints About the ABC Experts' Purported Failure to Give Reasons Are Frivolous

704. The Government's first allegation of a violation of "mandatory criteria" is that "[t]he Experts failed to provide reasons capable of forming the basis of a valid decision."<sup>807</sup> According to the Government, "there are crucial gaps in the argumentation of the Experts both in their rejection of the GoS case and in the adoption of the 10°10'N line."<sup>808</sup>

705. The Government's complaints about the supposedly inadequate reasoning of the ABC Report are nonsense, particularly insofar as these are claimed to be violations of "mandatory criteria." The GoS complaints ignore the absence of any requirement, either in the parties' agreements or any conceivably applicable law, for a reasoned decision – much less reasoning that satisfies the particular standard constructed by the GoS's Memorial. The Government's complaints also ignore the fact that the ABC Report provided extensive and well considered reasoning that fully satisfies even the most demanding standards for reasoned awards under national law – much less any generally applicable mandatory standard that might be constructed. Again, in this regard the Government's Memorial continues its unfortunate tactic of selectively quoting (and misquoting) the ABC Report, in a manner that is as unfair as it is ineffective.

706. Moreover, even if the ABC Experts' reasoning could be faulted (which it cannot be), any inadequacies in their reasoning do not by any stretch of the imagination violate a mandatory international rule of law, much less constitute an excess of mandate admissible in this proceeding. At bottom, the Government's complaints about the ABC Experts' reasoning are nothing more than recycled disagreements with the substance of the ABC Report's conclusions, which are manifestly not grounds for invalidating those conclusions.

a) Nothing in the Parties' Agreements or Applicable Law Mandatorily Required the ABC Experts to Give Reasons

707. There is nothing in the parties' agreements, or in any arguably applicable legal rules, that mandatorily required the ABC Experts to give reasons for their decision. The Government's effort to construct such a requirement instead depends on external sources of "mandatory criteria," which ignore both the terms of the parties' agreements and the character of the ABC proceedings, while distorting the meaning of the legal sources relied upon by the GoS Memorial.

708. The Government does not seriously argue that the parties' agreements required the ABC Experts to make a reasoned decision. Certainly, nothing in the Abyei Protocol, the Abyei Annex, the Terms of Reference or the Rules of Procedure provided "the ABC Experts'

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<sup>806</sup> See above at paras. 692-702.

<sup>807</sup> GoS Memorial, at para. 255.

<sup>808</sup> GoS Memorial, at para. 262.

decision shall be reasoned” or “the ABC Report shall include a statement of the reasons of the experts.”

709. It is notable that the parties’ agreements with regard to any requirement of reasoning for the ABC and the ABC Report stand in direct contrast to the provisions of the Abyei Arbitration Agreement in these proceedings. The Arbitration Agreement in this proceeding provides expressly that “[t]he Tribunal shall *comprehensively state the reasons upon which the award is based.*”<sup>809</sup> Clearly, when the Government and the SPLM/A intended to require a reasoned decision, they knew perfectly well how to achieve that end.

710. By contrast, the mandate of the ABC Experts, including as recited in Article 2(a) of the Abyei Arbitration Agreement, was simply to “to define (i.e., delimit) and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.”<sup>810</sup> Nothing in any of the parties’ agreements required that the ABC Experts explain their reasoning for adopting a particular definition or delimitation of the Abyei Area.

711. The Government’s Memorial refers occasionally to the parties’ agreement that the ABC Experts’ decision “shall be based on scientific analysis and research”<sup>811</sup> (albeit without ever arguing that this provision imposed a requirement for a reasoned decision). It is useful to consider this provision in its full context, in Article 4 of the Abyei Annex, which provides that:

“The experts shall consult the British Archives and other relevant sources on the Sudan wherever they may be available, *with a view to arriving at a decision that shall be based on scientific analysis and research.*”<sup>812</sup>

712. Importantly, the text of Article 4 does not address *the nature or form of the ABC Report*, much less require that the ABC Experts detail their reasoning. To the contrary, Article 4 merely explains the general objective of the ABC Experts’ independent investigations – namely, “*with a view to arriving* at a decision that is *based on* scientific analysis and research.” Indeed, the text of Article 4 requires only that the ABC Experts have the view of “arriving at *a decision*” on the basis of their scientific investigation – not that the ABC Experts produce a reasoned award, a particular type or length of report, or anything of the sort.

713. Equally, the parties’ agreement that the ABC Experts would produce a “report” does not require or imply that the report would contain the Experts’ reasoning. Rather, the “report” needed only to contain the ABC Experts’ resolution of the specific issue submitted to them, being “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”<sup>813</sup> Indeed, the Government omits to mention that the only requirement with regard to the form and explanation of the ABC Experts’ decision was contained in the Terms of Reference, which provided that “the ABC shall *demarcate the area, specified above, on map...*”<sup>814</sup> Again, although addressing what precisely the ABC Experts’ work-product should contain, the parties did not require any statement of reasons.

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<sup>809</sup> Abyei Arbitration Agreement, Art. 9(2), **Appendix A to SPLM/A Memorial** (emphasis added).

<sup>810</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial**.

<sup>811</sup> GoS Memorial, at paras. 151 and 254.

<sup>812</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial** (emphasis added).

<sup>813</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial**.

<sup>814</sup> ABC ToR, Art. 1.2, **Appendix E to SPLM/A Memorial** (emphasis added).

714. To be sure, the ABC Experts had the procedural discretion also to explain the reasoning that led to their definition and delimitation. Importantly, however, nothing in the parties' agreements required them to provide such an explanation, with the parties instead providing only for demarcation on a map.

715. It is also relevant to consider the timetable that was contemplated for the ABC Experts' work and the character of the ABC itself. Under the 'Program of work' contained in the Terms of Reference, the ABC Experts were to begin their work on 1 April 2005 and were to present their final report to the Sudan Presidency on 29 May 2005 (eight weeks later).<sup>815</sup> The time contemplated for the ABC Experts to "*prepare the final report*" was "*May 20-26*" – a total of *five working days*.<sup>816</sup> Even recognizing the vast expertise and diligence of the five ABC Experts, this was hardly a timeframe consistent with the preparation of an extensively reasoned report: to the contrary, it was a time frame that reflected an opportunity for careful deliberations and the parties' overriding desire for an expeditious, final resolution of their dispute.

716. As a consequence of these provisions, the Government ignores the parties' agreements with regard to the ABC proceedings. Instead, the Government contends that "it is *a general principle of law, confirmed in practice*, that the failure of a panel charged with deciding a dispute to state any reasons on the basis of which its decision can be supported, constitutes an excess of mandate."<sup>817</sup> In support of this purported general principle of law, the GoS Memorial cites a collection of provisions of the ICJ Statute (Article 56(1)), the ICSID Convention (Article 48(3)), the ILC Model Rules on Arbitral Procedure (Article 29), and miscellaneous institutional arbitration rules (Article 32(2) of the UNCITRAL Rules; Article 32(3) of the PCA Rules; and Article 47(1)(i) of the ICSID Rules).<sup>818</sup>

717. The various sources cited by the Government do not establish the existence of a generally applicable mandatory rule of international law that require decisions to contain reasoning. In particular, these sources do not establish the existence of any such rule of law in circumstances where the decision-maker is a group of experts, such as the ABC Experts, as opposed to a tribunal of international arbitration practitioners or jurists.

718. As on other subjects, the Government approaches the authorities concerning reasoned awards in an unhelpfully selective manner. That results in its analysis ignoring the fact that, while some legal systems require reasoned arbitral awards and other adjudicative decisions, subject to contrary agreement by the parties, many other legal systems do not impose any such requirement. In these circumstances, there is simply no basis for the "general principle of law" claimed by the Government regarding reasoned awards.

719. There is, of course, nothing in the New York Convention or the Inter-American Convention that requires arbitral awards to be reasoned.<sup>819</sup> The same is true in a number of

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<sup>815</sup> See ABC ToR, at pp. 2-3 ("Program of work"), **Appendix E to SPLM/A Memorial**.

<sup>816</sup> ABC ToR, at p. 3 ("Program of work"), **Appendix E to SPLM/A Memorial**.

<sup>817</sup> GoS Memorial, at para. 254 (emphasis added).

<sup>818</sup> See GoS Memorial, at paras. 151-159.

<sup>819</sup> See New York Convention, Arts. III, IV and V, **Exhibit-LE 5/1**; Inter-American Convention on International Commercial Arbitration 1975, Arts. 4 and 5, **Exhibit-LE 5/10**.

leading national jurisdictions including the U.S.,<sup>820</sup> France (in international matters),<sup>821</sup> as well as in various African states.<sup>822</sup> In the words of a leading commentator on African arbitration, “*the arbitral tribunal is not required to provide reasons for its award* unless the arbitration agreement provides otherwise.”<sup>823</sup> Other national arbitration laws are to the same effect.<sup>824</sup>

720. More generally, in many legal systems, vast numbers of civil and even criminal judgments are rendered without any statement of reasons (e.g., jury verdicts), including in the U.S.<sup>825</sup> and Canada.<sup>826</sup> Given this, it is difficult to see how one can argue that there is a mandatory rule of generally applicable international law that demands reasoned awards or decisions – much less a rule that demands reasoned awards from a commission of non-legal experts on a boundary commission such as the ABC.

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<sup>820</sup> See e.g., *United Steel Workers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (U.S. S.Ct. 1960) (“*Arbitrators have no obligation to the court to give their reasons for an award.*”), **Exhibit-LE 31/3**; see also *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 203 (U.S. S.Ct. 1956) (“[Arbitrators] ... need not give their reasons for their results . . . .”), **Exhibit-LE 26/13**; *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 385 (5th Cir. 2004) (“*Arbitrators need not give reasons for their awards.*”), **Exhibit-LE 30/9**; *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972) (“[T]he Supreme Court has made it clear that there is no general requirement that arbitrators explain the reasons for their award.”), **Exhibit-LE 33/24**; M. Domke et al., *Domke on Commercial Arbitration* §34:6 (3d ed. 2008) (“Arbitrators are not required to state the reasons for their award . . . . Of course, the written and signed award is a general requirement under the law in all jurisdictions in the United States, *but it need not be accompanied by an opinion setting forth the arbitrator’s reasoning.*”), **Exhibit-LE 33/25** (emphasis added); Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of A Common Law of International Transactions*, 23 Colum. J. Trans. L. 579, 581 (1984-1985) (“The prevalent practice has been to render international arbitration awards without explaining the reasons by which the decision was reached. This practice has its antecedents in antiquated English common law, where the writ procedure provided for having an arbitral award reviewed on the merits by a court for an error of law.”), **Exhibit-LE 33/26**; Schmitthoff, *The United Kingdom Arbitration Act 1979* 231, 237-238 (1980) (noting that under the (then) new (but now repealed) Arbitration Act 1979 “the court may order the arbitrator to state the reasons,” but that “awards without reasons are still admitted.”), **Exhibit-LE 33/27**.

<sup>821</sup> See e.g., E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1394 (1999) (“In French domestic arbitration, the grounds for the award must be stated. *No such requirement exists in French international arbitration law.* The mere fact that an award contains no reasons does not cause it to violate the French notion of international public policy and make it incapable of being recognized or enforced in France.”), **Exhibit-LE 23/2** (emphasis added). Under the French Code of Civil Procedure, Art. 1471 pertaining to domestic awards (“The ruling must be reasoned.”) is excluded in international arbitration: see Delvolvé, *Essai sur la motivation des sentences arbitrales*, 2 Rev. arb. 149, (1989) (“[Whereas] a reasoned award is required in French domestic arbitration, [the French Code of Civil Procedure] does not impose a similar requirement in international arbitral proceedings.”), **Exhibit-LE 33/28**.

<sup>822</sup> E. Cotran & A. Amisshah, *Arbitration in Africa* 170 (1996) (“[A]n arbitrator need not give reasons in support of the award as long its meaning [sic] is clear”), **Exhibit-LE 33/29**; Arbitration Act of South Africa 1965, Art. 24 (which provides only that “(1) The award shall be in writing and shall be signed by all the members of the arbitration tribunal. (2) If a minority of the members of the arbitration tribunal refuse to sign the award, such refusal shall be mentioned in the award but shall not invalidate it.”), **Exhibit-LE 33/30**; E. Cotran, A. Amisshah, *Arbitration in Africa* 2007 (1996), **Exhibit-LE 33/29**.

<sup>823</sup> E. Cotran & A. Amisshah, *Arbitration in Africa* 207 (1996), **Exhibit-LE 33/29**.

<sup>824</sup> See, e.g., *Arbitration Act of Israel* 5728-1968, Art. 20 (“The arbitral award shall be in writing and shall be signed by the arbitrator, indicating the date of signature. In the case of an arbitration before several arbitrators, the signatures of a majority of them shall be sufficient if the award indicates that the other arbitrators are unable or unwilling to sign it.”), **Exhibit-LE 33/31**. In addition, the lack of reasons in an award will only be the basis for the setting aside of an award if the parties’ agreement required reasons. *Arbitration Act of Israel* 5728-1968, Art. 24(6) (an award may be set aside where “the arbitrator did not assign reasons for the award *though the arbitration agreement required him to do so.*”), **Exhibit-LE 33/31** (emphasis added).

<sup>825</sup> See *United States v. Powell*, 469 U.S. 57, 67 (U.S. S.Ct. 1984) (“Courts have always resisted inquiring into a jury’s thought processes...through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality”), **Exhibit-LE 34/1**; *Chicago, Burlington, & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 593 (U.S. S.Ct. 1907) (“Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict.”), **Exhibit-LE 25/3**; *Barzelis v. Kulikowski*, 418 F.2d 869, 870 (9th Cir. 1969) (“A jury ... does not have to give reasons for what it does.”), **Exhibit-LE 34/2**; Schauer, *The Generality of Law*, 107 W. Va. L. Rev. 217, 231 (2004) (“Juries are not compelled to give reasons for their decisions...”), **Exhibit-LE 34/3**.

<sup>826</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 78 [Morgentaler cited to S.C.R.] (“[t]he jury is never called upon to explain the reasons which lie behind a verdict”), **Exhibit-LE 34/4**; Dufraimont, *Evidence Law and the Jury: A Reassessment*, 53 McGill L.J. 199, 209 (2008) (“Juries deliberate in secret; they are not required to give reasons for and are not accountable for their decisions in any way.”), **Exhibit-LE 34/5**.

721. The absence of a general rule is recognized under institutional frameworks specifically providing for awards to be reasoned. The Commentary to the UNCITRAL Model Law explains:

“The practice of stating reasons upon which the award is based is *more common in certain legal systems than in others and it varies from one type or system of arbitration to another*. Paragraph 2 adopts a solution which accommodates such variety by requiring that the reasons be stated but allowing parties to waive that requirement.”<sup>827</sup>

722. Moreover, in many of the jurisdictions where there is a requirement for reasoned arbitral awards, violation of that requirement is not a ground for annulment of an award. As one European commentary explains:

“Although national arbitration (and institutional rules) typically require that the award be ‘reasoned,’ *it is usually held that failure to give reasons is no valid ground for refusal of enforcement of an international award*.”<sup>828</sup>

723. Thus, in Austria, “[f]ailure to state the reasons upon which an award is based does not constitute grounds for challenging an arbitral award according to Section 611(2).”<sup>829</sup> Likewise, in Switzerland, the Swiss Federal Tribunal has held:

“In addition, Art. 190(2) PILS [providing grounds for setting aside] *does not know the grounds of a lack of reasons. One can also not deduce a mandatory requirement for reasons from the right to be heard within the meaning of Article 190(2)(d) PILS*. The lack of reasons also does not violate public policy. *If the lack of reasons does not even constitute a ground for annulment under Art. 190(2) PILS, it can equally not hinder enforcement*.”<sup>830</sup>

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<sup>827</sup> Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Report of the Secretary General, A/CN.9/264, 25 March 1985, at p. 67, **Exhibit-LE 34/6**.

<sup>828</sup> F. Schwarz & H. Ortner, *Procedural Ordre Public and the Internationalization of Public Policy in Arbitration*, in *Austrian Arbitration Yearbook 2008*, 133, 205, **Exhibit-LE 34/7**.

<sup>829</sup> J. Power, *The Austrian Arbitration Act, A Practitioner’s Guide to Sections 577-618 of the Austrian Code of Civil Procedure*, §606, ¶4 (2006), **Exhibit-LE 34/8**; see also Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozeßgesetzen*, Vol. 4 Part 2, §606, ¶86 (2d ed. 2007) (“Unlike in German law, a lack of reasons in absence of a respective authorization by the parties does not represent a ground for setting aside.”) (internal references omitted), **Exhibit-LE 23/19**.

<sup>830</sup> *Judgment of 9 December 2003*, DFT 130 III 125, 130 (Swiss Federal Tribunal), **Exhibit-LE 34/9** (internal citations omitted) (emphasis added); see also *Judgment of 21 August 1990*, DFT 116 II 373, 374 *et seq.* (Swiss Federal Tribunal) (“**Art. 190 (2) PILS does not mention the lack of reasons as a ground for annulment. This corresponds to the legislator’s intention ... to limit the grounds for annulment.** It would diametrically oppose the legislator’s intention if, by equating the right to be heard resulting from Art. 4 – which includes a requirement for reasons – with the right to be heard under Art. 190(2)(d) PILS, one implemented the lack of reasons as ground for annulment into the new provision... The provision’s context leads to the same result. Art. 190(2) PILS in (d) only adopts the mandatory procedural requirements of Art. 182(3) PILS as a ground for annulment, but not the requirement for reasons applicable to awards under Art. 189(2) PILS. A lack of reasons alone does not violate public policy.”), **Exhibit-LE 34/10** (emphasis added); *Judgment of 6 June 2007*, 4A\_18/2007, cons. 5.1 (Swiss Federal Tribunal) (“According to constant case law, **the right to be heard in contradictory procedures, provided for in Art. 182(3) and 190(2)(d) PILS, does not require that an international arbitral award provide reasons.**”), **Exhibit-LE 34/11** (emphasis added); C. Müller, *International Arbitration* 165 (2004) (“**In arbitral proceedings, the party does not have a particular right for reasons, which would permits it to challenge the award on that specific ground.** One cannot follow the doctrine which holds that reasons are part of the elementary requirements also in arbitration, provided that the parties did not expressly renounce them.”), **Exhibit-LE 28/17** (emphasis added).

724. In other national jurisdictions which require that domestic awards must be reasoned, the failure to provide reasons is not grounds for denying recognition to an international award if unreasoned awards were permitted in the arbitral seat.<sup>831</sup> In the words of one comparative study, “[i]n a number of cases, it has been held that **failure to give reasons (even if a mandatory requirement of any award made in the enforcement State) is not a reason to refuse enforcement of a foreign award.**”<sup>832</sup>

725. Thus, a leading Dutch decision has held that:

**“an unreasoned foreign arbitral award can be enforced in the Netherlands if the country where the award is rendered does not require that reasons are given.** Since it has not appeared from the documents filed in the proceedings that there is a legal provision of Israeli law requiring arbitrators to give reasons for their arbitral awards, this objection ... must be denied.”<sup>833</sup>

Similarly, the French Cour de Cassation has consistently held that an unreasoned award does not violate the French conception of international public policy and that the absence of reasons does not permit non-recognition of an award in France.<sup>834</sup>

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<sup>831</sup> *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, XXII Y.B. Comm. Arb. 643, 651 (1997) (“The opposing party does not show that the arbitrators failed in their duty to state reasons for their decision as required by the agreement of the parties and by the supplemental rules as adopted. The content of such duty to render a reasoned decision cannot be defined under Belgian law, which was not applicable to the contract entered into by the parties, and the duty to render a reasoned decision is not a principle of public policy in Belgian private international law.”), **Exhibit-LE 24/11**; *Judgment of 8 October 1977, Bobbie Brooks, Inc. v. Lanificio Walter Banci*, IV Y.B. Comm. Arb. 289, 292 (Florence Corte di Appello) (1979) (“[T]he fact that the reasoning constitutes a principle of the Italian Constitution is not important because what is fundamental in Italian law of procedure may not be considered as such by foreign legislative and judicial authorities.”), **Exhibit-LE 34/12**; *Judgment of 2 May 1980, Efxinos Shipping Co. v. Rawi Shipping Lines Ltd.*, VIII Y.B. Comm. Arb. 381, 383 (Genoa Corte di Appello) (1983) (“[i]t appears to be no longer contrary to Italian public policy to recognize a foreign award which does not contain reasons, provided that the parties have agreed in advance that reasons shall not be given. In the second place, an award without reasons no longer gives rise to a Constitutional question and a question of public policy if the award is rendered in an arbitral procedure under which it is not customary to give reasons for awards. The Court concluded that the English award without reasons did not offend Italian public policy.”), **Exhibit-LE 34/13**; M. Mustill & S. Boyd, *Commercial Arbitration* 336 (2d ed. 2001 Companion) (“**We think it would be unfortunate if reasons were regarded as an absolute and indispensable feature of an award to the extent that a foreign award without reasons would be regarded as unenforceable on grounds of public policy...**”), **Exhibit-LE 34/14**; A. van den Berg, *The New York Arbitration Convention of 1958* 381 (1985) (“[W]hilst making the distinction between domestic and international public policy, the courts of the countries under whose law the giving of reasons is mandatory generally enforce awards without reasons made in countries where such awards are valid.”), **Exhibit-LE 24/13**.

<sup>832</sup> Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, in *ILA, A Committee on International Commercial Arbitration, Proceeding of London Conference* (2000), reprinted in, 19 Arb. Int'l 217, 239 (2003), **Exhibit-LE 34/15** (emphasis added).

<sup>833</sup> *Judgment of 24 November 1994*, XXI Y.B. Comm. Arb. 635, 640 (Rotterdam Rechtbank) (1996), **Exhibit-LE 34/16** (emphasis added).

<sup>834</sup> *Judgment of 14 June 1960*, 1960 Bull. Civ. 1, No. 327 p. 2 of 2 (French Cour de Cassation, Civ. 1) (“[T]he Court of Appeal has correctly admitted that **the fact that the disputed award did not state reasons, was not, in itself, contrary to the French concept of international public policy.**”), **Exhibit-LE 34/17** (emphasis added); *Judgment of 22 November 1966*, 1966 Bull. Civ. 1, No. 517 (French Cour de Cassation, Civ. 1) (“**The lack of reasons in a foreign arbitral award is not in itself contrary to French public policy** within the meaning of private international law.”), **Exhibit-LE 34/18** (emphasis added); *Judgment of 18 March 1980*, Bull. Civ. I, No. 87 p. 2 of 3 (French Cour de Cassation, Civ. 1) (“[W]ith respect to an international arbitration governed by a foreign law, the Court of Appeal has correctly decided that **the lack of reasons is not in itself contrary to public policy within the meaning of French private international law**, because the silence of the award does not conceal a determination on the merits which is incompatible with public policy understood in this manner or an interference with the right to be heard...”), **Exhibit-LE 34/19** (emphasis added); E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1394 (1999) (“The mere fact that an award contains no reasons does not cause it to violate the French notion of international public policy and make it incapable of being recognized or enforced in France. The French courts would only censure the failure to give reasons if the law governing the proceedings required reasons to be given.”) **Exhibit-LE 23/2**.



726. These various authorities all contradict the existence of a mandatory general principle of law that requires reasoned arbitral awards or other adjudicative decisions. In reality, any reasonably careful review of the law shows that there is a diversity of approach in national courts, ranging from no requirement for reasons, to a requirement for reasons if the parties have so agreed but not annulling unreasoned awards, to not refusing recognition of unreasoned foreign awards even where national law requires reasons for locally-made awards. Importantly, in most jurisdictions, if the parties do not provide in their agreement that a reasoned award is required, then an unreasoned award will be subject neither to annulment nor to non-recognition.

727. It is also significant that all of the instruments relied upon by the Government as sources of a purported mandatory requirement for reasoned awards are consensual instruments. Only if states choose to adhere to the ICJ Statute and the ICSID Convention, or to incorporate the ILC Model Rules, the UNCITRAL Rules, the PCA Rules or the ICSID Rules, are the terms of such instruments binding on the parties in question. Moreover, in virtually all of the instruments relied upon by the Government, the parties are free not to require a reasoned award.<sup>835</sup> There is no mandatory requirement for reasoned awards, but instead merely provision for such awards if that is what the parties wish.

728. Thus, even in those jurisdictions where reasons are required for some commercial arbitral awards, leading commentators have noted that:

“[w]e would not in the least dissent from the proposition that reasons are highly desirable, even where they are obvious, if only to demonstrate that the arbitrator has addressed and answered the obvious question. *There are still, however, areas where the law does not regard transparency of reasoning as fundamental to a correct decision on the rights and obligations of others. We think it would be unfortunate if reasons were regarded as an absolute and indispensable feature of an award to the extent that a foreign award without reasons would be regarded as unenforceable on grounds of public policy...*”<sup>836</sup>

Again, there is no mandatory rule that forbids an approach to dispute resolution that omits any, or any particular, requirement of a reasoned award.

729. Furthermore, even if one assumed, contrary to fact, that there were some mandatory general principle of law requiring reasoned arbitral awards, that rule would not apply to proceedings in the nature of the ABC proceedings. Nothing that the Government cites concerning requirements for reasoned decisions remotely involves boundary commissions with investigative mandates and procedural regimes such as that applicable to the ABC. Simply put, the Government’s effort to extend its (non-existent) mandatory rule for reasoned

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<sup>835</sup> UNCITRAL Arbitration Rules, Art. 32(3), **Exhibit-LE 23/4**; PCA Rules, Art. 32(3), **Exhibit-LE 29/15**; LCIA Rules, Art. 26.1, **Exhibit-LE 23/6**; WIPO Arbitration Rules, Art. 62(c), **Exhibit-LE 34/20**; AAA International Arbitration Rules, Art. 27.2, **Exhibit-LE 21/17**; Inter-American Commercial Arbitration Commission Rules, Art. 29(3), **Exhibit-LE 34/21**; VIAC Arbitration Rules, Art. 27(1), **Exhibit-LE 21/15**; Stockholm Arbitration Rules, Art. 36(1), **Exhibit-LE 29/16**; Swiss Rules of International Arbitration, Art. 32(3), **Exhibit-LE 21/16**; DIS Arbitration Rules, Art. 34.3, **Exhibit-LE 21/19**; CIETAC Rules, Art. 43(2), **Exhibit-LE 34/22**; see also *Michell, Arbitral & Judicial Decision: Party Autonomy And Implied Choice In International Commercial Arbitration*, 14 Am. Rev. Int’l Arb. 571, 581 (2003) (“[J]urisdictions that require reasoned awards usually make that requirement a default rule rather than a mandatory rule. Where the reasoned award requirement exists, the parties are usually free to contract out of it, either expressly or by implication.”), **Exhibit-LE 34/23**.

<sup>836</sup> M. Mustill & S. Boyd, *Commercial Arbitration* 336 (2d ed., 2001 Companion), **Exhibit-LE 34/14** (emphasis added).

arbitral awards to boundary commission reports involves not just one bridge, but at least two bridges too far.

730. There is nothing in “general principles of law and practice” that required the ABC process to include a statement of reasons or that would warrant invalidating the ABC Report if it did not contain such reasons. On the contrary, general principles of law do nothing more than give effect to the parties’ agreement – which, as the Government concedes, did not impose any requirement for a reasoned award.

- b) Even Where Reasons are Required, International and National Arbitration Instruments Permit Arbitral Awards to be Invalidated only in Rare and Exceptional Cases

731. Even if one were to conclude (contrary to fact) that general principles of law required the ABC Experts to have delivered a reasoned decision (and that failure to do so could ever fall within an excess of mandate question), any requirement for reasoning could be grounds for invalidating the ABC Report only in the rarest, most exceptional cases. In particular, any requirement for a reasoned award would not be grounds for challenging or critiquing the substance of the ABC Experts’ analysis. None of these exceptional grounds for non-recognition would by any stretch of the imagination apply in this case.

732. Under Article 30 of the Draft ILC Convention on Arbitral Procedure (and Article 35(c) of the ILC Model Rules), an award may be challenged on the ground that “there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.”<sup>837</sup> (Notably, this ground is not equivalent to an excess of mandate, as discussed above<sup>838</sup>). One leading U.S. author comments in relation to such procedural defects:

“Not all failures to observe procedural stipulations contained in the *compromis* will lead to a nullity of the award. The legal effect of such a failure is not to be judged upon the purely abstract basis of whether it constitutes a departure from terms of submission. The question is rather: Does the departure constitute a deprivation of a fundamental right so as to cause the arbitration and the resulting award to lose its judicial character? Unless its effect is to prejudice *materially* the interests of a party, the charge of nullity should not be open to a party.”<sup>839</sup>

733. This passage is quoted with approval in the Commentary to the Draft ILC Convention on Arbitral Procedure, which notes that Article 30(c) is “concerned with *serious* departures from fundamental procedural rules rather than minor departures.”<sup>840</sup> The Commentary goes on to state specifically in relation to the requirement for reasons as follows:

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<sup>837</sup> Draft ILC Convention on Arbitral Procedure, Art. 30(c), **Exhibit-LE 5/7**; ILC Model Rules, Art. 35(c) (which provides, similarly, that an award may be challenged where “there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure.”), **Exhibit-LE 16/6**.

<sup>838</sup> See above at paras. 203-211.

<sup>839</sup> K. Carlston, *The Process of International Arbitration* 38-39 (1946, reprint 1972), **Exhibit-LE 27/24** (emphasis added).

<sup>840</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 109, available at [www.un.org](http://www.un.org), **Exhibit-LE 25/7** (emphasis added).

“Fiore states that an award will be null ‘if it is ***totally lacking in reasons both as to fact and as to law.***’ Numerous authorities are in accord. ***This view has been adopted by the present draft ...***”<sup>841</sup>

This is repeated elsewhere in the Commentary, which states that only an award “***without reasons*** is open to challenge [under Article 30].”<sup>842</sup> A leading author on international arbitration concurs with this view, and states that “[t]o the extent that none of the laws requiring a statement of reasons on which the award is based is specific as to the extent of reasoning, ***only total lack of reasons should lead to setting aside.***”<sup>843</sup>

734. Likewise, under German law, the standard for a reasoned arbitral award is also low:

“In view of the fact that the parties have precisely agreed on a private arbitrator and not on a state court, ***it is not decisive if the reasons are correct or justify the award in content.*** But they may not be absurd, and at the minimum, they need to give a view on the basic tenets of the parties’ contentions.”<sup>844</sup>

735. Similarly, a leading French commentary points out:

“***[I]t is not essential for the reasons of the award to be sound or well-founded, provided that reasons are indeed given.*** This assertion is based on the rule that, once awards are made, they cannot be reviewed or reversed by the courts so far as the decisions on the merits are concerned.”<sup>845</sup>

736. Elsewhere, another French author points out:

“Where the grounds for the award must be stated, that does not mean that they must be well-founded in fact or law. A court reviewing the award to ensure that reasons

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<sup>841</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 110, available at [www.un.org](http://www.un.org), **Exhibit-LE 25/7** (emphasis added).

<sup>842</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 88, available at [www.un.org](http://www.un.org), **Exhibit-LE 25/7** (emphasis added).

<sup>843</sup> J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶24-68 (2003), **Exhibit-LE 23/17** (emphasis added).

<sup>844</sup> Voit in H.-J. Musielak (ed.), *ZPO*, § 1059, at para. 21 (6th ed. 2008), **Exhibit-LE 34/24** (emphasis added); see also R. Kreindler, J. Schäfer & R. Wolff, *Schiedsgerichtsbarkeit Kompendium für die Praxis*, Chapter 13 ¶1097 (2006), **Exhibit-LE 28/10**; *Judgment of 26 September 1985*, BGHZ 96, 40, 47 (German Bundesgerichtshof) (“One may not apply the same standards applying to the reasons of court decisions to arbitral awards. The reasons to arbitral awards only have to meet minimum standards. They may not be obviously non-sensical, or contradict the decision. They may not be limited to meaningless phrases, and need to comment on the essential contentions of the parties.”), **Exhibit-LE 35/1**; *Order of 25 September 2002*, BeckRS (2002 30284443), p. 4 of 5 (Oberlandesgericht Frankfurt) (“One may not transfer the standards applying to court decisions to the obligation under section 1054(2) [of the German Code of Civil Procedure] to provide reasons [to arbitral awards]; those only have to meet minimum standards and may not be obviously non-sensical, or contradict the decision. The reasoning may not be limited to meaningless phrases, and needs to comment on the parties’ essential contentions.”), **Exhibit-LE 35/2**.

<sup>845</sup> J.-L. Delvolvé, J. Rouche & G. Pointon, *French Arbitration Law and Practice* ¶317 (2003), **Exhibit-LE 32/9** (emphasis added); See also *Judgment of 18 January 2007, Société éditions Glenat v. Société France Animation*, 1 Rev. arb., 134-135 (Cour de Cassation, Civ.1) (“Objections regarding the reasoning [of an award] effectively concern the merits and are inadmissible as a ground for annulment.”), **Exhibit-LE 35/3**; *Judgment of 21 January 2006, Interfac v. Dafci*, Bull. Civ. I, 37 (2006) (Cour de Cassation, Civ. 1) (“[T]he Court of Appeal, having established that the objections of Interfac concerned the merits of the dispute, rightly refused the request for annulment because the content of the reasoning of the award, [the merits of] which are not subject to review, falls outside the scope of control of the annulment judge.”), **Exhibit-LE 35/4**; *Judgment of 14 June 2007, Société Ciech v. Société Comexport*, 2007 R.G. No. 05/22672 p. 7 of 8 (Paris Cour d’appel) (“[T]he company Ciech objects to the reasoning of the arbitral award, the legitimacy of which falls outside the control of the annulment judge, but has not shown any violation of due process or of the arbitrator’s mandate as defined in the arbitration agreement and by the scope of the parties’ submissions...”), **Exhibit-LE 35/5**.

have been given will not of course review the substantive findings of the award. ***Thus, even grounds that are clearly wrong will satisfy the requirement that the arbitrators state the reasons for their award.***<sup>846</sup>

737. The Swiss Federal Tribunal explains similarly that even an award which was ***“illogical, nonsensical, inexplicable, arbitrary, untenable, completely incorrect, inequitable, absurd, abstruse, boundlessly unenlightened, unreasonable, in violation of common sense,”*** would not violate public policy per se, because “only the result and not the individual considerations of the arbitral judgment can be attacked as incompatible with public policy.”<sup>847</sup>

738. The Government ignores these arbitral authorities and instead devotes its attention solely to the inapposite ICSID context, which of course involves a specific treaty requirement for reasoned awards in the particular terms of Article 48(3) of the ICSID Convention.<sup>848</sup> Needless to say, this specialized provision under the ICSID Convention, and the particular authority developed under that provision, have precious little to do with the present case.

739. In any event, the Government’s analysis does not even manage correctly to parse the limited body of authorities it cites under Article 48(3) of the ICSID Convention. The Government selectively quotes from the decision of the *ad hoc* Committee in the *MINE* case but does not bother to mention that the Committee held that ***“[t]he adequacy of the reasoning is not an appropriate standard of review*** under paragraph 1(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal’s decision...<sup>849</sup>

740. Similarly, in the *Vivendi v. Argentina* annulment decision referred to in the GoS Memorial,<sup>850</sup> the *ad hoc* Committee expressly noted, in a passage again not mentioned by the Government, that “it is well accepted both in the cases and the literature that Article 52(1)(e) concerns ***a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons.***<sup>851</sup> The *ad hoc* Committee thus rejected a claim for annulment under Article 52(1)(e) of the ICSID Convention for lack of reasons, holding:

“Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, ***their correctness is beside the point...*** Moreover, reasons may be stated succinctly or at length, and ***different legal traditions differ in their modes of expressing reasons. ... In the Committee’s view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially***

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<sup>846</sup> E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1395 (1999), **Exhibit-LE 23/2** (emphasis added).

<sup>847</sup> *Judgment of 14 November 1990*, DFT 116 II 634, 637 (Swiss Federal Tribunal), **Exhibit-LE 31/6** (emphasis added).

<sup>848</sup> See GoS Memorial, at paras. 162-165.

<sup>849</sup> GoS Memorial, at para. 163 (quoting “*MINE v. Guinea* Decision on Annulment, December 1989, 4 *ICSID Reports*, p. 88, para. 5.08”).

<sup>849</sup> GoS Memorial, at para. 164 (emphasis added).

<sup>850</sup> GoS Memorial, at para. 164.

<sup>851</sup> Judgment of 3 July 2002 of the Ad Hoc Committee On the Application for Annulment Submitted by CAA Against the Arbitral Award Rendered on 21 November 2000 in the *CAA and CGE v. Argentine Republic Case* (ARB/97/3), 6 ICSID Rep. 340, 358 (2002), **Exhibit-LE 32/3** (emphasis added).

*lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision.*"<sup>852</sup>

741. The Government also relies on the *Klöckner* annulment decision. But it unhelpfully neglects to mention that the decision has been described by leading commentators as imposing a "formalistic approach" to the requirement for reasons.<sup>853</sup> It also omits to mention that the *Klöckner* standard has been described as "**unprecedented**" in the leading study of the subject, in which the authors conclude that "more modest formulations"<sup>854</sup> adopted in subsequent cases "*seem[] correct to us.*"<sup>855</sup> Other commentators consistently adopt the same view.<sup>856</sup> As has been well-explained:

"an insistence on a very detailed standard and a culturally unique ratiocinative style for the reasoning requirement would open up many awards to challenges of nullification and undermine the entire process of international arbitration. Hence, **there would appear to be very compelling reasons for the substantially reduced requirement found in international arbitral practice and adopted in the text of Article 52 of the ICSID Convention.**"<sup>857</sup>

742. Even more fundamentally, the Government's reliance on standards for reasoned arbitral awards drawn from Articles 48 and 52 of the ICSID Convention again incorrectly analogizes the ABC proceedings with an ICSID arbitration. As discussed in detail above, that analysis is fundamentally misconceived and incorrectly attempts to transpose a specific, consensually agreed regime for a particular type of investment arbitration onto the very different procedural mechanism adopted for the ABC proceedings.<sup>858</sup>

743. In sum, even if one were (wrongly) to conclude that there was some mandatory international rule requiring reasoned boundary commission reports, and (again wrongly) that the Government's complaint about the absence of such a reasoned report was an admissible basis to claim excess of mandate in this proceeding, such rule would only allow the most cursory and deferential inquiry into the ABC Report. Only where there were no reasons at all would this be a violation of any putative general principle of law.

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<sup>852</sup> Judgment of 3 July 2002 of the Ad Hoc Committee On the Application for Annulment Submitted by CAA Against the Arbitral Award Rendered on 21 November 2000 in the *CAA and CGE v. Argentine Republic Case* (ARB/97/3), 6 ICSID Rep. 340, 358 (2002), **Exhibit-LE 32/3** (emphasis added).

<sup>853</sup> See Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 Duke L.J. 739, 764, **Exhibit-LE 26/23**.

<sup>854</sup> G. Alvarez & W. Reisman (eds.), *The Reasons Requirement in International Investment Arbitration* 16 (2008), **Exhibit-LE 35/6**.

<sup>855</sup> G. Alvarez & W. Reisman (eds.), *The Reasons Requirement in International Investment Arbitration* 16 (2008), **Exhibit-LE 35/6**.

<sup>856</sup> Petrova, *The ICSID Grounds for Annulment in a Comparative Perspective: Analysis and Recommendations for the Future*, 10 Vind J. Int'l Comm. L. & Arb. 287, 316 (2006) ("Unlike in *Klöckner I*, ad hoc committees should not have to automatically annul an award if a ground for annulment exists. ... **The committees should follow the two prong test in Mine [sic] under which the ad hoc committee first determines whether any ground for annulment exists, and then determines whether the parties were affected and evaluates the negative impact on the parties.**"), **Exhibit-LE 23/10** (emphasis added); *Annulment Decision dated 29 June 2005 CDC v. Republic of Seychelles* ICSID Case No. ARB/02/14, ¶¶66, 70 (2005) ("[*Klöckner and Amco*] have been criticized as too closely resembling the work of appellate bodies and thus going beyond the ambit prescribed for *ad hoc* Committees. ... the more recent practice among *ad hoc* Committees is to apply Article 52(1)(e) in such a manner that the Committee does not intrude into the legal and factual decision-making of the Tribunal."), **Exhibit-LE 35/7** (referred to by the GoS, see GoS Memorial, at para. 144).

<sup>857</sup> Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, Duke L.J. 739, 792 (1989), **Exhibit-LE 26/23**.

<sup>858</sup> See above at paras. 114-117, 122-128.

- c) The ABC Report Provided Extensive, Well-Considered and Erudite Analysis Which Fully Satisfied Any Conceivable Requirement for Reasons

744. Even apart from the foregoing considerations, there is no serious basis for concluding that the ABC Report did not satisfy any requirement for reasons which might conceivably be applicable in this case. To the contrary, the ABC Experts' work compared favorably to judgments of national courts, international arbitral tribunals and other decision-makers.

745. As discussed in the SPLM/A's Memorial, the ABC Report was a substantial document.<sup>859</sup> It consisted of a main text (which was 45 single spaced pages), together with five Appendices (which were in total another 206 single spaced pages) and several maps. The main body of the ABC Report set forth analyses of nine "Propositions" advanced by the parties (pages 12 to 20) and a series of related "Conclusions" by the Commission (pages 20 and 21), before providing the ABC Experts' "Final and Binding Decision" (pages 21 and 22).

746. The ABC Report included a number of attachments, consisting of a series of Maps and Appendices. "Map 1," which was titled "*The Abyei Area Boundaries*," delimited the ABC Experts' definition of the Abyei Area.<sup>860</sup> The Appendices to the ABC Report provided further historical and other detail regarding the ABC Experts' analysis. Among other things, the Appendices included evidence regarding historical land rights in Sudan (Appendix 2), summaries of the GoS and SPLM/A opening and closing presentations and their positions on the evidence (Appendix 3), transcripts of the interviews conducted in April and May 2005 (Appendix 4), documentary evidence reviewed by the ABC Experts in the British and other archives (Appendix 5) and evidence relating to maps reviewed by the ABC Experts (Appendix 6).

747. The ABC Report addressed the definition of the Abyei Area in the context of the issues and the evidence that had been presented by the parties. In particular, the ABC Experts explained that they had sought "to determine as accurately as possible the area of the nine Ngok Dinka Chiefdoms as it was in 1905."<sup>861</sup>

748. In order to do so, the ABC Report addressed nine separate Propositions which the Experts concluded had "emerged from the GoS and SPLM/A presentations and from the oral testimony."<sup>862</sup> The Report tested each of the nine Propositions by reference to "analysis based on relevant historical evidence."<sup>863</sup> The ABC Experts' discussion of these Propositions provided an intensively researched and expert analysis of the geographic scope of the Abyei Area and, in particular, "the area of the nine Ngok Dinka Chiefdoms as it was in 1905."<sup>864</sup> The ABC Experts' analysis of each of these Propositions was set forth *seriatum*, and their conclusions were then summarized (on pages 20 and 21).

749. The ABC Experts' responses to the nine Propositions provided a deductive resolution of what constituted the Abyei Area. That resolution rejected each party's most expansive claims (Propositions 2, 7 and 9) and instead relied upon a detailed discussion of land usage and other historical evidence to conclude that the Ngok Dinka and the Misseriya occupied

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<sup>859</sup> SPLM/A Memorial, at paras. 518-531, 643.

<sup>860</sup> Abyei Protocol, Art. 1.1.2, **Appendix C to SPLM/A Memorial**.

<sup>861</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>862</sup> ABC Report, Part I, at p. 12, **Appendix B to SPLM/A Memorial**.

<sup>863</sup> ABC Report, Part I, at p. 12, **Appendix B to SPLM/A Memorial**.

<sup>864</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

defined geographic areas, while also using one another's territories, particularly during seasonal migrations.<sup>865</sup>

750. Based on these conclusions, the ABC Report identified an area where the Ngok Dinka had (in 1905) "established dominant rights of occupation," as well as a further area ("between latitudes 10°10' N and 10°35' N") as to which both the Ngok Dinka and the Misseriya shared "secondary rights."<sup>866</sup> The ABC Experts separately noted that the area of shared rights which it had identified "closely coincides with the band of Goz, which a number of sources identify as the border zone between the Ngok and the Misseriya."<sup>867</sup> The ABC Report then relied on local principles of land law, and the "legal principle of the equitable division of shared secondary rights," which it concluded mandated division of the area of shared rights between the Ngok Dinka and the Misseriya.<sup>868</sup>

751. Having defined the Abyei Area, the Commission then set forth specific latitudinal and longitudinal lines defining the Abyei Area's geographic scope in a "Final and Binding Decision."<sup>869</sup> Those coordinates were then implemented on Map 1 (noted above), with the title "*Abyei Area Boundaries*."<sup>870</sup>

752. Viewed generally, it is clear that the ABC Experts diligently considered the parties' submissions, which were summarized in the ABC Report<sup>871</sup> and in Appendix 3, as well as in the nine Propositions. It is also clear that the ABC Experts considered the oral evidence with equal care, referring to this in the ABC Report<sup>872</sup> and in Appendix 4, as well as in the nine Propositions; likewise, the ABC Experts carefully addressed the documentary evidence and maps (again, referred to throughout the ABC Report<sup>873</sup> and detailed in Appendices 5 and 6). There certainly can be no suggestion that the ABC Experts did not devote thorough attention to all of the various types of evidence which they had gathered.

753. Also viewed generally, it is clear that the ABC Experts approached the issues logically and with great expertise. Even if one were to disagree with aspects of the ABC Report, it is impossible not to acknowledge that it represents a serious and scholarly effort to define and delimit the Abyei Area as defined in the Abyei Protocol. Equally, it is impossible not to acknowledge – again, even if one were to disagree with the substance of the ABC Experts' analysis – that the ABC Report sets forth detailed reasoning in support of the boundary of the Abyei Area delimited on Map 1.

754. This conclusion is enough to dispose of the Government's complaint that the ABC Experts did not provide a reasoned decision. It is obvious that the ABC Experts did not provide a "*total lack of reasons*"<sup>874</sup> or commit "*a failure to state any reasons*"<sup>875</sup> or provide absurd and nonsensical reasons. The Government may disagree with the ABC Experts'

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<sup>865</sup> ABC Report, Part I, at pp. 18-20, **Appendix B to SPLM/A Memorial**; ABC Report, Part II, App. 2, at pp. 21-26, **Exhibit-FE 15/1**.

<sup>866</sup> ABC Report, Part I, at p. 21-22, **Appendix B to SPLM/A Memorial**.

<sup>867</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial**.

<sup>868</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial**.

<sup>869</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial**.

<sup>870</sup> ABC Report, Part I, at p. 46, **Appendix B to SPLM/A Memorial**.

<sup>871</sup> ABC Report, Part I, at p. 11, **Appendix B to SPLM/A Memorial**; ABC Report, Part II, App. 3, at pp. 27-29, **Exhibit-FE 15/1**.

<sup>872</sup> ABC Report, Part I, at pp. 3, 9-11, **Appendix B to SPLM/A Memorial**.

<sup>873</sup> ABC Report, Part I, at pp. 4, 11-20, **Appendix B to SPLM/A Memorial**.

<sup>874</sup> J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶24-68 (2003), **Exhibit-LE 23/17**.

<sup>875</sup> GoS Memorial, at para. 164 (quoting "*Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, paras. 64-65, 6 *ICSID Reports*, p. 358").

conclusions and argumentation – perhaps even pretend to disagree vigorously – but the inescapable reality is that the ABC Report set forth detailed reasoning to support the ABC Experts’ decision. That satisfies any conceivable requirement for a reasoned decision.

d) The Government’s Two “Illustrations” of Inadequate Reasoning Are Misconceived and Irrelevant

755. Despite the obvious fact that the ABC Report was reasoned, the Government purportedly identifies “two illustrations” of the ABC Experts’ failure to provide adequate reasons: (a) the rejection of the Bahr el Arab as the northern boundary of the Abyei Area; and (b) the adoption of latitude 10°10’N as the southern boundary of the “shared secondary rights” area. The Government goes on to claim that “there are *crucial gaps in the argumentation* of the Experts both in their rejection of the GoS case and in the adoption of the 10°10’N line [sic].”<sup>876</sup>

756. Even on its face, this criticism of the ABC Experts’ reasoning is insufficient to warrant disregarding the ABC Report. The fact that there are “crucial gaps” in two of the multiple aspects of the ABC Report’s analysis is simply not a basis for concluding that the ABC Report may be disregarded. On the contrary, this amounts to exactly the sort of nit-picking disagreement with steps in a decision’s analysis that the requirement for a reasoned award – if it applied – would not permit.

757. As discussed above, it is fundamental under even those legal regimes that require reasoned awards (or do so in particular circumstances, such as when the parties have so required) that correct, good, persuasive or complete reasoning is not required:

“[w]here the grounds for the award must be stated, that does not mean that they must be well-founded in fact or law. A court reviewing the award to ensure that reasons have been given will not of course review the substantive findings of the award. *Thus, even grounds that are clearly wrong will satisfy the requirement that the arbitrators state the reasons for their award.*”<sup>877</sup>

Instead, “[a]ll that is necessary is that the arbitrators should set out what, on their view of the evidence, *did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is.* This is all that is meant by a ‘reasoned award.’”<sup>878</sup>

758. Similarly, in the context of international law, “[a reasoned award] need not be in meticulous detail; a statement indicating in a general way the legal reasons upon which the award is based will be valid and binding. The circumstance, however, that upon *certain aspects of the opinion reasons were lacking cannot reasonably be considered to result in the nullity of the entire decision.*”<sup>879</sup> Other authors concur: “[a] detailed justification of every premise, every step in a process of inference, and every subsidiary conclusion, is unfeasible.

<sup>876</sup> GoS Memorial, at para. 262 (emphasis added).

<sup>877</sup> E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶1395 (1999), **Exhibit-LE 23/2** (emphasis added).

<sup>878</sup> *Bremer Handelsgesellschaft v. Westzucker* [1981] 2 Lloyd’s Rep. 130, 132 *et seq.* (English Court of Appeal), **Exhibit-LE 35/8** (emphasis added).

<sup>879</sup> K. Carlston, *The Process of International Arbitration* 53 (1946, reprint 1972), **Exhibit-LE 27/24** (emphasis added).



Excluding *per curiam* decisions, which are a rare international phenomenon, *few, if any, international judgments and awards have been 'fully reasoned.'*<sup>880</sup>

759. Even if one assumed (contrary to fact) that there were gaps in the ABC Experts' reasoning, that does not mean that their Report was unreasoned or that it may be invalidated. Even if the ABC Experts' reasoning had "gaps," obvious errors or *non sequiturs*, it remained a reasoned decision and thus not subject, under even the Government's authorities, to invalidation.

- e) The Government's Complaints About the ABC Experts' Reasons Are Nothing More Than Objections to the Substance of the ABC Report

760. In any case, the two illustrations proffered by the Government do not advance, but instead frustrate, the GoS's complaints about a supposed lack of reasons. Those two illustrations demonstrate that the Government's objections in reality concern the substance of the ABC Experts' analysis and conclusions, and simply do not concern a purported lack of reasoning.

- (1) The ABC Experts' Analysis of Proposition 7 Was Careful, Complete and Correct

761. First, the Government argues that the ABC Experts' reasoning failed to explain their rejection of Proposition 7. According to the GoS Memorial, the ABC Experts wrongly concluded that references to the Bahr el Arab prior to 1908 should be understood as references to the Ngol/Ragaba ez Zarga,<sup>881</sup> and that, if "the Ragaba ez Zarga was the southern boundary of the Province of Kordofan in 1905, then the transferred area must have been south of the Ragaba ez Zarga."<sup>882</sup> Assuming this premise, the Government concludes, "[y]et the Experts provide no reason whatever for then abandoning that feature [presumably the Ngol/Ragaba ez Zarga] in favour of a line much further to the north."<sup>883</sup>

762. The Government incorrectly muddles three conceptually separate issues, which the ABC Report (correctly) distinguished: (a) the location of the putative provincial boundary between Kordofan and Bahr el Ghazal in 1905; (b) the location and boundaries of the Ngok Dinka territory that the Anglo-Egyptian administrators transferred to Kordofan in 1905; and (c) the location and boundaries of the territory that the Ngok Dinka used and occupied in 1905. If one (correctly) distinguishes these separate inquiries, rather than trying to confuse them, then there is no gap and no basis upon which to criticize the ABC Experts' reasoning.

763. The ABC Report identified these three distinct issues in its opening paragraph discussing Proposition 7, in the specific context of the claims put forward by the Government: (a) "that the southern boundary of Kordofan Province at the inception of the Anglo-Egyptian Condominium was the Bahr el-Arab River;"<sup>884</sup> (b) "that the only territory transferred to the administration of Kordofan Province in 1905 was [the] territory lying

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<sup>880</sup> W. Reisman, *Nullity and Revision* 618 (1971), **Exhibit-LE 35/9** (emphasis added), quoting this passage from Carlston, and describing it as the "moderate position" as opposed to those authors who "demand a complete statement of reasons," W. Reisman concludes that "[t]he moderate position is the more sensible." See W. Reisman, *Nullity and Revision* 618 (1971), **Exhibit-LE 35/9**.

<sup>881</sup> GoS Memorial, at para. 259.

<sup>882</sup> GoS Memorial, at para. 259.

<sup>883</sup> GoS Memorial, at para. 259.

<sup>884</sup> ABC Report, Part I, at p. 36, first paragraph, first sentence.

immediately to the south of the Bahr el-Arab, occupied by both Ngok and Twich Dinka;”<sup>885</sup> and (c) “that in 1905 Sultan Arop Biong, paramount chief of the Ngok Dinka, was living south of the Bahr el-Arab” and that the Ngok Dinka lived only south of the Kiir/Bahr el Arab.<sup>886</sup>

764. As to point (a), the location of the purported Kordofan/Bahr el Ghazal provincial boundary, the ABC Report notes documentary and cartographic evidence indicating that the boundary was considered to be the “Bahr el Arab” prior to 1905. In the ABC Experts’ words, “the evidence presented supporting the government’s interpretation of the 1905 boundary is strong.”<sup>887</sup>

765. At the same time, the ABC Report noted (correctly) that there was substantial geographic confusion precisely at the time of the 1905 transfer of the Ngok Dinka about the identity and location of the river labeled the “Bahr el Arab” and, therefore, about the location of the putative Kordofan/Bahr el Ghazal provincial boundary (which was often referred to as the “Bahr el Arab”). As a consequence of this geographic confusion, the ABC Experts concluded that in practice the Anglo-Egyptian administrators actually treated what was the Ngol/Ragaba ez Zarga as the boundary between Kordofan and Bahr el Ghazal: “the Ragaba ez-Zarga/Ngol, rather than the river Kir, which is now known as the Bahr el Arab, *was treated as the province boundary*.”<sup>888</sup>

766. The Government’s Memorial contends that the ABC Experts’ conclusion as to the location of the Bahr el Ghazal/Kordofan provincial boundary was wrong.<sup>889</sup> It nonetheless acknowledges that this supposed mistake is irrelevant to the question whether the ABC Report was reasoned (“*that is not the present point*”).<sup>890</sup>

767. Instead, as noted above, the Government contends that, having decided that the Bahr el Ghazal/Kordofan provincial boundary was the Ngol/Ragaba ez Zarga, the ABC Experts inexplicably ignored that boundary.<sup>891</sup> Again, even if this were correct, it would be a criticism of the substance of the ABC Experts’ decision, not a lack of reasoning. In any case, however, this criticism is also wrong substantively. To explain this, it is necessary to consider the remainder of the ABC Experts’ discussion of Proposition 7, and particularly points (b) and (c) above.

768. As to point (b) above, regarding the location of the Ngok Dinka territory that the Anglo-Egyptian administrators transferred to Kordofan in 1905, the ABC Experts rejected the Government’s argument that the Anglo-Egyptian administrators only transferred Ngok Dinka territory south of a known and defined boundary between Kordofan and Bahr el Ghazal provinces. Rather, the ABC Report emphasized the “geographical confusion at the time,”<sup>892</sup> the consequence of which was overall confusion as to the location of the provincial boundary

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<sup>885</sup> ABC Report, Part I, at p. 36, first paragraph, second sentence, second clause, **Appendix B to SPLM/A Memorial**.

<sup>886</sup> ABC Report, Part I, at p. 36, first paragraph, second sentence, first clause, **Appendix B to SPLM/A Memorial**.

<sup>887</sup> ABC Report, Part I, at p. 36, **Appendix B to SPLM/A Memorial**.

<sup>888</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>889</sup> GoS Memorial, at para. 259.

<sup>890</sup> GoS Memorial, at para. 259.

<sup>891</sup> GoS Memorial, at paras. 259.

<sup>892</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial**. The ABC Experts set forth two pages of discussion of this confusion, variously terming it “considerable geographical confusion” and “part of a general geographical confusion” and “geographical uncertainty.” See ABC Report, Part I, pp. 37-39, **Appendix B to SPLM/A Memorial**.

between Kordofan and Bahr el Ghazal (discussed in point (a) above). As a consequence, the ABC Experts took the view that, irrespective of geographic confusion regarding the precise location of the general provincial boundary, as a matter of fact “*the Ngok people were regarded as part of the Bahr el-Ghazal Province until their transfer in 1905.*”<sup>893</sup>

769. This conclusion is precisely correct. As discussed in the SPLM/A Memorial, and in greater detail below,<sup>894</sup> the specific instruments issued by the Anglo-Egyptian administration recording the transfer of the Ngok Dinka in 1905 said explicitly that the Ngok Dinka had been located in Bahr el Ghazal and were being transferred to Kordofan:

a. The 1905 Kordofan Annual Report provided that “[t]he Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei are now included in Kordofan *instead of the Bahr El Ghazal.*...”<sup>895</sup>

b. The 1905 Bahr el Ghazal Annual Report provided that “the territories of Sultan Rob ... *have been taken from this Province* and added to Kordofan.”<sup>896</sup>

770. Consequently, the ABC Experts rejected the Government’s argument “that the only territory transferred to the administration of Kordofan Province in 1905 was this territory lying immediately to the south of the Bahr el-Arab, occupied by both Ngok and Twich Dinka.”<sup>897</sup> Instead, the ABC Experts concluded that the Ngok Dinka had been treated by the Anglo-Egyptian administrators as part of Bahr el Ghazal, and transferred to Kordofan in 1905.

771. The ABC Experts then went on to examine the extent of the territory that the Ngok Dinka used and occupied in 1905 (point (c) above), in order to determine what area had been transferred by the Anglo-Egyptian administrators. In doing so, the ABC Experts were proceeding precisely in accordance with the plain language of the definition of the Abyei Area, which they had stated at the outset of the ABC Report was “*the area of the nine Ngok Dinka Chiefdoms as it was in 1905.*”<sup>898</sup> This is not only not a failure to provide reasons, but is a perfectly correct and well-reasoned decision – in striking contrast to the Government’s ill-articulated explanation of the putative defects in the reasoning of the ABC Report.

772. The Government condemns as erroneous<sup>899</sup> the ABC Experts’ interpretation of the Anglo-Egyptian administrators’ view of the territory that they transferred in 1905 (i.e., the ABC Experts’ view that “*the Ngok people were regarded as part of the Bahr el-Ghazal Province until their transfer in 1905*”<sup>900</sup>). Once again, that disagreement with the ABC Experts’ conclusions and interpretations is not grounds for challenging their Report as being unreasoned. It is a substantive disagreement that has no place in these proceedings.

773. As to point (c) above, being the extent of the territory that the Ngok Dinka used and occupied in 1905, the ABC Report (correctly) rejected the Government’s claim that the Ngok

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<sup>893</sup> ABC Report, Part I, p. 39, **Appendix B to SPLM/A Memorial**.

<sup>894</sup> See below at paras. 1485-1487. See also above at paras. 87-90.

<sup>895</sup> See SPLM/A Memorial, at paras. 346-357; see also Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13** (emphasis added).

<sup>896</sup> See SPLM/A Memorial, at paras. 346-357; see also Annual Report of the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13** (emphasis added).

<sup>897</sup> ABC Report, Part I, at p. 36, first paragraph, second sentence, second clause, **Appendix B to SPLM/A Memorial**.

<sup>898</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>899</sup> GoS Memorial, at paras. 258-259.

<sup>900</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial**.

Dinka only used and occupied territory south of the Kiir/Bahr el Arab. As discussed in detail below, this factual claim is absurd and was properly dismissed by the ABC Experts.<sup>901</sup>

774. The ABC Report reasoned “[e]vidence of *the Ngok presence north of the Bahr el Arab before 1905* is found in many of the same sources the Government of Sudan has cited to prove that they [the Ngok Dinka] were south of the river,”<sup>902</sup> and “[a]ll references before 1908 to ‘Sultan Rob’s’ northern boundary with the Arabs being the Bahr el-Arab now must be understood as meaning the Ragaba ez-Zarga/Ngol.”<sup>903</sup> (Although the Government’s Memorial attempts to confuse these issues (*see* GoS Memorial, paragraphs 258-259), the ABC Experts’ discussion of “*Sultan Rob’s northern boundary*” concerned the location of the Ngok Dinka’s territory as a geographic matter in 1905 (e.g., it extended north of the Bahr el Arab), and not the location of the provincial boundary. Based on this analysis, and subsequent discussion under Propositions 8 and 9, the ABC Experts then proceeded to delimit the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 to include significant territory north of the Kiir/Bahr el Arab.<sup>904</sup>

775. Although the foregoing historical and geographical issues were factually complex, the ABC Report dealt coherently and logically with these issues. That is apparent from even a minimally careful reading of the Report.

776. In any case, the ABC Experts’ reasoning is entitled to a very substantial measure of deference and benefit of the doubt. As discussed above, it is illegitimate to read an award or other adjudicative decision with a view to finding fault or inconsistencies.<sup>905</sup> Rather, a decision must be read with a view towards, if at all possible, upholding it. Here, even if one thought that the ABC Experts’ reasoning could be improved, there are no conceivable grounds for reading it to produce defects or gaps, rather than to make sense.

777. In sum, the Government’s criticisms of the ABC Experts’ analysis of Proposition 7 are disagreements with the substance of the ABC Report. As detailed below, those criticisms are themselves substantively wrong and confused. More fundamentally, for present purposes, the GoS’s complaints do not remotely rise to the level of a lack of reasoning.

(2) The ABC Experts’ Analysis of Proposition 8 Was Careful, Complete and Correct

778. The Government also attacks the ABC Experts’ analysis of Proposition 8, arguing that “[t]here is simply no justification for latitude 10°10’N in [the ABC Experts’] Report.”<sup>906</sup> According to the GoS, there is “not a single reference to latitude 10°10’N, in the Report or in the relevant Appendices”<sup>907</sup> and the ABC Experts did not attempt to “confirm[] the positions of the[] [Ngok Dinka] villages” to which they referred.<sup>908</sup>

779. The Government’s criticism is again unreflective and wrong, constituting at best an ill-founded disagreement with the substance of the ABC Report. The GoS’s criticism ignores the ABC Experts’ specific attention to precisely the issue of ascertaining the limits of the

<sup>901</sup> See below at paras. 875-876, 885-1066.

<sup>902</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>903</sup> ABC Report, Part I, at p. 40, **Appendix B to SPLM/A Memorial**.

<sup>904</sup> ABC Report, Part I, at pp. 39-45, **Appendix B to SPLM/A Memorial**.

<sup>905</sup> See above at paras. 640-644.

<sup>906</sup> GoS Memorial, at para. 260.

<sup>907</sup> GoS Memorial, at para. 261.

<sup>908</sup> GoS Memorial, at para. 261.

Ngok Dinka territory in 1905, despite a general paucity of historical materials and reliable oral testimony. When the ABC Experts' actual words and analysis are considered, it is impossible to fault their conclusions – much less to characterize them as unreasoned or having some logical “gap.”

780. The ABC Experts' discussion of Proposition 8 followed from their treatment of Proposition 7 (discussed immediately above) and addressed the extent of the territory used and occupied by the nine Ngok Dinka Chiefdoms in 1905. In answering this question, the ABC Experts forthrightly acknowledged the evidentiary obstacles they faced: “We do not have a detailed and systematic description of Ngok settlement and land use patterns throughout the Condominium period” and “[t]here is, as yet, no clear independent evidence establishing the northern-most boundary of the area either settled or seasonally used by the Ngok.”<sup>909</sup>

781. In the face of these obstacles, the ABC Experts observed that “there is general agreement from other sources ... that the band of Goz intervening between the Humr permanent territory and the Ngok permanent settlements is settled by nobody; that it is an area to be traversed, rather than occupied; and that there is regular seasonal use of the Goz by both peoples.”<sup>910</sup> The ABC Experts also observed that the *goz* lay between latitudes 10°10'N and 10°35'N: “the Goz belt is roughly contained within these limits.”<sup>911</sup>

782. When the Government claims, therefore, that there is “not a single reference to latitude 10°10'N, in the Report or in the relevant Appendices,”<sup>912</sup> and that “there is no evidence supporting the 10°10'N parallel,”<sup>913</sup> its statements are demonstrably wrong. The Government presumably does not agree with the substance of the ABC Experts' analysis (although, since the GoS Memorial does not address it, one can only speculate). But that disagreement ignores the inescapable fact that the ABC Report *expressly equates latitude 10°10'N with the southern border of what it describes as the goz.*

783. Likewise, the ABC Report accepts both the Ngok and Misseriya secondary rights to areas between latitudes 10°10'N and 10°35'N, and explains why the character of the *goz* (uninhabited; not occupied) makes it an appropriate boundary strip. Having reached this conclusion, the ABC Experts then reasoned that, given the parties' equal secondary rights in the *goz*, it was appropriate to divide that area equally between the two parties (with the boundary drawn at 10°22'30''N).

784. One may not agree that the actual *goz* is uninhabited or uninhabitable, or that the *goz* starts or ends at latitudes 10°10'N and 10°35'N, or even that the *goz* is an appropriate boundary area. But it is impossible credibly to assert that the ABC Report does not make any reference to 10°10'N or that the equal division of the *goz*, located between latitudes 10°10'N and 10°35'N, between the parties does not provide a reasoned explanation for why latitude 10°22'30''N is the northern boundary of the Ngok Dinka's primary rights. And, of course, disagreements about the significance or location of the *goz* are matters of substance and fact-finding, not relevant to the question whether or not the ABC Report was reasoned.

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<sup>909</sup> ABC Report, Part I, at p. 43, **Appendix B to SPLM/A Memorial.**

<sup>910</sup> ABC Report, Part I, p. 43, **Appendix B to SPLM/A Memorial.**

<sup>911</sup> ABC Report, Part I, p. 44, **Appendix B to SPLM/A Memorial.**

<sup>912</sup> GoS Memorial, at para. 261.

<sup>913</sup> GoS Memorial, at para. 261.

785. In sum, the Government’s complaint that the ABC Experts exceeded their mandate by not making a reasoned award is absurd. That is true for multiple reasons: (a) there is no general, mandatory principle of international law requiring that arbitral awards, much less decisions like the ABC Experts’ boundary determination, must be reasoned as a condition of validity; (b) the violation of any putative mandatory requirement for reasoning would not be an excess of mandate; (c) the violation of any requirement for reasoning would not be grounds for invalidating or disregarding the ABC Report; (d) any requirement for reasoning would be extremely deferential, fully satisfied by the carefully reasoned and erudite ABC Report; and (e) the Government’s putative complaints about the ABC Experts’ reasoning on Propositions 7 and 8 in the ABC Report are misconceived, both in the standards they apply and their unsustainable efforts to misread and/or oversimplify the ABC Report.

4. The Government’s Complaints About the ABC Experts’ Purported “Equitable” or “Ex Aequo Et Bono” Decision Are Frivolous

786. The Government also complains, in three paragraphs, that the ABC Experts rendered a decision *ex aequo et bono* or, alternatively, a decision taken “equitably,” and that this violated their mandate. This complaint supposedly arises in a statement from the ABC Report to the effect that “[t]he two parties lay equal claim to the shared areas and accordingly it is reasonable and equitable to divide the Goz between them.”<sup>914</sup> The Government argues that this finding violated “mandatory criteria” that supposedly forbid *ex aequo et bono* decisions (absent express consent).<sup>915</sup> According to the Government, “by dividing the Goz on an ‘equitable’ basis ... , the Experts completely disregarded, and thereby exceeded, their mandate.”<sup>916</sup>

787. The Government’s argument is frivolous. The ABC Experts manifestly did not render an *ex aequo et bono* decision and, in any case, there was no prohibition against the ABC Experts rendering such a decision if they concluded it was necessary and appropriate.

a) The ABC Experts Did Not Render An *Ex Aequo Et Bono* Decision

788. The Government’s quotation of the ABC Experts’ decision regarding the division of the *goz* makes no reference to the discussion of that issue in the ABC Report. That omission is in stark contrast to the Government’s effort in the immediately preceding sections of its Memorial to attempt minutely to dissect the reasoning of the ABC Experts. In any case, when the omitted materials are considered, it is clear that the Government’s claim that the ABC Experts rendered an *ex aequo et bono* decision is baseless.

789. Preliminarily, the GoS does not suggest that the entire ABC Report was an *ex aequo et bono* decision. Rather, the Government alleges only that the *goz*, at the northern boundary of the Abyei Area, was divided 50/50 between the parties and that this “equitable” division constitutes an *ex aequo et bono* decision by the ABC Experts.<sup>917</sup> This claim is spurious.

790. The basis for the ABC Experts’ division of the *goz* is set forth in the discussion under Propositions 8 and 9, and Appendix 2 (not mentioned in the Government’s *ex aequo et bono*

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<sup>914</sup> GoS Memorial, at para. 264.

<sup>915</sup> GoS Memorial, at paras. 166-176, 263.

<sup>916</sup> GoS Memorial, at para. 265.

<sup>917</sup> GoS Memorial, at paras. 264-265.

analysis). When the ABC Report's treatment of these issues is considered with even minimal care, it is clear that the ABC Experts did not adopt an *ex aequo et bono* decision, either generally or with regard to the *goz* specifically.

791. In Proposition 8, the ABC Experts concluded that the area of the *goz* (between latitudes 10°10'N and 10°35'N) was used on a seasonal basis ("secondary rights") by both the Ngok Dinka and the Misseriya.<sup>918</sup> The ABC Report reasoned that "[f]urther to the north [i.e., in the *goz*], **the two communities exercised equal** secondary rights to use of the land on a seasonal basis."<sup>919</sup>

792. In Proposition 9, the ABC Experts reasoned both that "[t]he area between latitudes 10°10'N and 10°35'N ... represents the area of secondary rights shared between the Ngok and Misseriya"<sup>920</sup> and "[b]ased on **the legal principle of the equitable division of shared secondary rights**, therefore, the northern boundary [of the Abyei Area] should fall within the zone between latitudes 10°10'N and 10°35'N."<sup>921</sup> The ABC Report went on, given the parties' "**equal** secondary rights" of seasonal usage, to "place the boundary at 10°22'30"N, so as to **bisect equally** the band between latitudes 10°10'N and 10°35'N."<sup>922</sup> The ABC Experts also reasoned that "the border zone between the Ngok and Misseriya falls in the middle of the *Goz*, roughly between latitudes 10°10' N and 10°35' N."<sup>923</sup>

793. The ABC Experts also addressed the subject of land rights in Appendix 2. That Appendix distinguished between "land rights" and "land ownership," and identified three categories of "land rights:" (a) dominant occupation leading to "**exclusive rights**;" (b) dominant occupation leading to **non-exclusive "primary" or "secondary" rights**; and (c) "**shared secondary**" rights in boundary areas (e.g., the *goz*).<sup>924</sup> Based on admittedly limited evidence as to the legal regime applicable in 1905 Sudan, Appendix 2 concluded that "the implication of all of the above is that the **principles of equity, substantive justice and fairness shall guide the drawing of the line(s) within the territory of shared secondary rights**."<sup>925</sup>

794. The ABC Experts' division of the area it defined as the *goz* between the parties in this manner was plainly not a decision *ex aequo et bono*. Rather, the ABC Experts first carefully delimited a particular region (between latitudes 10°10'N and 10°35'N) as to which a particular category of legal rights ("**shared secondary rights**," as opposed to "primary" or "exclusive" rights) were enjoyed in "equal" measure by the Ngok Dinka and the Misseriya. It was only the ABC Experts' decision as to this specifically defined area, with specifically-defined characteristics, about which the Government complains.

795. Moreover, the ABC Experts made their decision with regard to the area they defined as the *goz* only after they had determined that in fact the Ngok Dinka and the Misseriya possessed "**equal** secondary rights" of seasonal usage,<sup>926</sup> leading the Experts to adopt a line that "bisect[ed] **equally**" the *goz*. In these circumstances, where two parties enjoy "equal" rights to the same territory, it is not a decision *ex aequo et bono* to divide the territory

<sup>918</sup> ABC Report, Part I, at pp. 18-19, 43-44, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>919</sup> ABC Report, Part I, at p. 19, 43-44, **Appendix B to SPLM/A Memorial**.

<sup>920</sup> ABC Report, Part I, at p. 19, **Appendix B to SPLM/A Memorial**.

<sup>921</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>922</sup> ABC Report, Part I, at p. 45, **Appendix B to SPLM/A Memorial**.

<sup>923</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial**.

<sup>924</sup> ABC Report, Part II, App. 2, at pp. 24-25, **Exhibit-FE 15/1**.

<sup>925</sup> ABC Report, Part II, App. 2, at p. 26, **Exhibit-FE 15/1** (emphasis added).

<sup>926</sup> ABC Report, Part I, at pp. 19, 43-44, **Appendix B to SPLM/A Memorial** (emphasis added).

“equally” between them. Rather, that is simply a decision made on the basis of the two parties’ respective, and equal, historical use of and rights to the same territory.

796. Furthermore, the ABC Report relied expressly on what it considered to be a legal principle mandating this equal division: “*the legal principle of the equitable division of shared secondary rights*,”<sup>927</sup> which the ABC Experts had referred to in Appendix 2.<sup>928</sup> The correctness of the ABC Experts’ understanding of the law of Sudan (and other areas of Africa) in 1905 is neither here nor there for these purposes; what is important is that the ABC Experts sought to resolve the question of the parties’ rights to the area that they defined as the *goz* by reference to specified legal principles.

797. Even if the ABC Experts erred in their understanding or application of those legal principles, they plainly did not render a decision *ex aequo et bono*; rather, they applied what they took to be the law to a very carefully defined circumstance of shared and equal secondary rights in a specific territory. That is in no way a decision *ex aequo et bono*; it was a wise resolution of a problem, based on a careful appreciation of those facts that could be ascertained and analysis of that law which could be identified. Indeed, it stretches the limits of credulity for the Government to claim that a decision-maker who has specifically invoked and applied legal principles in circumstances such as these has really somehow made an *ex aequo et bono* decision.

- b) Even if the ABC Experts Had Relied Upon General Principles of Equity, Their Determination Would Not Have Been An *Ex Aequo Et Bono* Decision

798. Even if one put aside the fact that the ABC Experts specifically cited and applied a defined legal principle to a particular and carefully defined set of facts, it would be impossible to regard the ABC Report as making an *ex aequo et bono* decision. Rather, even if the ABC Experts had relied upon general principles of equity or fair dealing alone, without reference to any legal system or legal rule, this would not convert their decision into an *ex aequo et bono* decision.

799. It is beyond dispute that principles of equity are an important aspect of the system of international law which arbitral tribunals and other decision-makers are fully entitled to consider and apply.<sup>929</sup> There is no mention of equity in Article 38(1) of the ICJ Statute, but it is clear that “the absence of an express authorization to apply equity does not necessarily

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<sup>927</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial**.

<sup>928</sup> ABC Report, Part II, App. 2, at pp. 24-25, **Exhibit-FE 15/1**.

<sup>929</sup> See, e.g., H. Lauterpacht, *Private Law Sources and Analogies of International Law* 65 (1927) (“Rules of equity are rules of law both in municipal law and in international arbitration.”), **Exhibit-LE 35/10**; C. de Visscher, *De l’Equité Dans le Règlement Arbitral ou Judiciaire des Litiges de Droit International Public* 17 (1972) (“Since equity is inherent in a good application of the law, the international judge applies frequently equitable considerations even when the arbitration agreement does not mention equity.”), **Exhibit-LE 35/11**; Francioni, *Equity in International Law* in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* ¶¶5 *et seq* (2008), available at [www.mpepil.com](http://www.mpepil.com) (setting out authority that equity is “a material component of the category of general principles of law” and stating “another uncontroversial role that equity may play in international law is that of an instrumental criterion of interpretation of the applicable law in order to adapt such law to the specific circumstances of the case.”), **Exhibit-LE 35/12**; see *Judgment of the Ad Hoc Committee of 16 May 1986 on the Application for Annulment Submitted by the Republic of Indonesia Against the Arbitral Award Rendered on 20 November 1984 in Amco Asia v. Indonesia*, 1 ICSID Rep. 509, 517 (1993) (“Equitable considerations may indeed form part of the law to be applied by the Tribunal”), **Exhibit-LE 23/8** (emphasis added); Jenks, *Equity as a Part of the Law Applied by the Permanent Court of International Justice*, L.Q.R. 519, 523 (1937) (“Principles of equity have long been considered to constitute a part of international law, and a sharp division between law and equity such as prevails in the administration of justice in some States should find no place in international jurisprudence.”), **Exhibit-LE 35/13**.



mean that an international tribunal is forbidden to apply equity.”<sup>930</sup> Indeed, the ICJ and other international tribunals have long drawn on principles of equity (as distinct from rendering decisions *ex aequo et bono*) in determining disputes in accordance with international law,<sup>931</sup> particularly in the context of boundary disputes.<sup>932</sup>

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<sup>930</sup> Akehurst, *Equity and General Principles of Law*, 25 Int'l & Comp. L.Q. 801 (1976), **Exhibit-LE 35/14**; C. Rossi, *Equity and International Law: A Legal Realist Approach to International Decision-Making* 250 (1993) (“Although Article 38 makes no mention of equity as one of the law-creating sources to be applied by judges, equity is a source of international law – more specifically, a general principle of law – because judges choose to employ it, and have always employed it, as such.”), **Exhibit-LE 35/15**.

<sup>931</sup> *Judgment of 28 June 1937, The Separate Opinion of Judge Hudson in The Diversion of Water from the Meuse*, PCIJ Ser. A/B 4, 76 (P.C.I.J. 1937) (“What are widely known as **principles of equity have long been considered to constitute a part of international law**, and as such they have often been applied by international tribunals.”), **Exhibit-LE 35/16** (emphasis added); Goldie, *Equity and the International Management of the Transboundary Resources*, 25 Nat. Resources J. 665, 666 (1985) (“Equity and general principles of law recognized by civilized nations are sources of rules of decision by the ICJ and are authoritatively provided for in Article 38.1.c of the Court’s Statute”), **Exhibit-LE 35/17**; Akehurst, *Equity and General Principles of Law*, 25 Int'l & Comp. L.Q. 801, 808 (1976) (“To a large extent the question whether equity is a formal source of international law is a purely verbal question; whichever way the question is answered, it is an undeniable fact that international tribunals often apply equity.”), **Exhibit-LE 35/14**; Cheng, *Justice and Equity in International Law* in G. Keeton & G. Schwarzenberger (eds.), *Current Legal Problems* 185, 210 (1955), **Exhibit-LE 35/18**; C. de Visscher, *De l’Equité Dans le Règlement Arbitral ou Judiciaire des Litiges de Droit International Public* 17 (1972) (“Since equity is inherent in a good application of the law, the international judge applies frequently equitable considerations even when the arbitration agreement does not mention equity.”), **Exhibit-LE 35/11**.

<sup>932</sup> K. Kaikobad, *Interpretation and Revision of International Boundary Decisions* 314 (2007) (“In general terms, there can be absolutely no doubt that equitable considerations play an important part in the delimitation of boundaries, both land and maritime. Although the notion of equitable principles and considerations, and the formula of ‘equitable solution’ gained enormous currency in the context of maritime delimitation ... it needs to be emphasised that equity and equitable considerations generally constitute the bedrock of the law of title to territory and boundary delimitation.”), **Exhibit-LE 35/19**; C. de Visscher, *De l’Equité Dans le Règlement Arbitral ou Judiciaire des Litiges de Droit International Public* 102 (1972) (“The role of equity has been important in several arbitral proceedings regarding boundary delimitation. On the one hand, this is because of the insufficiency of the legal grounds contained in the terms of the parties’ arbitration agreements; on the other hand, because of the subject matter of the dispute itself which generally concerns compensation, exchange or reassignment of territory. For this reason, equitable considerations feature in a number of arbitration agreements concerning such matters”), **Exhibit-LE 35/11**; W. Reisman, *Nullity And Revision* 565 (1971) (“Equity or public policy has been a recurrent feature of international adjudication. Despite few specific references to its operation, careful examination of any decision will reveal its impact.”), **Exhibit-LE 35/9**.

800. Commentators on international law have long drawn a distinction between “equity” and “*ex aequo et bono*.”<sup>933</sup> Equity in its broadest sense can be used to perform three main functions: (i) to fill the gaps in the law (equity *praeter legem*); (ii) to justify a refusal to apply unjust laws (equity *contra legem*); and (iii) to adapt the law to the facts of individual cases (equity *infra legem*).<sup>934</sup> In particular, “[a]ll authors admit that an international tribunal can apply equity *infra legem*, even if it is not expressly authorised to do so.”<sup>935</sup>

801. In his Report to the ILC in connection with the Draft ILC Convention on Arbitral Procedure, the Special Rapporteur confirmed that “[a] decision in equity is always justified.”<sup>936</sup> Similarly, another author notes that:

***“To the extent that the law is linked to a search for justice, equity is inherent in its application. It intervenes particularly as a source of guidance and inspiration, to***

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<sup>933</sup> See, e.g., H. Lauterpacht, *The Function of Law in the International Community* 313-314 (1933) (“The authorization to decide *ex aequo et bono* – clearly to be distinguished from the clause instructing the Tribunal to decide on the basis of equity.”), **Exhibit-LE 35/20** (emphasis added); H. Lauterpacht, *Private Law Sources and Analogies of International Law* 63 (1927) (“It would be a grave mistake to assume that in all those cases in which, in contradistinction to rules of international law proper, rules of ‘justice,’ of ‘equity,’ and of ‘general principles of law’ are resorted to, the field of judicial settlement is abandoned, and a settlement *ex aequo et bono* on a non-judicial basis adopted.”) and at 65 (“some arbitrators refuse to accept this term [the rules of equity] in its technical meaning as understood in the English-American jurisprudence, **they never confuse it with a settlement *ex aequo et bono***”), **Exhibit-LE 35/10** (emphasis added); Janis, *The Ambiguity of Equity in International Law*, 9 Brook J. Int’l L. 7, 9 (1983) (“The first distinction of traditional doctrine considers the difference between ‘equitable principles’ and ‘*ex aequo et bono*’”), **Exhibit-LE 35/21**; Janis, *Equity and International Law: the Comment in the Tentative Draft*, 57 Tul. L. Rev. 80, 82 (1982-1983) (“equity as a general principle is distinguished from *ex aequo et bono*.”), **Exhibit-LE 36/1**; Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today in Livre du Centenaire 1873-1973: Evolution et perspectives du droit international* 196, 325-326 (1973) (in proposing a body to work out what are the “general principles of law”, the author refers to “the principles and rules of equity that would be suitable for application in the international field – **not on a basis *ex aequo et bono* but as legal principles that must enter every decision of an international tribunal.**”), **Exhibit-LE 36/2** (emphasis added); Chattopadhyay, *Equity in International Law: Its Growth and Development*, 5 Ga. J. Int’l & Comp. L. 381, 385 (1975) (“the differences between the ‘meaning’ of equity and equity in the context of *ex aequo et bono* should be maintained” referring to Lauterpacht, op cit.), **Exhibit-LE 36/3**; M. Hudson, *The Permanent Court of International Justice, 1920-1942 A Treatise* 619 (1943) (“Decisions applying the international law which includes equity, as in the *Meuse* case, are not to be confused with decisions *ex aequo et bono* which may be given by the Court.”), **Exhibit-LE 36/4**; see also one of the Government’s own sources of authority: *Judgment of the Ad Hoc Committee of 16 May 1986 on the Application for Annulment Submitted by the Republic of Indonesia Against the Arbitral Award Rendered on 20 November 1984 in Amco Asia v. Indonesia*, 1 ICSID Rep. 509, 517 (1993) (“The ad hoc Committee thus believes that **invocation of equitable considerations is not properly regarded as automatically equivalent to a decision *ex aequo et bono*.**”), **Exhibit-LE 23/8** (emphasis added).

<sup>934</sup> M. Miyoshi, *Considerations of Equity in the Settlement of Territorial Boundary Disputes* 12 (1993), **Exhibit-LE 36/5**; M. Shaw, *International Law* 99 in fn. 135 (2003), **Exhibit-LE 36/6**; Janis, *The Ambiguity of Equity in International Law*, 9 Brook J. Int’l L. 7, 12 (1983), **Exhibit-LE 35/21**; Akehurst, *Equity and General Principles of Law*, 25 Int’l & Comp. L.Q. 801 (1976), **Exhibit-LE 35/14**; Grauer, *The Role of Equity in the Jurisprudence of the World Court*, 37 University of Toronto Faculty of Law Rev. 101, 102 (1979), **Exhibit-LE 36/7**.

<sup>935</sup> Akehurst, *Equity and General Principles of Law*, 25 Int’l & Comp. L.Q. 801, 802 (1976), **Exhibit-LE 35/14**; see also Sohn, *Arbitration of International Disputes Ex aequo et bono in International Arbitration Liber Amicorum for Martin Domke* 332 (1967) (“[A]pplication of equity *infra legem* ... simply means that a judge or an arbitrator has a certain amount of discretion in interpreting the law, in clarifying obscurities and in filling minor gaps in the law. When a judge or an arbitrator applies equity in this manner, he keeps within the bounds of international law; **there is no special need to authorize him explicitly to apply equity.**”), **Exhibit-LE 36/8** (emphasis added); Francioni, *Equity in International Law* in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* ¶¶2 (2008), available at [www.mpepil.com](http://www.mpepil.com), **Exhibit-LE 35/12**; J. Müller & L. Wildhaber, *Praxis des Völkerrechts* 322 (3d ed. 2001) (“**Even without such authorization, an international court may refer to equity** when interpreting and applying international public law (equity *infra* or *intra legem*)”), **Exhibit-LE 36/9** (emphasis added).

Indeed, the ICSID Convention, on which the GoS relies, implicitly provides for the application of *equity infra legem*. Article 42(2) of the Convention provides that “[t]he Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.” See ICSID Convention, Art. 42(2), **Exhibit-LE 23/3**.

<sup>936</sup> Report of G. Scelle, special rapporteur on arbitral procedure to the ILC Commission, Yearbook of The International Law Commission, 1950 (UN Doc. A/CN. 4/18), Vol. II, 149 (1950) **Exhibit-LE 36/10**.

*assist in the application of an abstract rule to concrete facts. Thus, [equity] constitutes both the finality and the means by virtue of which the law applies in practice.*<sup>937</sup>

802. While “the precedents or authorities that might be relied upon to evidence or confirm the existence of Equity as an operational principle of International Law are relatively few and far between,”<sup>938</sup> there are a number of cases in which the ICJ and other international tribunals have applied “equity” even in the absence of any provision in the *compromis* so authorizing. In addition, the authorities clearly distinguish between principles of equity and a decision *ex aequo et bono*:

a. In the *Water of the Meuse* case, Judge Hudson provided what is perhaps the most oft-cited dicta relating to the use of equity (as distinct from a decision *ex aequo et bono*). Judge Hudson’s separate Opinion concurred with the Court’s judgment in relation to the Netherlands’ claims regarding construction of certain canal works by Belgium and the use by Belgium of water from the Meuse. At the same time, Judge Hudson made the following observations on the role of equity in general in international law (and as explaining the judgment of the Court):

“What are widely known as *principles of equity have long been considered to constitute a part of international law*, and as such they have often been applied by international tribunals. ... The Court has not been expressly authorized by its Statute to apply equity as distinguished from law. Nor, indeed, does the Statute expressly direct its application of international law, though as has been said on several occasions the Court is ‘a tribunal of international law’ [citing authorities]. Article 38 of the Statute expressly directs the application of “general principles of law recognized by civilized nations”, and in more than one nation principles of equity have an established place in the legal system. The Court’s recognition of equity as a part of international law is in no way restricted by the special power conferred upon it ‘to decide a case *ex aequo et bono*, if the parties agree thereto’. ... It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, *the Court has some freedom to consider principles of equity as part of the international law which it must apply*. ... [I]n a proper case, and with scrupulous regard for the limitations which are necessary, *a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.*”<sup>939</sup>

b. In the *Cayuga Indians* case, Great Britain, on behalf of the Cayuga Nation of Indians of Canada, made certain claims before an *ad hoc* tribunal against the United States pursuant to various treaties entered into between the U.S. and the “Cayuga Nation.” The tribunal held as “a matter of justice” that the Canadian Cayugas could maintain an alternative claim and that there were “special circumstances making the equitable claim of the Canadian Cayugas especially strong.”<sup>940</sup> It reasoned:

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<sup>937</sup> P.-M. Dupuy, *Droit international public* ¶354 (2008), **Exhibit-LE 30/6**.

<sup>938</sup> McWhinney in R. Newman (ed.), *Equity in International Law in Equity in the World’s Legal Systems: A Comparative Study* 581 (1973), **Exhibit-LE 36/11**.

<sup>939</sup> *Judgment of 28 June 1937, The Separate Opinion of Judge Hudson in The Diversion of Water from the Meuse*, PCIJ Ser. A/B 4, 76 *et seq.* (P.C.I.J. 1937), **Exhibit-LE 35/16** (emphasis added).

<sup>940</sup> *Cayuga Indians (Great Britain) v. United States, Award dated 22 January 1926*, VI R.I.A.A. 173, 177, 179 (1926), **Exhibit-LE 36/12**.

“[A]rt. 38 of the Statute of the Permanent Court of International Justice (1920) provides specially that the Court may decide *ex aequo et bono*, if the parties agree thereto. As Anzilotti points out, however, that much-criticized provision is meant for cases such as we have seen above, which call, not for principles of equity, but for a degree of compromise (Anzilotti, *Corso di diritto internazionale*, 64 (1923)). Such a power is not necessarily non-judicial... ***But it is a different thing from what we invoke in the present case, namely, general and universally admitted principles of justice and right dealing, as against the harsh operation of strict doctrines of legal personality*** in an anomalous situation for which such doctrines were not devised and the harsh operation of the legal terminology of a covenant which the covenantees had no part in framing and no capacity to understand.”<sup>941</sup>

A leading author concludes in relation to the *Cayuga Indians* case that “the equitable motives of the award were as manifest as its technical errors of law”<sup>942</sup> and also notes that while the U.S. protested the decision, it nevertheless complied with it.<sup>943</sup> Another author cites the decision as “illustrat[ing] one of the main propositions of this monograph namely that ***rules of equity are identical with legal rules proper***.”<sup>944</sup>

c. In *The Guiana Boundary* case determining the frontier between Brazil and British Guiana, the King of Italy held that neither party had established rights of sovereignty over the whole of the territory in dispute, but only certain portions of that territory.<sup>945</sup> In his award, the King of Italy held that “it is not possible to divide the contested territory into two parts equal as regards extent and value, but that it is necessary that it should be divided in accordance with the lines traced by nature, and that the preference should be given to a frontier which... ***lends itself to a fair decision of the disputed territory***.”<sup>946</sup>

d. In the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, relied on by the GoS,<sup>947</sup> the Court was called upon to decide on a boundary dispute between El Salvador and Honduras. From the historical documents, the *uti possidetis* boundary could not be determined. The court therefore relied on equity *infra legem*. The court stated:

“In these circumstances, being satisfied that the line of *the uti possidetis juris* in this area is impossible to determine, ***the Chamber considers it right to fall back on equity infra legem, in conjunction with the unratified delimitation***

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<sup>941</sup> Award dated 22 January 1926, *Cayuga Indians (Great Britain) v. United States*, VI R.I.A.A. 173, 183 (1926), **Exhibit-LE 36/12** (emphasis added).

<sup>942</sup> W. Reisman, *Nullity and Revision* 567 (1971), **Exhibit-LE 35/9**.

<sup>943</sup> W. Reisman, *Nullity and Revision* 567-568 (1971), **Exhibit-LE 35/9**.

<sup>944</sup> H. Lauterpacht, *Private Law Sources and Analogies of International Law* 286 (1927), **Exhibit-LE 35/10** (emphasis added).

<sup>945</sup> Award dated 6 June 1904, *The Guiana Boundary case (Brazil, Great Britain)* XI R.I.A.A. 11, 21-22 (1904). The King of Italy was directed to “ascertain all facts which he deems necessary to a decision of the controversy, and shall be governed by such principles of international law as he shall determine to be applicable to the case.” Award dated 6 June 1904, *The Guiana Boundary case (Brazil, Great Britain)* XI R.I.A.A. 11, 18 (1904), **Exhibit-LE 36/13**.

<sup>946</sup> Award dated 6 June 1904, *The Guiana Boundary case (Brazil, Great Britain)*, XI R.I.A.A. 11, 22 (1904), **Exhibit-LE 36/13** (emphasis added).

<sup>947</sup> See GoS Memorial, at para. 168 (see accompanying footnote, citing to this case in support of its conclusion that Article 38(2) of the ICJ Statute provides for a decision *ex aequo et bono* only with the consent of the parties. As discussed elsewhere in this Memorial, Article 38(2) of the ICJ Statute does not evidence some mandatory rule of law as regards decisions *ex aequo et bono*).

*of 1869* .... the Chamber has no doubt that it is equitable, as a corollary, to allow the 1869 agreement to take effect on this specific point.”<sup>948</sup>

e. In the *Rann of Kutch* arbitration, the tribunal agreed with the parties that “**equity forms part of International Law**,”<sup>949</sup> and determined that “the Parties are free to present and develop their cases with reliance on principles of equity”<sup>950</sup> although the parties’ *compromis* made no such allowance. In its conclusions regarding the allocation of the territory of two deep inlets, the tribunal, awarding the territory to Pakistan, concluded that:

“it would be inequitable to recognize these inlets as foreign territory. It would be conducive to friction and conflict. **The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such.**”<sup>951</sup>

803. Applying these principles in the present case, it would be impossible to conclude that a decision by the ABC Experts based merely on principles of equity (as opposed to the legal principles cited and relied upon by the ABC Report) would have been an excess of mandate or improper. Rather, as all the foregoing authorities conclude, equity is a general principle of law, distinguishable from an *ex aequo et bono* decision, which may properly be applied by an international tribunal even without express or specific consent by the parties.

804. Here, the Government alleges only that the ABC Experts adopted a 50/50 “equitable” division between the parties of the area described by the ABC Experts as the *goz* and that this division constitutes an unauthorized *ex aequo et bono* decision.<sup>952</sup> Even if the Government’s characterization of the ABC Experts’ decision as adopting a decision “on an ‘equitable’ basis” were correct, that is not an *ex aequo et bono* decision.

805. Rather, as noted above, the ABC Report made its decision with regard to a specifically defined area of the *goz* only after it had determined that the Ngok Dinka and the Misseriya had possessed “**equal** secondary rights” of seasonal usage of that area,<sup>953</sup> leading the ABC Experts to adopt a line that “bisect[ed] **equally**” that area. Where the two peoples had enjoyed “**equal**” rights to the same territory, it was not a decision *ex aequo et bono* to divide the territory “**equally**” between them. Rather, the ABC Experts’ decision was an effort to give meaning to the definition of the Abyei Area as the area of the nine Ngok Dinka Chiefdoms in 1905, as applied to the specific circumstances of the area.

806. This would at most constitute either an interpretation of the parties’ agreement or an instance of the application of equity *infra legem*, involving interpretation and extension of the law, which is indisputably permitted. Even if the ABC Experts had not expressly cited and relied upon legal principles to justify their principle of equal sharing of the territory, an application of equity to the respective rights and usage of the Ngok and Misseriya in the *goz* would in no way be a decision *ex aequo et bono*. It would instead be an application of general principles of equity recognized by international law in order to resolve an issue.

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<sup>948</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Decision of 11 September 1992* [1992] I.C.J. Rep. 351, 514 (I.C.J.) (relied on by the GoS).

<sup>949</sup> *Rann of Kutch (India v. Pakistan)* 50 ILR 1, 18, **Exhibit-LE 37/1**.

<sup>950</sup> *Rann of Kutch (India v. Pakistan)* 50 ILR 1, 18, **Exhibit-LE 37/1**.

<sup>951</sup> *Rann of Kutch (India v. Pakistan)* 50 ILR 1, 520, **Exhibit-LE 37/1**.

<sup>952</sup> GoS Memorial, at paras. 264-265.

<sup>953</sup> ABC Report, Part I, at pp. 19, 43-44, **Appendix B to SPLM/A Memorial**.

- c) The ABC Experts' Application of General Principles of Equity to One Aspect of Their Boundary Determination Would Not Have Converted That Determination into a Decision *Ex Aequo Et Bono*

807. In addition to the foregoing insuperable obstacles to the Government's *ex aequo et bono* arguments, it bears emphasis that the Government alleges only that the division of the *goz*, at the northern boundary of the Abyei Area, was divided 50/50 between the parties and that this "equitable" division constitutes an *ex aequo et bono* decision.<sup>954</sup> Even if everything else the Government said on this issue were correct (which it is not), the ABC Experts' treatment of this single issue would not convert their definition of the Abyei Area's boundaries into an *ex aequo et bono* decision.

808. The vast bulk of the ABC Experts' analysis and reasoning was devoted to a detailed discussion of the evidence and the extent of the Ngok Dinka Chiefdoms' territory in 1905. The Government does not suggest that any aspect of this analysis – which obviously sought to apply the ABC Experts' interpretation of the parties' agreed definition of the Abyei Area – was a decision *ex aequo et bono*. Instead, it is only as to one issue (the division of the *goz*), that the Government even attempts to allege that the ABC Experts made an *ex aequo et bono* division.

809. A decision-maker's reliance on a purely equitable, 50/50 split between two opposing claims on a particular aspect of a significantly larger dispute does not convert the decision into an *ex aequo et bono* decision. Instead, an *ex aequo et bono* decision arises when a decision-maker does not make any effort to apply any legal principles to resolve a dispute and instead decides the parties' dispute based exclusively on non-legal considerations. This proposition is well-settled:

a. "decisions *ex aequo et bono* ... relieve[] the Court from the necessity of deciding according to law. ***It makes possible a decision based upon considerations of fair dealing and good faith, which may be independent or even contrary to law.*** Acting *ex aequo et bono*, the Court is not compelled to depart from applicable law, but it is permitted to do so, and it may even call upon a party to give up legal rights. ... Such considerations depend, in large measure, upon the judges' personal appreciation, and yet the Court would not be justified in reaching a result which could not be explained on rational grounds."<sup>955</sup>

b. "to decide *ex aequo et bono* ... is generally considered as an authorization to act *contra legem*, ***to depart from the law, to change the law, to accept a claim not recognized by the law or to reject a claim based on the law.*** A judge or an arbitrator acting *ex aequo et bono* may thus disregard existing law and vested rights; he can change a legal situation or refuse to recognize a legal claim to change a situation."<sup>956</sup>

<sup>954</sup> GoS Memorial, at paras. 264-265.

<sup>955</sup> M. Hudson, *The Permanent Court of International Justice, 1920-1942 A Treatise* 619-620 1943, **Exhibit-LE 36/4** (emphasis added).

<sup>956</sup> Sohn, *Arbitration of International Disputes Ex Aequo Et Bono* in P. Sanders (ed.), *International Arbitration Liber Amicorum For Martin Domke* 332 *et seq.* (1967), **Exhibit-LE 36/8** (emphasis added).

c. “a decision *ex aequo et bono* confers on the judge ***the authority to deviate from existing law.***”<sup>957</sup>

810. An *ex aequo et bono* decision does not arise where, on one discrete issue within a larger dispute that is resolved in accordance with legal or contractual formula, a decision-maker is unable to discern a clear basis for resolution and concludes that the best he or she can do is draw a line between the competing claims. The latter is not a deliberate non-application of law, but instead a recognition that the law or the contract does not provide a clear answer to a particular issue and that, in these circumstances, the parties’ intentions would be to permit an equitable division.<sup>958</sup>

811. For example, in the *North Sea Continental Shelf* cases, the ICJ applied equitable principles in directing the parties to delimit the relevant portions of the continental shelf in dispute “in accordance with equitable principles,”<sup>959</sup> rather than by using the equidistance method which, the Court observed, “in certain geographical circumstances which are quite frequently met with ... leads unquestionably to inequity ...”<sup>960</sup> The Court noted in particular that:

***“Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made.”***<sup>961</sup>

812. Applying these principles, the present case would involve an entirely appropriate and uncontroversial disposition of the area that the ABC Experts defined as the *goz*. As discussed above, the ABC Experts found that both the Ngok Dinka and the Misseriya had possessed equally shared secondary (seasonal) patterns and rights of usage in the area treated as the *goz*.<sup>962</sup> Based on those equally shared rights, in one part of the Abyei region, the ABC Experts applied a rule of equal division of that border region as a means of determining precisely the boundaries of the area of the nine Ngok Dinka Chiefdoms in 1905. Even if this

<sup>957</sup> Scheuner, *Decisions Ex Aequo et Bono* by International Courts and Arbitral Tribunals in P. Sanders (ed.), *International Arbitration Liber Amicorum For Martin Domke* 282 (1967), **Exhibit-LE 38/1**.

<sup>958</sup> Scheuner, *Decisions Ex Aequo et Bono* by International Courts and Arbitral Tribunals in P. Sanders (ed.), *International Arbitration Liber Amicorum For Martin Domke* 275, 277 (1967) (“***It always possible ... to complete the rules of the existing order by those legal principles which find general acceptance in the internal legal orders*** of the nations composing the global community. Existing international law provides the international judge or arbitrator with sufficient elements for a legal decision of disputes and does not allow a *non-liquet*..”) and at 282 (“that “[t]o apply principles of equity is a part of the normal task of a judge or arbitrator who does not alter the law in this way but only adapts it to individual or social needs.”), **Exhibit-LE 38/1** (emphasis added); Lammasch, *Die Lehre von der Schiedsgerichtbarkeit in Ihrem Ganzen Umfange* 180 (1914) referred to in K. Carlston, *The Process of International Arbitration* 156 (1946, reprint 1972) (“[An arbitral judge] must not correct the law governing between the parties according to his subjective views of equity, ***but he may and should fill the gaps of the law according to equity***, that is, in the spirit of the law, according to legal analogy.”), **Exhibit-LE 27/24** (emphasis added); *Judgment of 31 July 1928, Responsabilité de L’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (sentence sur le principe de la responsabilité (Portugal contre Allemagne)*, R.I.A.A., 1011, 1016 (1928) (“Finally, in the absence of rules of international law applicable to the case, ***the arbitrators consider that they should fill gaps by deciding in accordance with principles of equity***, while keeping within the spirit of the law ... as it evolves.”), **Exhibit-LE 38/2**.

<sup>959</sup> *North Sea Continental Shelf Cases, (Germany v. Netherlands)* [1969] I.C.J. Rep. 3, 53 (I.C.J.), **Exhibit-LE 38/3**.

<sup>960</sup> *North Sea Continental Shelf Cases, (Germany v. Netherlands)* [1969] I.C.J. Rep. 3, 49 (I.C.J.), **Exhibit-LE 38/3**.

<sup>961</sup> *North Sea Continental Shelf Cases, (Germany v. Netherlands)* [1969] I.C.J. Rep. 3, 22 (I.C.J.), **Exhibit-LE 38/3**.

<sup>962</sup> See above at paras. 501-502, 631-633, 790-794.

had been based purely on equity (which it was not), this in no way constituted an *ex aequo et bono* decision.

813. Finally, in no conceivable way could the ABC Experts' purportedly *ex aequo et bono* decision on the division of the area termed the *goz* constitute grounds for invalidating the ABC Report. As discussed above, it is only in rare and exceptional cases, involving direct and serious violations of fundamental rules of morality where an adjudicative decision may be denied effect based on a mandatory criteria.<sup>963</sup> On any view, the ABC Experts' decision regarding what it defined as the *goz* does not remotely approach this standard.

d) There Was No Prohibition Against *Ex Aequo Et Bono* Decisions by the ABC Experts

814. In any case, although the point is academic, the ABC Experts would not have exceeded their mandate even if they had rendered a purely *ex aequo et bono* decision. There is nothing in the parties' agreements or in any general principles of law that forbid an *ex aequo et bono* decision.

815. As discussed above, the parties' agreements did not contain any express or implied prohibition against an *ex aequo et bono* decision. On the contrary, the parties' agreements contained no choice of law clause or similar provision prescribing the legal system that the ABC Experts were to apply. This left it to the ABC Experts' discretion to decide whether they wished to define the Abyei Area by reference to purely non-legal, including entirely equitable, considerations or instead to take into account principles of law.<sup>964</sup>

816. It is also of significance that the parties did not choose a traditional arbitral tribunal to resolve their disputes, but rather selected a body consisting primarily of experts in regional history, politics, ethnography and culture. Indeed, the Government acknowledges exactly this point elsewhere, when it complains after the fact that the ABC Experts (to whom it agreed) contained only one lawyer.<sup>965</sup>

817. Likewise, as noted above, the parties' agreements provided that the ABC Experts' archival research was to be undertaken "with a view to arriving at a decision that shall be based on scientific analysis and research."<sup>966</sup> Although this provision encouraged a decision based on "scientific analysis and research," it did not mandatorily require that (being phrased precatoryly and aspirationally ("with *a view to arriving at*")); rather, this provision left the ABC Experts free, if they were unable to reach a decision on this basis, to pursue other forms

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<sup>963</sup> See above at paras. 682-691.

<sup>964</sup> See, e.g., *Prostyakov v. Masco Corp.*, 513 F.3d 716, 725-26 (7th Cir. 2008) ("When the parties agree to arbitrate without specifying a rule of decision[,] then the arbitrator has considerable leeway so long as he respects the limits the parties' contract and public law place on his discretion.") (quoting *George Watts & Sons, Inc. v. Tiffany & Co.*, 248 F.3d 577, 579 (7th Cir.2001)), **Exhibit-LE 38/4**; Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 Duke L.J. 547, 578 (2005) ("Historical notions of arbitral discretion are consistent with a refusal to vacate awards even where arbitrators intentionally disregard the law. Traditional doctrine provides that arbitrators are not bound to apply any particular substantive law unless the parties expressly contract to limit the arbitrator in this way."), **Exhibit-LE 38/5**; M. Domke *et al.*, *Domke on Commercial Arbitration* § 25:01 (2000) (referring to U.S. practice: "The general rule in both statutory and common-law arbitration is that arbitrators need not follow otherwise applicable law when deciding issues before them unless they are commanded to do so by the terms of the arbitration agreement. ... Unless parties expressly or impliedly wish the arbitrator to determine the question by application of a specific law, the arbitrator appears free to resolve the dispute on the basis of his just and fair appreciation."), **Exhibit-LE 38/6** (internal citations omitted).

<sup>965</sup> GoS Memorial, at para. 269 ("if a legal decision had been required, rather than a factual one, then this would have been reflected in the composition of the ABC itself").

<sup>966</sup> Abeyi Annex, Art. 4, **Appendix D to SPLM/A Memorial**.



of reasoning. Moreover, in neither case did the parties' agreements require the ABC Experts to decide in accordance with legal principles or forbid an *ex aequo et bono* decision; on the contrary, the requirement for "scientific analysis and research" would be in no way require the application of legal principles or forbid an *ex aequo et bono* decision.

818. The Government's Memorial nonetheless attempts to construct a "mandatory" prohibition against an *ex aequo et bono* decision by reference to a variety of provisions of international arbitration instruments. According to the Government, these instruments give rise to a rule that "disputes can only be settled on an *ex aequo et bono* basis with the express consent of the parties to the dispute."<sup>967</sup> As with its argument for a mandatory rule requiring reasoned awards, the GoS Memorial cites the ICJ Statute, Law of the Sea Convention, ICSID Convention and miscellaneous institutional arbitration rules (UNCITRAL, ICC, LCIA) as support for this purportedly uniform rule.<sup>968</sup>

819. In the present case, the parties' agreement imposed no prohibition against an *ex aequo et bono* decision. There is nothing in the parties' agreement that remotely approaches the provisions cited by the Government from the ICJ Statute (Article 38(2)), Law of the Sea Convention (Articles 23, 293(2)), ICSID Convention (Article 42(3)) or the UNCITRAL Rules (Article 33(2)), ICC Rules (Article 17(3)), and LCIA Rules (Article 22(4)).

820. This was not an oversight. In the arbitral proceedings before this Tribunal, the parties have chosen to prohibit a decision *ex aequo et bono* absent their consent by virtue of their agreement to the PCA Rules. Adopted by the mutual consent of both parties, the PCA Rules specify that the Tribunal may only decide as "*amiable compositeur* or *ex aequo et bono if the parties expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration*."<sup>969</sup> In contrast, the parties' agreements relating to the proceedings before the ABC contained no such prohibition (and no choice of law clause).

821. Despite this, the Government seeks to transpose a number of specific requirements for *ex aequo et bono* decisions, which are contained in particular instruments, into a general principle of law that would apply to the ABC proceedings. Although the specific conditions on *ex aequo et bono* decisions cited by the Government exist, and although there is skepticism regarding *ex aequo et bono* arbitral decisions in many jurisdictions, there is no indication that these provisions have led to the development of a general, mandatory principle of law. Moreover, there is virtually no authority – one way or the other – on whether a boundary commission like the ABC is mandatorily required to provide a reasoned decision.

822. The Government's argument ignores the consensual nature of all of the instruments on which it relies (e.g., parties must accept the ICJ's jurisdiction or agree to the ICC Rules or the LCIA Rules) and the fact that each of these instruments contains within it a specific requirement for the parties' express consent to a decision *ex aequo et bono*. It is entirely understandable, and required by the rule of party autonomy, for decisions *ex aequo et bono* to

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<sup>967</sup> GoS Memorial, at para. 167.

<sup>968</sup> GoS Memorial, at paras. 168-176 (citing "*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment, I.C.J. Reports 1992, p. 351, at pp. 390- 391, para. 47; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, at p. 60, para. 71; *Frontier Dispute, Judgment*, I.C.J. Reports 1986, p. 567, paras. 27-28, p. 570, para. 34, p. 633, para. 149; ICSID Rules, Art. 50; ICSID Convention, Art. 52; *MINE v. Guinea*, Decision on Annulment, 22 December 1989, para. 5.03; LCIA Rules, Art. 22.4.").

<sup>969</sup> PCA Rules, Art. 33(2), **Exhibit-LE 29/15** (emphasis added).

require express consent in these circumstances: it is what the parties' agreed dispute resolution mechanism specifically provides.

823. Importantly, however, it is a very different thing to conclude, from these specific provisions, that there is a universally applicable general principle of law that requires both affirmative and express consent by the parties to an *ex aequo et bono* decision. On the contrary, the fact that particular dispute resolution regimes (e.g., ICJ Statute, ICC Rules) have affirmatively introduced a requirement of express consent to *ex aequo et bono* decisions is evidence that there is no such general mandatory rule requiring express consent to an *ex aequo et bono* decision. Had such a rule existed, there would be no need for specific requirements, in the various consensual regimes relied upon by the Government's Memorial.

824. It is notable that the Government cites no authority – not a single case or commentary – suggesting the existence of some general rule of law forbidding an international adjudicatory body from deciding *ex aequo et bono* in the absence of the parties' express and affirmative consent.<sup>970</sup> Nor does further research reveal the existence of any authority to support such a general principle of law: none of the texts or, so far as appears, reported decisions from leading jurisdictions, recognize any general principle of law conditioning an *ex aequo et bono* decision on express consent by the parties.

825. On the contrary, historic and contemporary conceptions of arbitration in a number of important jurisdictions fully recognize and encourage the possibility of *ex aequo et bono* decisions as one of the distinguishing characteristics of arbitration (as compared to litigation in national courts).<sup>971</sup> This is reflected in a non-trivial number of institutional rules and national arbitration statutes.

826. Thus, Article 766(2) of the Argentinean Code of Civil and Commercial Procedure Law provides that: "If the terms of reference do not say whether arbitration is to be *de iure* or *amiable composition* or if arbitrators have been authorized to decide *ex aequo et bono*, it shall be understood that they shall decide as *amiabiles compositeurs*."<sup>972</sup> Likewise, the Israeli Arbitration Act provides that a decision *ex aequo et bono* is not a ground for vacating an

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<sup>970</sup> Indeed, a leading author on the subject of the ICSID Convention, so heavily but inappropriately relied on by the GoS, notes that "[i]n the course of the Convention's drafting, there was some suggestion to allow the tribunal to decide *ex aequo et bono even without the parties' specific authorization*." C. Schreuer, *The ICSID Convention: A Commentary* Art. 42 ¶159 (2001), **Exhibit-LE 27/17** (emphasis added); see also *Convention on the Settlement of Investment Disputes between States and Nationals of other States: Documents concerning the Origin and the Formulation of the Convention*, Vol. II(1), 330 (1968), **Exhibit-LE 38/7**.

<sup>971</sup> See, e.g., Trakman, *Ex Aequo Et Bono: Demystifying an Ancient Concept*, 8 Chi. J. Int'l L. 621, 629 *et seq* (2008) ("Merchant judges under the Medieval Law Merchant decided cases *ex aequo et bono* according to merchant codes devised, adopted, and applied by merchant judges. These merchant judges resolved disputes . . . outside the jurisdiction of courts and judges who administered the law of local princes), **Exhibit-LE 38/8**; Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 Berkeley J. Emp. & Lab. L. 107, 111 (2002) ("The use of equity or fairness as a basis of decision by the arbitrator reflects the history of arbitration. Traditionally, arbitrators were seldom lawyers but were fellow merchants in the same business as the disputants and were selected because of the expectation that they would decide using industry custom and usage norms."), **Exhibit-LE 38/9**; Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703, 744 *et seq* (1999) ("There is a long tradition of arbitrators deciding on the basis of their own sense of justice, rather than any set of rules."), **Exhibit-LE 38/10**.

<sup>972</sup> Argentinean Code of Civil and Commercial Procedure Law, Art. 766(2) ("1. All matters which can be submitted to arbitration can be decided by *amiabiles compositeurs*. 2. If the terms of reference do not say whether arbitration is to be *de iure* or *amiable composition* or if arbitrators have been authorized to decide *ex aequo et bono*, it shall be understood that they shall decide as *amiabiles compositeurs*."), **Exhibit-LE 38/11**.

award, even absent the parties' consent.<sup>973</sup> A number of other national arbitration statutes are similar.<sup>974</sup>

827. Similarly, the CIETAC Rules provide that “[t]he arbitration tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices, **and in compliance with the principles of fairness and reasonableness.**”<sup>975</sup> According to one commentator on Chinese arbitral practice, “[i]n fact, it is impossible for the disputing parties to instruct the arbitral tribunal to disregard the principle of equity and determine the dispute via a strict application of the relevant laws.”<sup>976</sup>

828. Indeed, in many traditions, arbitral tribunals were and are expected to act as *amiable compositeurs*, exercising authority and employing principles akin to what is used in rendering *ex aequo et bono* decisions. As one German author explains:

“The fact that decisions *ex aequo et bono* still persist in arbitration may appear strange for an institution that aspires to possess proper judicative powers because state courts are bound by substantive law and may only found their decisions on *ex aequo et bono* considerations if the law itself so permits. **The reason for the continuous existence of decisions *ex aequo et bono* lies in the history of arbitration. Decisions *ex aequo et bono* used to be the rule because arbitration was in the first place viewed as a mechanism for the resolution of disputes.**”<sup>977</sup>

829. Moreover, a particular tradition of deciding *ex aequo et bono* exists with regard to boundary and similar types of disputes. Article 28 of the General Act for the Pacific Settlement of International Disputes of 1926 provided :

“If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard of the substance of the dispute enumerated in Art. 38 of the Statute of the Permanent Court of International Justice.

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<sup>973</sup> Arbitration Act of Israel 5728-1968, Art. 24(7) (an award may be set aside if “the arbitrator did not make the award in accordance with law **though the arbitration agreement required him to do so.**” The necessary corollary of this is that the arbitrators are only required to comply with “the law” if the parties expressly so provide in their agreement. Otherwise, the arbitrators are free to decide how they wish.), **Exhibit-LE 33/31** (emphasis added).

<sup>974</sup> Panama Arbitration Law 1999, Art. 3(1) (“Arbitration proceedings will be according to law or *ex aequo et bono*. They will be according to law when the power conferred by the parties to the arbitrators is aimed at resolving the subject matter according to the rules of law. It will be *ex aequo et bono* if the arbitrators will have to solve [the dispute] according to their prudent knowledge/appreciation and understanding, without subjection to the rules of law. The parties shall be able to decide [the kind of arbitration] in their agreement or subsequently. **If this is not the case, the type of arbitration shall be the one resulting from the applicable regulation and, in absence of this, it shall be understood that the arbitration shall be *ex aequo et bono*.**”), **Exhibit-LE 38/12** (emphasis added); Mediation, Conciliation and Arbitration Law of El Salvador, Art. 59 (“The arbitrators shall decide the subject matter of the arbitration according to law, *ex aequo et bono* or to technical principles, in accordance with the agreement of the Parties. **In the event the parties have not expressed themselves on the matter, arbitrators shall resolve [the dispute] *ex aequo et bono*.**”), **Exhibit-LE 38/13**.

<sup>975</sup> CIETAC Rules, Art. 43(1), **Exhibit-LE 34/22** (emphasis added); see also J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶¶18-95 - 18-96 (2003) (“in accordance with the Chinese tradition that the tribunal may decide the case as *amicales compositeurs*, even if the parties have not authorised it to act so.”), **Exhibit-LE 23/17**.

<sup>976</sup> J. Tao, *Arbitration Law and Practice in China* 105 *et seq* (2008), **Exhibit-LE 38/14**.

<sup>977</sup> K. Lionnet & A. Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit* 371 (3d. 2005), **Exhibit-LE 38/15** (emphasis added); see also B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* ¶1315 (2006) (“The possibility to have the dispute decided *ex aequo et bono* follows from a long tradition in commercial arbitration, and also in the arbitral resolution of conflicts in international public law.”), **Exhibit-LE 33/10**.

***Insofar as there exists no such rule applicable to the dispute, the Tribunal shall decide ex aequo et bono.***<sup>978</sup>

830. Similarly, Article 26 of the European Convention for the Peaceful Settlement of Disputes of 1957 declares:

***“If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall decide ex aequo et bono, having regard to the general principles of international law, while respecting the contractual obligations and the final decisions of international tribunals which are binding on the parties.”***<sup>979</sup>

831. The point is not that the General Act for the Pacific Settlement of International Disputes or the European Convention for the Peaceful Settlement of Disputes applied to the ABC Experts: they did not, any more than the ICSID Convention, ILC Model Rules or UNCITRAL Model Law applied to the ABC. The relevant point instead is that there is no basis for concluding that there is a generally applicable principle of mandatory law, forbidding *ex aequo et bono* decisions absent express agreement by the parties. Rather, there is simply a diversity of approaches under different international and national legal regimes, which provide no basis for constructing some mandatory general principle of law.

832. This conclusion is particularly powerful given the character of the ABC. The authorities cited by the Government are derived wholly from the context of international investment and commercial arbitration; not a single one of them addresses boundary commissions such as the ABC. The notion that one can derive a general principle of law applicable to boundary commissions – apparently by implied analogy – is both striking and misconceived. Instead, the proper view is that the parties were free to agree what they wished regarding an *ex aequo et bono* decision by the ABC – either to impose a prohibition on such a decision or to leave the ABC with freedom to choose the appropriate means of expressing its decision.

833. In sum, if the ABC Experts had in fact rendered an *ex aequo et bono* decision – which they did not – there was nothing in the parties’ agreements or any general principle of law that would have forbidden such an action. The ABC Report would still be entirely valid and not subject to challenge in these proceedings.

##### 5. The Government’s Complaints About the ABC Experts’ Purported Reliance on “Unspecified Legal Principles” Are Frivolous

834. The Government also argues in passing that the ABC Experts’ reference to “unspecified ‘legal principles in determining land rights’” constitutes a violation of mandatory criteria.<sup>980</sup> The Government’s complaint appears to focus on Appendix 2 to the ABC Report and on the principles of “equitable division of shared secondary rights” (discussed above).<sup>981</sup>

835. The GoS Memorial makes no effort to reconcile its claim that the ABC Experts rendered their decision *ex aequo et bono* with its complaint that the ABC Experts’ decision

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<sup>978</sup> General Act for the Pacific Settlement of International Disputes of 1926, Art. 28, **Exhibit-LE 38/16**.

<sup>979</sup> European Convention for the Peaceful Settlement of Disputes of 1957, Art. 26, **Exhibit-LE 38/17** (emphasis added).

<sup>980</sup> GoS Memorial, at paras. 266-269.

<sup>981</sup> See above at paras. 501-502, 790-797.

wrongly relied on legal principles. In any case, the Government's complaint about the ABC Report's reliance on legal principles is just as indefensible as its *ex aequo et bono* complaint.

836. The Government's Memorial devotes four cryptic paragraphs to this half-hearted complaint. The principal bases for the GoS's objection appear to be that the ABC Experts should not have applied any law (and instead should have only considered "factual" matters), that the ABC Experts did not specify what law they applied and that the ABC Experts failed to apply Sudanese law from 1956 or 2005. These points are all without basis.

837. There was nothing in the parties' agreements that forbade the ABC Experts from considering legal principles – indeed, the logical predicate for the GoS's *ex aequo et bono* argument is that the ABC Experts were required to consider legal principles. In any case, insofar as the ABC Experts concluded that it was relevant to consider issues of land rights or land ownership, the status of boundaries, or other legal matters, they were entirely free to do so.

838. Indeed, experience teaches that most disputes cannot be resolved solely by consideration of "factual" matters, and parties therefore naturally intend that their decision-makers will have the authority to consider "legal" issues as well. Notably, the Government does not manage to cite even a single authority, including from its eclectic repertoire of "general principles and practices," that holds that adjudicatory bodies may not apply legal principles. Needless to say, no such principle exists.

839. There was also nothing in the parties' agreements that required the ABC Experts to specify the source of the legal principles they applied or to write a lengthy description of what those alleged legal principles were. Certainly, many national court judgments and international arbitral awards apply legal principles either without identifying their precise source, or by identifying multiple sources or some transnational source.

840. In any event, the ABC Experts did identify the legal principles that they referred to in Appendix 2 as applicable in "*former British colonies and protectorates, including Sudan (a Condominium)*"<sup>982</sup> and "*Sudan*" at the "*time of the Condominium.*"<sup>983</sup> The Appendix also cited to a number of secondary sources about Sudanese and British colonial law.<sup>984</sup> The Government's objection to the accuracy of the legal analysis in Appendix 2 is beside the point; its objections about supposedly undefined legal principles are simply not sustained by the terms of the ABC Report which identified the sources of the legal principle on which it relied.

841. Equally, the ABC Report stated the essential point of the legal principle on which it relied (a passage omitted by the GoS Memorial): "*the legal principle of the equitable division of shared secondary rights,*" leading to an equal division of the *goz* in which the parties both possessed "equal shared rights."<sup>985</sup> As discussed above, there is no basis at all for critiquing this analysis, which is no doubt why the Government chooses to omit it from its discussion.

842. Finally, the Government complains that the ABC Experts applied Sudanese law incorrectly, arguing, obscurely, that "the position is that the law of Sudan, in 1956 as in 2005

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<sup>982</sup> ABC Report, Part II, App. 2, at p. 24, **Exhibit-FE 15/1**.

<sup>983</sup> ABC Report, Part II, App. 2, at p. 25, **Exhibit-FE 15/1**.

<sup>984</sup> ABC Report, Part II, App. 2, at pp. 24-25, **Exhibit-FE 15/1**.

<sup>985</sup> ABC Report, Part I, at p. 20, **Appendix B to SPLM/A Memorial**.

[sic], did not recognize customary land rights as distinct from rights of use and pasturage which could be exercised in common.”<sup>986</sup> Why the Government considers the state of Sudanese law in either 1956 or 2005 to be relevant is a mystery, as is the authority for the Government’s unsupported statement. That mystery need not be resolved though: the Government’s complaints concern only the substance of the ABC Experts’ analysis and are not the basis for its excess of mandate claim.

6. The Government’s Complaints About the ABC Experts’ Purported Attempt to Allocate Oil Resources Are Frivolous

843. Finally, the Government argues in passing that the ABC Report was in reality motivated by an “unarticulated” desire by the five ABC Experts to allocate Sudan’s oil resources to the Abyei Area.<sup>987</sup> Even in a submission littered with errors and misquotations, this claim by the GoS distinguishes itself.

844. As discussed above, the Government does not cite a single authority for its suggestion that an adjudicator’s alleged subjective motivations can provide the basis for impugning his or her decision.<sup>988</sup> Nor is it surprising that the Government cannot identify authority for its claim: such inquiries have been rejected in the very few instances in which they have been requested.<sup>989</sup>

845. In any case, there is no basis at all for the Government’s tendentious accusations. The exact location of oil fields in the Abyei region is not information which was readily known in 2005 (or even today), and there is no indication from the extensive documentary record of the proceedings of the ABC that the ABC Experts received any information from the parties or witnesses regarding this issue. Indeed, the only time that the issue of oil was even mentioned was *by the Government*, with Ambassador Dirdeiry pointing out in his closing presentation “[the ABC decision] this is very important because so many rights, including oil rights and other rights will be in fact treated according to what we are going to establish.”<sup>990</sup>

846. It bears emphasis that *all five ABC Experts unanimously* agreed upon the decision in the ABC Report. The Government has not, despite one or two isolated slurs, challenged the impartiality of any of the five ABC Experts – much less the impartiality of the entire body of ABC Experts. Given that, it is impossible to see how the Government can seriously complain that the unanimous ABC Experts really made a secret allocation of oil resources that was disguised as something else.

847. The Government’s accusations are also contradicted by the terms of the ABC Report. That Report explained in detail (as discussed above) precisely why the area it found to be uninhabited *goz* was chosen as the border zone between the Ngok Dinka and the Misseriya and precisely why the northern boundary of the Abyei Area was drawn through the middle of that area (based on “equal shared rights”).<sup>991</sup> The Government’s suggestion that “even without extrinsic evidence, one could infer that the north-eastern turning point of the

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<sup>986</sup> GoS Memorial, at para. 269.

<sup>987</sup> GoS Memorial, at paras. 270-275.

<sup>988</sup> See above at paras. 212-214.

<sup>989</sup> See above at para. 213.

<sup>990</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 2, at p. 1,

**Exhibit-FE 19/16.**

<sup>991</sup> See above at paras. 790-797.

boundary was chosen for [the purpose of enveloping the oil fields]”<sup>992</sup> is also completely spurious.

848. First, in suggesting that “one could [sic] infer” that the line of longitude selected for the eastern boundary was somehow arrived at by some unarticulated joint illegitimate design on the part of the Experts, the GoS fails to acknowledge that the specific co-ordinates of the eastern boundary were in fact advanced by the SPLM/A.<sup>993</sup> Despite this argument having been made clearly by the SPLM/A, which submitted evidence to support its claim,<sup>994</sup> the GoS did not put forward any alternative arguments regarding where an eastern boundary should lie in the event that the Experts concluded that the northern boundary of the Abyei Area was, contrary to the GoS’s submissions, *above* the Bahr el Arab.

849. Given this, it was entirely understandable that the ABC Experts would adopt the line claimed and substantiated by the SPLM/A, and not challenged by the Government, in defining the eastern boundary of the Abyei Area. Indeed, this is the justification for this component of their determination given by the Experts in their Report: “as neither the Ngok nor the SPLM/A have presented claims to the territory east of longitude 29°32’15” E, it is reasonable to take this line as the eastern boundary.”<sup>995</sup>

850. Second, and in any case, the claims of the parties and the evidence before the ABC left the ABC Experts with few options other than to draw the eastern boundary where they did, at longitude 29°32’15”E. First, the Abyei Protocol provided that the “January 1, 1956 line between north and south will be inviolate, except as agreed above,”<sup>996</sup> with the result that the southern and western boundaries of the Abyei Area were expected to follow the boundaries that already existed between Kordofan and its neighboring states.

851. Consistent with this, the ABC Experts, in their final determination, recorded that “the western boundary shall be the Kordofan-Darfur boundary as it was defined on 1 January 1956. The southern boundary shall be the Kordofan-Bahr el Ghazal-Upper Nile boundary as it was defined on 1 January 1956.”<sup>997</sup> Accordingly, only the northern and eastern boundaries of the Abyei area remained to be identified, defined and demarcated by the ABC. However, most of the evidence placed by the parties before the ABC went to the question of how far *north* the Ngok Dinka were in 1905.<sup>998</sup>

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<sup>992</sup> GoS Memorial, at paras. 273(b).

<sup>993</sup> ABC Report, Part I, **Appendix B to SPLM/A Memorial**, pp. 19, 44 (“the SPLM/A’s sketch map of the Abyei area places the northern boundary at latitude 10°35’N, running from the current Darfur boundary in a straight line east to approximately longitude 29°32’15”E. The eastern boundary then south along this line until it joins the boundary with Upper Nile at approximately 10°05’N”). *See also* SPLM/A Final Presentation, dated 14-16 May 2005, (delivered 16 June 2005), p. 18 (“the area lies between latitudes 9 degrees 21 minutes – 10 degrees 35 minutes and longitudes 27 degree 44 minutes – 29 degree 32 minutes”), **Exhibit-FE 14/13**.

<sup>994</sup> ABC Report, Part I, p. 44, **Appendix B to SPLM/A Memorial**.

<sup>995</sup> ABC Report, Part I, p. 45, **Appendix B to SPLM/A Memorial**.

<sup>996</sup> Abyei Protocol, Art. 1.4, **Appendix C to SPLM/A Memorial**.

<sup>997</sup> ABC Report, Part I, p. 22, **Appendix B to SPLM/A Memorial**.

<sup>998</sup> *See, e.g.*, ABC Report, Part I, **Appendix B to SPLM/A Memorial**, p. 10 (“the Misseriya contended that the land from their *northern* permanent settlements to *south* of the Bahr el-Arab has been theirs for several centuries”), p. 11 (“the Ngok...contended that they had occupied the river area (Bahr el-Arab/Kir, Ragaba ez-Zarga/Ngol) before the Misseriya arrived in the Muglad area...that before, during and after 1905 their permanent settlements were situated both *north* and *south* of the Bahr el-Arab/Kir”), (“the Government of Sudan’s position is that...the Abyei Area should be defined as lying *south* of the Bahr el-Arab/Kir, and excluding all territory to the *north* of the river”), (“the SPLM/A position...is that the Ngok Dinka have established historical claims to an area extended from the existing Kordofan Bahr el-Ghazal boundary to *north* of the Ragaba ez-Zarga/Ngol [to 10°35’ N]”).

852. Having determined this issue, concluding that the northern boundary of the Abyei Area was at approximately latitude 10°22'30"N, the ABC Experts were faced with a situation in which no natural "cut-off line" existed to create an eastern boundary (by, for example, the boundary of Unity state bisecting the 10°22'30" N line). Indeed, the 10°22'30"N line continues uninterrupted by other internal boundaries all the way to the Kordofan-Upper Nile boundary at approximately 31°50'30"N – approximately 260 kilometers further east than the point at which the north-east corner of the boundary as determined by the ABC Experts lies.

853. The ABC Experts therefore had little practical alternative but to draw a "dog-leg" extending south from the northern boundary at some appropriate place, in order to create the eastern boundary and complete the Abyei Area. The "dog-leg" which the ABC Experts chose was to extend the existing line of the Kordofan-Upper Nile boundary at longitude 29°32'15"E (where that boundary makes an approximate 60° turn north east) due northwards to meet the latitude 10°22'30" N. The location and course of this perpendicular "dog-leg" can be seen clearly on the ABC Experts' map. The perpendicular line, drawn from an existing boundary, provides an entirely neutral explanation for the eastern boundary, and disposes of the Government's dark suggestions of some illicit motivations.

854. Third, the ABC Experts had been presented with evidence during the Commission's proceedings that the Ngok Dinka were located in 1905 in areas very close to the 29°32'15" E line: in particular, the evidence showed Ngok settlements at Mading [Arabic: Heglig], and Anyak, which lie just to the west of the line adopted by the ABC Experts as the eastern boundary;<sup>999</sup> it would have been wrong of the ABC Experts to have excluded these Ngok settlements from the Abyei Area by placing the boundary further to the west. Accordingly, not only was the ABC Experts' decision to select the eastern boundary explicable by reference to the parties' claims and the location of the Kordofan/Upper Nile boundary, but this decision was also consistent with the evidence before the Experts.

855. Finally, the supposed "smoking gun" newspaper interview with Dr. Johnson in May 2006 is in fact a dripping wet squib. The Government touts the interview as "tantamount to an admission of excess of mandate" and "evidence of lack of partiality."<sup>1000</sup> But when one reads the words attributed to Dr. Johnson in 2006, they amount to nothing of the sort.

856. On the contrary, Dr. Johnson specifically *rejected* any suggestion that the ABC Experts had "taken into consideration these developments," being the "exploration and drilling of oil wells in the area,"<sup>1001</sup> in performing their work; likewise, Dr. Johnson explained "*we were not shown a map of where these oil wells were.*"<sup>1002</sup> These statements are not indications of partiality or an excess of mandate, but rather confirmation of the exact opposite.

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<sup>999</sup> Deng Alor, Transcript of Oral Evidence Submitted to the ABC 14 to 21 April 2005, at p. 4, **Exhibit-FE 14/5a**; SPLM Preliminary Presentation, dated 10 April 2005, at p. 5, **Exhibit-FE 14/1**; The SPLM Final Presentation on the Boundaries of Abyei Area, (2005) at p. 35, **Exhibit-FE 14/3**; ABC Report, Part II, App. 4, p. 125 (oral testimony of Ring Makwach Dheer Yak, Achaak Chiefdom), p. 133 (response of Ring Makwach Dhool to expert questioning), **Exhibit-FE 15/1**.

<sup>1000</sup> GoS Memorial, at para. 274.

<sup>1001</sup> "Interview with Douglas Johnson, expert on Abyei Boundaries Commission," Sudan Tribune, 29 May 2006, p. 2, Annex 85 to GoS Memorial.

<sup>1002</sup> "Interview with Douglas Johnson, expert on Abyei Boundaries Commission," Sudan Tribune, 29 May 2006, p. 2, Annex 85 to GoS Memorial.



857. In sum, there is no basis for the Government’s claims that the ABC Experts purportedly exceeded their mandate by violating various supposed “mandatory criteria.” On the contrary, the hopelessness of these claims illustrates the Government’s litigation tactics: to throw as much dust into the air as possible in the hope that the eyes of justice will be blinded or that the wheels of fairness will either slow or stop turning.

858. Here, there is no basis in general principles of international or national law for any of the putative “mandatory criteria” constructed by the Government. To the contrary, each of the principles that the Government seeks to construct in its Memorial is either controversial in international and national legal regimes (e.g., requirements for reasons, prohibitions against *ex aequo et bono* decisions) or is unsupported in such regimes (e.g., prohibitions against using legal authorities, requirements regarding arbitrators’ subjective motivations).

859. It is equally clear that the ABC Experts’ decision did not violate any of the putative mandatory criteria that the Government’s Memorial pretends to construct. Even if these mandatory rules existed (which they do not), and could be invoked in these proceedings (which they cannot), the ABC Report was fully reasoned, it did not involve an *ex aequo et bono* decision, it properly relied on general principles of law and it did not entail some hidden, wrongful motivation by the ABC Experts. On the contrary, the Government’s various claims are both hopelessly inconsistent (e.g., the ABC Report is at once unreasoned, wrongfully reliant on legal authorities and an *ex aequo et bono* decision) and hopelessly wrong (e.g., a 45 page, scholarly report being unreasoned; a unanimous decision of five African experts, whose impartiality is not challenged, really being some secret effort to allocate oil resources).

G. *The GoS Excluded or Waived Any Rights to Claim that the ABC Experts Exceeded Their Mandate*

860. As discussed in the SPLM/A’s Memorial, the Government has waived its objections to the validity of the ABC Experts’ decision. The GoS did so both in its agreements relating to the ABC proceedings and then in its conduct during those proceedings.<sup>1003</sup>

1. The Parties’ Agreement that the ABC Report Is “Final and Binding” and Entitled to “Immediate Effect” Waives Any Right to Challenge the Report

861. First, the Government waived its objections to the validity of the ABC Experts’ decision by agreeing both that the ABC Report would be “final and binding” and that the Report would be given “immediate effect,” without any possibility for appeal or other challenge. In the context of the Comprehensive Peace Agreement, this regime left neither party with any substantive rights to claim that the ABC Experts exceeded their mandate. The Government was under no obligation to agree to this regime, but, for its own reasons, it chose to do so.

862. The Government’s Memorial provides no grounds to doubt the GoS’s waiver of objections to the validity of the ABC Report. On the contrary, the Government emphasizes the “primary role of the consent of the parties”<sup>1004</sup> and “the overriding principle that the decision maker is bound by the limits of the scope of the consent to which the parties have

<sup>1003</sup> See SPLM/A Memorial, at paras. 792-868.

<sup>1004</sup> GoS Memorial, at p. 50, Heading (i).

agreed.”<sup>1005</sup> Thus, if the Government’s consent in the Comprehensive Peace Agreement and related instruments included a waiver of rights to challenge the ABC Experts’ boundary determination, then that waiver is the “overriding principle” applicable in these proceedings.

863. There is no reason to doubt that the Government’s waiver applied fully to all actions by the ABC Experts during the ABC proceedings. There were good reasons for the Government, as well as the SPLM/A, to accept such a blanket advance waiver. In particular, both parties wanted to ensure an immediate and final determination of the boundaries of the Abyei Area, in order to safeguard their broader peace agreements. In order to guarantee that, the parties accepted a broad, advance waiver of future challenges to the ABC Report.

864. Of course, the parties also had the security of close involvement in much of the work of the ABC through their party-nominated and partisan members of the Commission and through their confidence in IGAD (and the other states involved in the process). These aspects of the ABC procedures (ignored by the Government) enabled both parties to have confidence in the fairness of the ABC Experts and their proceedings. Indeed, as discussed above, the Government reiterated that confidence throughout the ABC proceedings.

865. In these circumstances, there is no reason not to give full effect to the parties’ specific agreement, for legitimate and important reasons, to treat the ABC Report as “final and binding” and to give it “immediate effect.” These agreements leave no room for after-the-fact efforts to undo the parties’ collaborative dispute resolution agreements or the result that those agreements produced.

2. The GoS Waived any Rights it Might Have Had to Challenge the ABC Experts’ Decision

866. Second, as also discussed both in the SPLM/A Memorial and above, it is well-settled that jurisdictional and procedural objections must be raised at the time they occurred or they will be waived.<sup>1006</sup> Basic and generally applicable rules of procedural fairness forbid a party from holding back objections, and instead require parties to assert claims of an excess of mandate at the earliest opportunity.

867. Here, the GoS raised no jurisdictional (or other) objection at any time during the ABC’s work – in which it actively participated. Instead, as described in the SPLM/A Memorial, the GoS repeatedly and explicitly affirmed that the Commission’s decision would be final and binding.<sup>1007</sup> Indeed, even after the ABC Report was published, the GoS provided no comprehensible articulation of any excess of mandate claims. In these circumstances, the GoS has either waived or is estopped from asserting excess of mandate claims in these proceedings.

868. Nothing in the Government’s Memorial addresses in any fashion the Government’s repeated and explicit waivers of any rights to challenge the ABC Experts’ decision. Nor is there any basis for questioning such waivers. They apply in particular to those matters as to which the Government clearly had knowledge during the ABC proceedings, including: (a) the ABC Experts’ interpretation of the definition of the Abyei Area; (b) the ABC Experts’ Khartoum meetings; and (c) the ABC Experts’ delivery of their final report without circulating a prior draft to the Commission. With regard to these matters, the Government

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<sup>1005</sup> GoS Memorial, at para. 189.

<sup>1006</sup> See above at paras. 354-360, 472.

<sup>1007</sup> See SPLM/A Memorial, at paras. 636-642.

explicitly and clearly waived any possibility of challenging the ABC Experts' actions and cannot now raise those objections.

### **III. THE GOVERNMENT'S PURPORTED DEFINITION OF THE ABYEI AREA IS DEMONSTRABLY WRONG**

869. Chapter 6 of the Government's Memorial purports to define the boundaries of the Abyei Area.<sup>1008</sup> The Government attempts to do so by addressing (a) very briefly, the supposed location of the Ngok Dinka (and the Misseriya) in 1905; (b) at greater length, the alleged location of the Kordofan/Bahr el Ghazal boundary in 1905; and (c) virtually not at all, the Government's interpretation of the Abyei Area, as defined in Article 1.1.2 of the Abyei Protocol.

870. There is no need for the Tribunal to consider Chapter 6 of the Government's Memorial or the definition of the Abyei Area. For the reasons set forth above, the ABC Experts did not exceed their mandate and, as a consequence, there is no need or justification for the Tribunal to address any further aspects of the parties' presentations.

871. Nonetheless, for the sake of completeness, we demonstrate below that the Government's purported definition of the boundaries of the Abyei Area in Chapter 6 of its Memorial is manifestly wrong. Each step in the Government's analysis is contradicted by an overwhelming body of consistent historical and other evidence and by the plain language and obvious purpose of the Abyei Protocol. If the Tribunal were to reach these issues, it should reject the Government's factual claims in their entirety and instead define the boundaries of the Abyei Area in the manner set out in the SPLM/A Memorial.<sup>1009</sup>

872. The Government's definition of the Abyei Area rests first on the manifestly false factual claim that the Ngok Dinka were located entirely to the south of the Kiir/Bahr el Arab, in a narrow, 14 mile wide strip of swampland along the southern bank of that river. The Government's position also rests on the unsustainable position that the Kiir/Bahr el Arab was a definite, determinate provincial boundary between Kordofan and Bahr el Ghazal in 1905. Finally, the Government's case rests on the equally misconceived claim that – no matter where the Ngok Dinka might have been located in 1905 – any territory north of the Kiir/Bahr el Arab was necessarily excluded from the Abyei Area.

873. Part III of this Reply Memorial addresses each of the Government's claims with regard to the definition of the Abyei Area. It shows that each of the Government's positions is wrong, in a number of instances relying on outright misquotations of the relevant documentation or gross misrepresentations or distortions of the relevant evidence.

874. First, as discussed in Part III(A) below, the Government's discussion of the location of the Ngok Dinka in 1905 is based on a highly-selective and misleading presentation of the pre-1905 Anglo-Egyptian and other historical records. That review ignores many of the most important historical documents, while dwelling on materials that are at best irrelevant.

875. As a consequence, the Government advances the extraordinary factual claim that the Ngok Dinka lived only south of the Kiir/Bahr el Arab in 1905. Among other things, the Government's claim is directly contradicted by an impressive body of uniform, specific and first-hand observations by Condominium officials (including Mahon, Percival, Wilkinson and Lloyd) between 1901 and 1905 of "Sultan Rob" and the Ngok Dinka living in permanent settlements well to the north of the Kiir/Bahr el Arab. The Government's claim is also impossible to reconcile with a substantial body of cartographic evidence, post-1905

<sup>1008</sup> GoS Memorial, at p. 99, Heading Chapter 6.

<sup>1009</sup> SPLM/A Memorial, at paras. 873-1202.

documentary materials, oral traditions, witness testimony and environmental/cultural evidence – all of which confirm the pre-1905 documentary record.

876. In fact, as detailed in the SPLM/A's Memorial, and again below, the Ngok Dinka plainly lived throughout the Bahr region, centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, extending north to the *goz* region. The Government's contrary claim that the Ngok Dinka lived only south of the Kiir/Bahr el Arab in 1905 is demonstrably false. Indeed, it is difficult to imagine that such a factual claim could be advanced seriously in these or other proceedings.

877. Second, as also discussed in Part III(B) below, the Government's treatment of the 1905 boundary between Kordofan and Bahr el Ghazal is distorted and inaccurate. Contrary to the Government's claims, there was no determinate boundary, much less a definite or permanent boundary, between Kordofan and Bahr el Ghazal in 1905.

878. As discussed in the SPLM/A Memorial, there was no constitutional, legislative or executive decision establishing the Kordofan/Bahr el Ghazal boundary as of 1905. At most, there were a limited number of references to an approximate, uncertain and provisional boundary at the "Bahr el Arab."

879. As the Anglo-Egyptian authorities recognized at the time, however, there was a high degree of geographical confusion about the Bahr region generally, and even greater confusion specifically about the identity and location of the "Bahr el Arab." In particular, the "Bahr el Arab" was understood between 1902 and 1907 by a number of Anglo-Egyptian officials (including Wilkinson, Mahon, Percival, Boulnois and Lloyd) to refer to what was the Ngol/Ragaba ez Zarga. As confirmed by the cartographic evidence, this confusion was widespread among Condominium officials and was not clarified by responsible officials until at least 1907. In these circumstances, there was no determinate provincial boundary between Kordofan and Bahr el Ghazal prior to or in 1905.

880. Third, as discussed in Part III(C) below, the Government's definition of the Abyei Area rests on an unarticulated and unsustainable interpretation of the Abyei Protocol. In particular, the Government's definition rests on the unexplained premise that the "area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905," defined in Article 1.1.2 of the Abyei Protocol, should be defined solely by reference to purported Sudanese provincial boundaries and without regard to the actual location of the territory that the Ngok Dinka occupied and used.

881. The Government's interpretation of the Abyei Protocol's definition of the Abyei Area is plainly wrong. As detailed in the SPLM/A's Memorial, the definition of the Abyei Area refers to the area inhabited and used by the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905.<sup>1010</sup> That is clear from the language and linguistic structure of the parties' agreed definition of the Abyei Area, the purposes of the Comprehensive Peace Agreement (incorporating the Abyei Protocol) and the character and language of the 1905 records of the transfer of the Ngok Dinka.

882. The Government's interpretation of the Abyei Area would produce absurd results, that the parties could not have intended. The consequence of the Government's interpretation would be to divide the Ngok Dinka's historic homeland in two, excluding both Abyei town

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<sup>1010</sup> SPLM/A Memorial, at paras. 1095-1189.

and the seat of Sultan Rob, as well as the vast majority of the lands occupied and used by the nine Ngok Dinka Chiefdoms, and three of the Chiefdoms in their entirety. The Government's interpretation would also confine the Ngok Dinka to an approximately 14 mile wide strip of land along the southern bank of the Kiir/Bahr el Arab, excluding them from what was indisputably their historic homeland centered on the Bahr region. These results are implausible and profoundly inequitable, confirming that the Government's interpretation of the Abyei Area simply cannot be correct.

883. For these reasons, the Government's attempt to divide the territory of the Ngok Dinka based upon the putative location of an approximate 1905 provincial boundary between Kordofan and Bahr el Ghazal is misconceived. That attempt ignores the overwhelming factual evidence as to the location of the historic homeland of the Ngok Dinka, the clear language and purposes of the Abyei Protocol and the specific language of the 1905 Anglo-Egyptian records regarding the transfer of the Ngok Dinka.

884. In an effort to deny the Ngok Dinka their ancestral homeland, the Government has manufactured a non-existent, indeterminate colonial boundary and then sought to use that boundary to divide the historic territory of the Ngok Dinka in two. Nothing of the sort was contemplated by the parties and nothing of the sort is supported by the historical evidence; equally, nothing of the sort would remotely do justice between the parties.

A. *The Government's Claim that the Ngok Dinka Were Located Entirely South of the Kiir/Bahr El Arab in 1905 Is Demonstrably Wrong*

885. The GoS Memorial claims repeatedly that the Ngok Dinka Chiefdoms were located entirely south of the Kiir/Bahr el Arab in 1905. The Government alleges that the Ngok Dinka "**territories were to the south of the Bahr al Arab** at this time [i.e., 1905],"<sup>1011</sup> and that "[p]rior to 1905, **the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab.**"<sup>1012</sup>

886. The Government's factual claims about the location of the Ngok Dinka (and the Misseriya) in 1905 are demonstrably wrong. In fact, the evidence demonstrates very clearly that the Ngok Dinka occupied territory well above the Kiir/Bahr el Arab in 1905, extending up to the Ngol/Ragaba ez Zarga and further north into the *goz*.

887. As discussed below, the Government's argument depends on a selective and misleading analysis of the pre-1905 Anglo-Egyptian documents. When properly reviewed, the pre-1905 documents demonstrate beyond any doubt that the Ngok Dinka inhabited permanent villages that were located throughout the Bahr region to the north of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga.

888. As also detailed below, the Government's Memorial ignores a very substantial body of important witness evidence (including evidence which the GoS adduced and relied upon in the ABC proceedings) from both the Ngok Dinka and Misseriya residing in the Abyei region. Likewise, the GoS ignores a wide range of oral traditions, post-1905 documents, cartographic materials and environmental evidence. This evidence corroborates the pre-1905 documentary record, clearly showing that in 1905 the Ngok Dinka used and occupied the territory extending north of the current Bahr el Ghazal/Kordofan boundary to 10°35'N latitude.

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<sup>1011</sup> GoS Memorial, at para. 279(b) (emphasis added).

<sup>1012</sup> GoS Memorial, at para. 332.

889. The historical documents and witness testimony are corroborated by a Community Mapping Project which the Ngok Dinka people have conducted over the past weeks in parts of the Abyei Area. Despite formidable logistical and other obstacles and delays, the Ngok Dinka and a professional community mapping expert have used global positioning system technology to mark and locate on a satellite map the locations of a representative sample of Ngok Dinka villages, settlements, burial sites, birth places, age set initiation sites and other points of historic cultural importance in the region surrounding Abyei town. The resulting Community Mapping Project Report fully corroborates the conclusion that the Ngok Dinka lived substantially to the north of the Kiir/Bahr el Arab throughout the Bahr region.

890. In sum, there is nothing but unintended irony to the Government's accusation that the "ABC Experts committed *many errors of substance*" and supposedly displayed "*wilful blindness to crucial items of evidence*."<sup>1013</sup> As detailed below, the ABC Experts' factual and historical conclusions were careful, nuanced and almost entirely accurate. In fact, it is the GoS Memorial that commits many grave errors of substance and that displays "wilful blindness" to the historical evidence by advancing wholly indefensible claims.

1. The Government's Claim that the Ngok Dinka Did Not Use and Occupy Territory North of the Kir/Bahr el Arab in 1905 is Conclusively Disproved by the Pre-1905 Documentary Record

891. The Government's factual case rests on the proposition that the nine Ngok Dinka Chiefdoms were located entirely south of the Kiir/Bahr el Arab in 1905. The GoS Memorial says variously that "[p]rior to 1905, the Western Dinkas (including the Ngok Dinka) were located to the *south of the Bahr el Arab*"<sup>1014</sup> and that the Ngok "territories were *to the south of the Bahr al Arab [in 1905]*."<sup>1015</sup>

892. The Government's factual claim is manifestly false. In fact, the pre-1905 documents demonstrate beyond any conceivable doubt that the Ngok Dinka were located to the north of the Kiir/Bahr el Arab, extending up to the Ngol/Ragaba ez Zarga and further north; they also demonstrate that the Paramount Chief of the Ngok Dinka ("Sultan Rob") resided and held court to the north of the Kiir/Bahr el Arab in 1905. The Government's contrary factual claims are impossible to reconcile with the pre-1905 documents, much less the remainder of the evidentiary record.

a) The Pre-Condominium Documents Provide No Support for, and Instead Flatly Contradict, the Government's Claims Regarding the Ngok Dinka

893. The GoS Memorial relies on a random assortment of 19<sup>th</sup> century materials (by Pallme, Schweinfurth, Junker and Lupton, as well as Stanford's *Compendium*). It is unclear why the Government refers to these sources, other than as part of an effort to create the impression that external observers found no Ngok Dinka near the Kiir/Bahr el Arab. As detailed below, the Government's effort is, on even cursory examination, without substance; at the same time, the GoS's use of a number of historical sources is distorted and misleading, warranting general caution in relying on the Government's historical assertions. It is useful to consider each of the sources purportedly relied upon by the Government.

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<sup>1013</sup> GoS Memorial, at para. 278 (emphasis added).

<sup>1014</sup> GoS Memorial, at para. 332.

<sup>1015</sup> GoS Memorial, at para. 279(b) (emphasis added).

(1) Random and Irrelevant Materials Cited by the Government

894. The Government’s narrative begins with reference to an 1838 European expedition to locate the sources of the White Nile.<sup>1016</sup> The Government does not mention that the White Nile is hundreds of miles away from the Abyei region, nor does it attempt to explain how this expedition might have any relevance to the locations of the Ngok Dinka and Misseriya. (As Professor Daly observes, the only historical source cited by the Government with regard to the 1838 expedition does not mention the Ngok Dinka or Misseriya, the Abyei region, the Kiir/Bahr el Arab or Ngol/Ragaba ez Zarga or anything else of relevance to the issues in dispute.<sup>1017</sup>)

895. The Government then cites Pallme (an “Austrian businessman”) and his 1844 description of a two-year visit to Sudan.<sup>1018</sup> Again, the Government makes no effort to explain what Pallme’s observations were or how they are relevant to this case (providing no page citations from Pallme’s book, no quote, paraphrase or description of what Pallme said and appending no extracts of Pallme’s book to its Memorial). Proper examination of Pallme’s materials reveals that he travelled nowhere near the Abyei region (coming no closer than El Obeid some 300 miles, as the crow flies, to the north<sup>1019</sup>) and says nothing at all about the Ngok Dinka or the Misseriya.<sup>1020</sup>

896. The Government turns next to Schweinfurth, who it describes as having made a “significant contribution to the knowledge of the indigenous population of southern Kordofan.”<sup>1021</sup> Again, the Government provides no page citations from Schweinfurth’s works, no paraphrases or description of what Schweinfurth said that might support the GoS case and attaches no extracts from his publications. Schweinfurth’s apparent “knowledge of the indigenous population of southern Kordofan” did not extend to either the Ngok or Misseriya, neither of which his book ever mentions.

897. The GoS Memorial asserts, again without page citation or even a general reference, that “Schweinfurth was among the first westerners to encounter *the Dinkas* near the Bahr el Arab.”<sup>1022</sup> As explained in the SPLM/A’s Memorial, the southern Sudanese Dinka population is large and diverse, and the Ngok are but one Dinka tribe, located in the relatively remote Bahr region.<sup>1023</sup> Given that Schweinfurth got no closer to the Ngok territory than Lake No (some 120 miles east as the crow flies, and scarcely “near the Bahr el Arab”), it is obvious that the Dinka he encountered were *not* Ngok Dinka.

898. Schweinfurth’s original German text was translated as “*The Heart of Africa*” in 1874, which documents his travels. Chapter IV of Schweinfurth’s text describes his journey “*Across the Dinka Land.*”<sup>1024</sup> In that Chapter, Schweinfurth said clearly that he was “only acquainted with *the western branch of this people* [i.e. the Dinka];”<sup>1025</sup> as discussed below,

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<sup>1016</sup> GoS Memorial, at para. 285.

<sup>1017</sup> Daly Supplemental Expert Report, at pp. 10-11.

<sup>1018</sup> GoS Memorial, at para. 286.

<sup>1019</sup> R. Hill, *A Biographical Dictionary of the Anglo-Egyptian Sudan* 301 (1951) (“in 1837 he started on a journey to the Sudan and went via Dongola to al-Ubaiyad”), **Exhibit-FE 18/18**.

<sup>1020</sup> Daly Supplemental Expert Report, at p. 10.

<sup>1021</sup> GoS Memorial, at para. 287.

<sup>1022</sup> GoS Memorial, at para. 347.

<sup>1023</sup> SPLM/A Memorial, at paras. 114-118.

<sup>1024</sup> G. Schweinfurth (translated by E. Frewer), *The Heart of Africa* 137 (1874), **Exhibit-FE 17/2**.

<sup>1025</sup> G. Schweinfurth (translated by E. Frewer), *The Heart of Africa* 148 (1874), **Exhibit-FE 17/2** (emphasis added).



the Ngok Dinka are **NOT** “Western Dinka,” and hence were not mentioned by Schweinfurth.<sup>1026</sup>

899. This is confirmed by Schweinfurth’s description of the western Dinkas’ “**average height [of] about 5 ft. 7 in.**”<sup>1027</sup> and the comment that “the majority of this western branch of the nation [i.e. the Western Dinka] rarely exceeds a middle height.”<sup>1028</sup> That is, of course, not even a remotely correct description of the very tall Ngok Dinka. As Professor Daly confirms in his Supplemental Expert Report, Schweinfurth did not go near, and did not address, the Ngok Dinka or their location.<sup>1029</sup>

900. Schweinfurth’s text also contains “A Sketch Map of Dr. Schweinfurth’s Routes 1868-1871.”<sup>1030</sup> The sketch map is attributed to C. Korbhwett (Berlin) and depicts Schweinfurth’s journey down the White Nile to the Bahr el Ghazal and down the Bahr el Ghazal into Bahr el Ghazal province. It contains no indication that Schweinfurth travelled in Kordofan or on the Kiir/Bahr el Arab, or that he ever ventured anywhere closer to the Kiir/Bahr el Arab than its junction with the Bahr el Ghazal. Whatever the Government’s reason for citing Schweinfurth, his travels are irrelevant to this case.

901. The GoS goes on to refer to Junker (“another important figure ...” who “received a gold medal from the Royal Geographic Society...”), who it says “carried out extensive journeys in central Africa, ascending the Sobat River and exploring the Bahr el Ghazal and neighboring districts.”<sup>1031</sup> Junker also did not travel anywhere close to the Abyei region – as Professor Daly explains in his Supplemental Expert Report<sup>1032</sup> – and he therefore was in no position to comment on the Kiir/Bahr el Arab or any geographic aspect of the Abyei region. That is confirmed by the absence of any citation or reference in the Government Memorial to observations by Junker of either the Ngok Dinka, the Misseriya or the Abyei region generally.

902. The one thing that the Government cites Junker for is the proposition that the Kiir/Bahr el Arab was a “physical barrier.”<sup>1033</sup> Since Junker never visited the Abyei region, it is unclear why the Government selects him as (the GoS’s sole) authority on this point. In any event, as discussed in detail below, the notion that the Kiir/Bahr el Arab was a “physical barrier” is decisively rebutted by a vast body of evidence to the contrary.<sup>1034</sup>

903. The GoS Memorial next refers to Frank Lupton (Deputy-Governor of the Equatorial Province) for remarks in 1884 concerning the Bahr el Ghazal.<sup>1035</sup> In fact, the remarks cited by the Government were not made by Frank Lupton (or even his son as the Government also incorrectly suggests), but by his brother, one Malcolm Lupton. In any event, nothing referred to by the Government in “Lupton’s” works, nor otherwise contained in Lupton’s own

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<sup>1026</sup> See below at paras. 1334-1343.

<sup>1027</sup> G. Schweinfurth (translated by E. Frewer), *The Heart of Africa* 148 (1874), **Exhibit-FE** 17/2.

<sup>1028</sup> G. Schweinfurth (translated by E. Frewer), *The Heart of Africa* 148 (1874), **Exhibit-FE** 17/2.

<sup>1029</sup> Daly Supplemental Expert Report, at p. 28.

<sup>1030</sup> G. Schweinfurth (translated by E. Frewer), *The Heart of Africa*, Map -Front leaf next to p. 1 (1874), **Exhibit-FE** 17/2. The quality of Schweinfurth’s map was criticised by later explorers (including Lupton who was very critical of it: “Dr. Schweinfurth’s map of this province [i.e. Bahr El Ghazal] contains serious mistakes.”). *Proceedings of the Royal Geographical Society and Monthly Record of Geography* 252 (10 March 1884), **Exhibit-FE** 17/4.

<sup>1031</sup> GoS Memorial, at para. 288.

<sup>1032</sup> Daly Supplemental Expert Report, at pp. 10-11.

<sup>1033</sup> GoS Memorial, at para. 291.

<sup>1034</sup> See below at paras. 1321, 1329, 1344-1360.

<sup>1035</sup> GoS Memorial, at para. 292.

writings, sheds any light on the location of the Ngok Dinka or the Misseriya or even mentions either of these peoples.

904. The Government next refers to “*Stanford’s Compendium of Geography and Travel*” as supposedly containing a “detailed description of the location of the Dinkas.”<sup>1036</sup> The GoS Memorial then refers to the index of this work, referring to the “Dinka” as located on the “Right bank of White Nile, S. of and akin to the Nuehr,” and the Baggara as located on the Bahr el Arab.<sup>1037</sup>

905. As Professor Daly observes, “*Stanford’s Compendium of Geography and Travel*” was a travel guide and is an exceptionally uninformed and unreliable source about the location of either the Ngok Dinka or Misseriya.<sup>1038</sup> Its index cannot be regarded as serious historical evidence for the location of indigenous peoples at the time.<sup>1039</sup>

906. Worse, the Dinka described in *Stanford’s Compendium* are plainly not the Ngok Dinka of the Abyei Area, but are instead the “Eastern Ngok Dinka.” The Government’s indiscriminate reliance on *Stanford’s Compendium* fails to distinguish between the nine Ngok Dinka Chiefdoms of the Abyei Area and the “Eastern Ngok Dinka” – who lived more than 200 miles away, near the Sobat Rover in the Upper Nile Province, east of the river White Nile.<sup>1040</sup> As described in the SPLM/A Memorial, the “Eastern Ngok Dinka,” live in the Upper Nile Province at roughly the place referred to in *Stanford’s Compendium*<sup>1041</sup> – but this has nothing to do with the Ngok Dinka or the Abyei Area.

907. The Government also cites *Stanford’s Compendium* as authority for the proposition that the Baggara live “[o]n the Bahr-el-Arab.”<sup>1042</sup> In the very same line of the entry in the Compendium, it betrays the *Compendium’s* level of knowledge by describing the “Baggara-el-Homr” as being “Negro(?)”<sup>1043</sup> As Professor Daly observes, this sort of material provides no serious historical basis for either the Government’s claims or this Tribunal’s work.<sup>1044</sup>

908. In sum, the pre-Condominium sources cited by the Government contain nothing concerning the locations of the Ngok Dinka and Misseriya, either in 1905 or at any other time. On the contrary, the collection of random European visitors to other parts of the Sudan, and to other Dinka peoples, does nothing but demonstrate the shoddy historical basis on which the GoS Memorial proceeds. The inadequacy of the Government’s historical analysis is particularly striking given the fact – discussed below – that there is in fact a substantial

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<sup>1036</sup> GoS Memorial, at paras. 344-345 (quoting K. Johnston, *Stanford’s Compendium of Geography and Travel* 230 (4th ed. 1884), **Exhibit-FE 17/3**).

<sup>1037</sup> GoS Memorial, at para. 345 (quoting Stubbs & Morison, “*Land and Agriculture of the Western Dinka*,” 21 SNR 251, 258 (1938), **Exhibit-FE 3/14**).

<sup>1038</sup> Daly Supplemental Report, at p. 28.

<sup>1039</sup> Daly Supplemental Report, at p. 28.

<sup>1040</sup> SPLM/A Memorial, at para. 1187. The presence of the Eastern Ngok and their relationship with the nine Chiefdoms of the Ngok Dinka is well known. Howell records that there “is a branch of the same tribe living along the River Sobat and centred on Abwong (Lat. 9° Long. 32°) and Ngork of Western Kordofan sometimes refer to them as their own people, but there has been no contact between them for many generations.” Howell, “*Notes on the Ngork Dinka of West Kordofan*,” 32(2) SNR 241 (1951), **Exhibit-FE 4/3**. The co-ordinates of the Eastern Ngok provided by Howell match the location of the “Dinka” on the map included with *Stanford’s Compendium* (which the Government did not submit with its Annexes). Map of the “Nile from Victoria N’Yanza to Khartum.” in K. Johnston, *Stanford’s Compendium of Geography and Travel* (4th ed.) Special Insert (1884), **Exhibit-FE 17/3**.

<sup>1041</sup> SPLM/A Memorial, at paras. 150, 1187.

<sup>1042</sup> GoS Memorial, at para. 345.

<sup>1043</sup> K. Johnston, *Stanford’s Compendium of Geography and Travel* 547 (4th ed. 1884), **Exhibit-FE 17/3**.

<sup>1044</sup> Daly Supplemental Report, at p. 28. The “negro?” described in the Compendium index is as likely to be a reference to Ngok Dinka as Misseriya.

body of reliable historical documentation that bears directly on the question of where the Ngok Dinka and Misseriya were located in 1905.

(2) 1794 Browne Report Not Mentioned by Government

909. One traveller who did make it to the region and did address the locations of the Ngok Dinka and the Misseriya, was Browne, a British explorer who travelled to Sudan in 1794.<sup>1045</sup> While discussing in some detail other European travellers, who did *not* visit the Abyei region, the GoS Memorial accords Browne only cursory mention (in relation to his mistaken identification of the Bahr el Arab).

910. In fact, however, Browne provides directly relevant evidence. His book described “numerous” inhabitants of the Abyei region, who were “tall and black,” being located at a place called “*Jungeion*” that was five days travel by foot south-east of the Misseriya.<sup>1046</sup> (Later observers (Henderson) identified “*Jungeion*” as the area of Debbat el Mushbak, near Hasoba, which is located on the Ngol/Ragaba ez Zarga.)<sup>1047</sup> Among other things, Browne described the people of this area as eating “*Mahriek* or white maize.”<sup>1048</sup>

911. Browne’s description of “tall and black” tribesmen perfectly describes the Ngok’s physical characteristics, while his description of the consumption of “white maize” is consistent with the Ngok staple crop (*rab/sorghum [Arabic: dura]*), referred to by the Misseriya as Mahriek, Mareig or mariekh.<sup>1049</sup> (As Henderson later notes, “Mareig is the Homr name for the Ngok.”)<sup>1050</sup> Browne’s description, based on first-hand observations, thus places the Ngok in the area of the Ngol/Ragaba ez Zarga at the beginning of the 19<sup>th</sup> century, precisely consistent with Ngok oral traditions and with the later Sudan Government records (discussed below).

(3) Pre-Condominium Oral Traditions Not Mentioned by Government

912. Similarly, while referring to irrelevant travelogues by Pallme, Junker and Schweinfurth about other parts of Sudan, the Government fails to mention any of the other authorities addressing the respective locations of the Ngok Dinka and the Misseriya in the pre-Condominium period. Like Browne’s observations, these pre-Condominium traditions (recounted by a variety of authors, before the current dispute arose, including Henderson,

<sup>1045</sup> SPLM/A Memorial, at paras. 905-907.

<sup>1046</sup> W. Browne, *Travels in Africa, Egypt, and Syria from the year 1792 to 1798* 572 (2d ed. 1806), **Exhibit-FE 1/1**.

<sup>1047</sup> **Map 44a** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Detail). Henderson, “*A Note on The Migration of the Messiria Tribe into South West Kordofan*,” 22(1) SNR 49, 60 (1939) (“This is a recognisable description of a journey from Kubja down the Wadhi Ghalla to Baraka, the present headquarters of the Awlad Serur and the starting point of the road to Turda (plural Turud). From Turda *to the Dinka country at Debbat el Mushbak* is much as described.”), **Exhibit-FE 3/15** (emphasis added). The reference to “*Jungeion*” is also a reference to one of the historic names of the Dinka in the region (“*Jange*” or “*Jaenge*”).

<sup>1048</sup> W. Browne, *Travels in Africa, Egypt, and Syria from the year 1792 to 1798* 571 (2d ed. 1806), **Exhibit-FE 1/1**.

<sup>1049</sup> See SPLM/A Memorial, at paras. 176-189; ABC Report, Part I, at p. 30, **Appendix B to SPLM/A Memorial**; Henderson, “*A Note on The Migration of the Messiria Tribe into South West Kordofan*,” 22(1) SNR 49, 60 (1939), **Exhibit-FE 3/15**.

<sup>1050</sup> Henderson, “*A Note on The Migration of the Messiria Tribe into South West Kordofan*,” 22 (1) SNR 49, 60 (1939) (“The people of *Jungeion* are tall and black: they have cows and sheep and goats and feed on the *mahreck* or white maize. C. Mareig is the Homr name for the Ngok.”), **Exhibit-FE 3/5** (emphasis added). The reference to “*Jungeion*” is also a likely reference to one of the historic names of the Dinka in the region (“*Jange*” or “*Jaenge*”).

Howell, Santandrea, Deng and Sabah) uniformly place the Ngok well to the north of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga.<sup>1051</sup>

913. Ironically, the Government does not even address the oral traditions of the Misseriya recorded by Henderson in 1931.<sup>1052</sup> There, as detailed in the SPLM/A Memorial, Henderson's 1931 notes recount Misseriya oral traditions that place the Alei Chiefdom of the Ngok Dinka north of the Ngol/Ragaba ez Zarga:

*“the Ngork Dinka already held the G nol river (Rageba Zerga) up to Hugn at Abu Urf.... Deinga was easily defeated by Hameidan.... He fled south eastwards to Turda and so brought the Arabs for the first time into contract [sic] with the Ngork, whose leading man at this time was Deing of Torjok, residing at Debbat El Mushbak, near Hasoba. Moindong [Monydhang], son of Kwal Dit, was chief of Malyor.”*<sup>1053</sup>

914. As detailed in the SPLM/A Memorial, these references in the Misseriya oral tradition place the Ngok on the Ngol/Ragaba ez Zarga and in the vicinity of Turda, further to the north, well before 1905. That tradition, including references to specific Ngok place-names (i.e., “Nyam,” “G nol”) and Ngok Chiefs (Monydhang, accurately described as son of “Kwal Dit” (i.e., Kwoldit), “Deing,” accurately described as being “of Torjok” referring to the leader of the Alei), is precisely consistent with the Ngok Dinka oral traditions, also placing the Ngok in the same region.<sup>1054</sup>

#### (4) Effects of the Mahdiyya Not Mentioned by Government

915. Furthermore, the Government's pre-Condominium historical account erases from Sudanese history the period for which it is probably best known to outside observers – the 17-year long Mahdiyya between 1881 and 1898. That historical epoch left limited records relevant to the Abyei Area, but nonetheless had significant effects on Sudan that must be considered. Those effects are considered by Professor Daly, whose Expert Report concluded:

*“[t]he evidence leaves us then with the likely conclusion that the Ngok suffered relatively little during the Mahdiyya, while the Humr's fortunes would appear to have declined precipitously.”*<sup>1055</sup>

That conclusion enables one to infer that the Ngok would not have retreated from prior settlements in the Bahr region and that the Misseriya would have been in no position to expand at the expense of the Ngok.

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916. In sum, although not extensive, the available documentary and other evidence concerning the pre-Condominium period shows that, by the end of the 19<sup>th</sup> century, the Ngok Dinka were settled in the Bahr region, around the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab rivers, and extending north to the vicinity of Turda. This corroborates the other

<sup>1051</sup> SPLM/A Memorial, at paras. 883-893.

<sup>1052</sup> K. Henderson, “A Note on History of the Homer tribe of Western Kordofan,” 660/11/1-244 SNR 1, 4 (1930), **Exhibit-FE 3/12**.

<sup>1053</sup> K. Henderson, “A Note on History of the Homer tribe of Western Kordofan,” 660/11/1-244 SNR 1, 4 (1930), **Exhibit-FE 3/12** (emphasis added).

<sup>1054</sup> Witness Statement of Peter Nyuat Agok Bol (Alei elder), at p. 2, ¶8; Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶10.

<sup>1055</sup> Daly Expert Report, at p. 26 (emphasis added).

evidence in the record (discussed below), which directly contradicts the Government's claim that the Ngok were located exclusively to the south of the Kiir/Bahr el Arab and instead directly supports the ABC Report's conclusions.

b) The Condominium Documents Prior to and in 1905 Provide No Support for, and Instead Flatly Contradict, the Government's Claims Regarding the Ngok Dinka

917. The Government's Memorial moves on from its treatment of irrelevant materials in the pre-Condominium period to a cursory discussion of pre-1905 Condominium records. Again, the GoS analysis is highly selective in its use of sources – in both the documents referred to and the passages discussed – and gravely flawed and misleading in its historical conclusions.

918. As discussed below, the Government's discussion of the Anglo-Egyptian documents from the Condominium period omits many key records, while mischaracterizing or fundamentally misunderstanding those documents which it does address. When the Condominium records are considered systematically, with serious attention to their specific observations, it is clear beyond any doubt that, as of 1905, a significant population of Ngok Dinka lived in permanent settlements with extensive cattle herds and agricultural fields dotted throughout the Bahr region, centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab and extending north to the *goz*. It is also clear that the Paramount Chief of the Ngok Dinka in 1905 (Arop Biong or "**Sultan Rob**") lived to the north of the Kiir/Bahr el Arab in the Ngok Dinka village identified by contemporaneous travel accounts (and maps) as "**Burakol**."

(1) Limitations on Pre-1905 Condominium Records and Anglo-Egyptian Knowledge of Abyei Region

919. Preliminarily, the Government's Memorial suggests that "[i]n the Condominium period, the history of the country [i.e., Sudan] is generally well documented,"<sup>1056</sup> and "there is considerable information about the Ngok Dinka and their interaction with the Condominium authorities."<sup>1057</sup> The GoS statements about Condominium records regarding the Ngok Dinka and Misseriya are exaggerated.

920. There are, to be sure, a number of important Anglo-Egyptian documents from the first decade of the 20<sup>th</sup> century and these documents provide more and better information than those from earlier periods.<sup>1058</sup> At the same time, it is also clear that many of the relevant documents have inherent and important shortcomings, arising from the limited knowledge and access of the Anglo-Egyptian authorities to the Abyei region until well after 1905.

921. As discussed in the SPLM/A Memorial and Professor Daly's Expert Report, the Anglo-Egyptian administrators knew little of the Abyei region or the Ngok Dinka during the first decade of the 20<sup>th</sup> century; their contacts with the region were in the nature of exploratory treks, uniformly occurring in the dry season and following limited routes.<sup>1059</sup> The

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<sup>1056</sup> GoS Memorial, at para. 283. *See also* GoS Memorial, at paras. 284, 287, 336, 354.

<sup>1057</sup> GoS Memorial, at para. 336.

<sup>1058</sup> These are discussed in SPLM/A Memorial, at paras. 908-941 and *below* at paras. 1069-1196.

<sup>1059</sup> Daly Expert Report, at pp. 33-37; Daly Supplemental Expert Report, at pp. 3, 18-19; SPLM/A Memorial, paras. 270-296

British officials spoke no local languages (and not Dinka) and were dependent on their Arab guides from Khartoum or local guides, for what information they obtained.<sup>1060</sup>

922. The few Anglo-Egyptian officials who travelled to the Abyei region prior to 1905 – Mahon, Wilkinson, Percival, Bayldon, Lloyd – also all did so in the dry season.<sup>1061</sup>

Inevitably, these officials did not observe the Ngok Dinka and their land use in the wet season, when the Ngok inhabited their permanent villages to the north.

923. These early Condominium officials also did not explore the vast bulk of the Abyei region – an area of more than 12,000 square miles, roughly the size of Belgium – instead following fairly limited routes. In particular, as illustrated on **Map 28** (Excursions of British Authorities), Condominium officials virtually never ventured to the north of the Ngol/Ragaba ez Zarga, save along a single corridor extending from Fauwel to Keilak covered by Mahon’s, Wilkinson’s and Percival’s treks. These Anglo-Egyptian officials did not venture off this track, much less to the west or north in the expanse of the Bahr region lying between the Ngol/Ragaba ez Zarga and the *goz*. As Professor Daly put it, “British knowledge of the Ngok was based on a few hours’ path-crossing.”<sup>1062</sup>

924. Thus, prior to 1905 and for some time thereafter, the Anglo-Egyptian officials were able to report that the Ngok Dinka were located in particular places during the dry season, but their observations do not suggest in the slightest that the Ngok were *only* located in the places where they were observed. Rather, **Map 28** (Excursions of British Authorities), **Map 29** (Wilkinson’s Route, 1902), **Map 71** (Excursions of Saunders and Percival) (Percival trek) and Figure 5 attached to the Macdonald Report show the very limited routes followed by Mahon, Wilkinson, Percival and Lloyd. The location of these routes makes it clear that the officials’ observations cannot indicate the absence of the Ngok Dinka from the overwhelming bulk of the Abyei Area – for the simple reason that the officials never went to the bulk of the Abyei Area.

925. According to the account of Michael Tibbs, the Condominium officials’ lack of knowledge about the full extent of the Ngok Dinka had not fundamentally changed by the 1950s.<sup>1063</sup> Tibbs, an Assistant District Commissioner and later District Commissioner in Kordofan from 1949 to 1954, states:

“overseeing Dar Misseria seemed a formidable task. The district covered an area of 25,000 square miles with a total population that I estimated to be approximately 130,000. Movement around the district was difficult. Its size was vast and there were no made up roads though we still moved around the district by lorry for the most part. In the southern part of the district, the seasonal change in weather was extreme. The dry season was parching and, in the rainy season, the roads quickly became impassable, the vast and complex river system flooded and much of the land was water-logged.”<sup>1064</sup>

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<sup>1060</sup> SPLM/A Memorial, at paras. 91, 279.

<sup>1061</sup> See below at paras. 948, 953, 975, 991, 1027, 1036.

<sup>1062</sup> Daly Expert Report, at p. 43. As discussed in further detail below, this left the Condominium officials exposed to deception, however honorably employed, by the local inhabitants of the area.

<sup>1063</sup> Witness Statement of G. Michael Tibbs, at pp. 2-3, ¶10-14, and p. 5, ¶26.

<sup>1064</sup> Witness Statement of G. Michael Tibbs, at p. 2, ¶10.

“I never visited the Ngok during that period ‘wet season’ because the conditions made it impossible for us to penetrate the district at all between May and November.”<sup>1065</sup>

”The above represents the extent of my knowledge of where the Ngok lived in 1905. I cannot conclude that the Ngok did not live in other places, as I simply was not able to travel throughout the whole region during the limited time available in the dry season.”<sup>1066</sup>

926. The officials in 1905 had an even larger area to cover and did not have motor vehicles. Provincial officials in the early Condominium described it as “impossible”<sup>1067</sup> to get around the whole province, and with respect to the territories of the Ngok Dinka “[t]heir country is difficult to traverse at all times of the year and is so distant from an administrative centre that it has been rarely visited.”<sup>1068</sup>

927. It is also essential, in evaluating the pre-1905 documents, carefully to assess the names that were used for particular watercourses. It is common ground that there was substantial geographical and terminological confusion about the rivers of the Bahr region at the time (1900 to 1907) and in particular concerning the watercourse referred to as the “Bahr el Arab.”

928. As discussed below, and as correctly found by the ABC Experts, most references to the “*Bahr el Arab*” in Condominium reports from immediately prior to 1905 were intended as references to the *Ngol/Ragaba ez Zarga*, and not what is today referred to as the *Kiir/Bahr el Arab*. Even earlier, references to the “Bahr el Arab” were often references to the Lol (or other watercourses). It is essential to keep this terminological confusion clearly in mind when considering what the pre-1905 Condominium records and maps indicated about the locations of the Ngok Dinka and Misseriya.

929. It is also important to note that, for most of the Condominium period, the Ngok Dinka were left to govern themselves with little contact with the Condominium administrators. This was an express policy and is restated in the 1929 Report on the Finances, Administration and Condition of the Sudan: “In the three southern provinces of the Sudan *the policy of fostering native authority among the negroid peoples has been continued.*”<sup>1069</sup> As noted in 1931 by the District Commissioner of Western Kordofan, to the Governor of Kordofan “*I understand the policy is to exclude the Dinka from Arab influence.*”<sup>1070</sup> Michael Tibbs’ witness statement confirms this.<sup>1071</sup>

930. As a consequence, Condominium officials typically only travelled to and from the residence of the successive Paramount Chiefs and had very limited interaction with the Ngok Dinka people more generally. This conclusion is confirmed by Michael Tibbs,<sup>1072</sup> and is

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<sup>1065</sup> Witness Statement of G. Michael Tibbs, at p. 2, ¶11.

<sup>1066</sup> Witness Statement of G. Michael Tibbs, at p. 5, ¶26.

<sup>1067</sup> Sudan Intelligence Report, No. 151, dated February 1907, Appendix C, at p. 7, **Exhibit-FE 17/25**; Sudan Intelligence Report, No. 162, dated January 1908, Appendix G, at pp. 56-57, **Exhibit-FE 17/30**.

<sup>1068</sup> *Anglo Egyptian Handbook Series (Bahr el Ghazal Province)*(1911), Supp. 9.11, p. 5 **Exhibit-FE 18/4**.

<sup>1069</sup> Reports on the Finances, Administration and Condition of the Sudan in 1929, at p. 12, **Exhibit-FE 18/9** (emphasis added).

<sup>1070</sup> Letter dated 9 August 1931, **Exhibit-FE 18/10**.

<sup>1071</sup> Witness Statement of G. Michael Tibbs, at p. 3, ¶¶13, 14.

<sup>1072</sup> Witness Statement of G. Michael Tibbs, at p. 2, ¶13 and p. 5, ¶26.

reflected in the pre- and post-1905 Condominium records.<sup>1073</sup> The absence of interaction between the Ngok Dinka and the Condominium administrators is another one of the reasons for the paucity of information on the location of the Ngok pre- and post-1905.

931. Finally, the pre-1905 documents also show that the Ngok Dinka (particularly Arop Biong or “Sultan Rob”) were reluctant in early years of the Condominium to describe to the Anglo-Egyptian authorities the full extent of their territory and took active steps to conceal where Ngok villages were located.<sup>1074</sup> The reason for the Ngok reticence was fear of slave-raiding, exacerbated by the fact that the Condominium officials were accompanied by substantial contingents of Arab troops (for example, the “Arab Mounted Infantry”). Again, this tended to skew the reports of the Anglo-Egyptian administrators in the direction of fewer Ngok Dinka and smaller Ngok territory.

932. Despite these factors, however, the pre-1905 documents demonstrate unequivocally that the Ngok Dinka were located well above the Kiir/Bahr el Arab, with permanent villages extending north up to the Ngol/Ragaba ez Zarga and further north. The records also show beyond any doubt that the Paramount Chief of the Ngok Dinka in 1905 (“Sultan Rob”) resided and held court to the north of the Kiir/Bahr el Arab (in the Ngok village described on maps as “Burakol”).

## (2) 1900 Saunders Expedition to Bahr el Ghazal

933. The Government first cites a 1900 expedition to the Bahr el Ghazal by Saunders – which it describes as “one of the first explorations of southern Sudan.”<sup>1075</sup> The GoS refers to nothing reported by Saunders bearing one way or the other on the locations of the Ngok Dinka (or the Misseriya), although both the Government and its expert (Macdonald) cite Saunders as correctly identifying the location of the Kiir/Bahr el Arab.<sup>1076</sup>

934. The Government’s Memorial and Mr. Macdonald claim that because the “Bahr el Arab” was blocked by sudd, “[p]roceeding on foot, [Saunders] nonetheless surveyed the first 47 ½ miles (76 km) of the [Kiir/Bahr el Arab] river.”<sup>1077</sup> As demonstrated in the attached Expert Report by MENAS, this statement by the Government and its expert is wrong.

935. Saunders produced a written report and a travel log of his journey which enables one to trace precisely where he went.<sup>1078</sup> Nowhere in his written report or his travel log does Saunders say that he proceeded on foot along the “Bahr El Arab.” In fact, careful attention to Saunders’ report shows that he did not proceed on foot up the Kiir/Bahr el Arab at all and that what he referred to as the “Bahr el Homr” was neither the Ngol/Ragaba ez Zarga, the Kiir/Bahr el Arab or the Lol, but some other watercourse altogether.<sup>1079</sup>

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<sup>1073</sup> See for example the detailed 1908 report on Kordofan Provinces by its then Governor Captain Watkiss Lloyd, at some 50-plus pages, which goes into specific detail as to the administration, peoples and territory of Kordofan yet almost wholly fails to mention the Ngok Dinka. Sudan Intelligence Report, No. 171, dated October 1908, at pp. 29-86, **Exhibit-FE 17/31**.

<sup>1074</sup> See below at paras. 1005-1007.

<sup>1075</sup> GoS Memorial, at para. 310.

<sup>1076</sup> GoS Memorial, at para. 310; Macdonald Report, at para 3.7, fn. 24 (“[Saunders’] distance of 94 miles from Lake No [to the mouth of Kiir/Bahr el Arab] agrees with measurements on modern maps.”).

<sup>1077</sup> GoS Memorial, at para. 310.

<sup>1078</sup> Sudan Intelligence Report, No. 74, dated 9 October 1900, Appendix A, at pp. 3 (written report) and 4 (travel log), **Exhibit-FE 17/8**.

<sup>1079</sup> These are the rivers that have at certain points in time been referred to as the Bahr el Homr. See Macdonald Report, at para. 1.4.



936. As explained in the MENAS Expert Report, the Government has very clearly misunderstood the distance of 47 ½ miles recorded in Saunders’ travel log as a reference to a distance *along what Saunders calls the Bahr El Arab*. In fact, it is the distance Saunders records from the *juncture of what he called the “Bahr El Arab” with the Bahr El Ghazal*, to the southernmost point on the Bahr El Ghazal to which he could travel by boat until prevented by the sudd. Saunders explains this in his written report:

“The *Bahr El Ghazal* (called by natives Bahr el Ferial) *is completely blocked by* sudd, and shoals to 4 feet 48 miles *from the Bahr el Arab*; the sudd lasts up to Meshra El Rek.”<sup>1080</sup>

937. In this passage, Saunders is clearly referring to the Bahr el Ghazal and not to the Bahr el Arab. When Saunders refers to 47 ½ miles (or 48 miles<sup>1081</sup>) he does so as a distance *along the Bahr El Ghazal* (“[t]he Bahr El Ghazal ... is completely blocked”) measured “*from*” the juncture of the Bahr el Ghazal with the Bahr El Arab and extending “up to” Meshra El Rek. This is also confirmed by the heading to his travel log “*Report on the Bahr El Ghazal, from Bahr El Arab to Meshra Er Rek* [sic].”<sup>1082</sup>

938. Saunders’ report does not assist in locating the territory of the Ngok Dinka or the Misseriya. What it does, however, indicate is the general lack of knowledge of the Condominium authorities at the time as to the Bahr region and the inaccuracies in the Government’s historical assertions.

(3) 1901 Inspection by Butler

939. The next reference in the GoS Memorial is to a 1901 “inspection” by Butler that supposedly “arranged the boundary” between the South Kordofan and Nahud inspectorates.<sup>1083</sup> Butler’s travels took him no closer than 150 miles from the Abyei region and he made no reference to the Ngok Dinka or to the Misseriya. His inspection also does not assist in the slightest in determining the locations of either the Ngok or the Misseriya.

(4) Report of November/December 1901 trek by Mahon (Kordofan Governor) – Sudan Intelligence Report No. 90

940. The Government fails to mention the November and December 1901 trek through Southwestern Kordofan by Mahon (the Governor of Kordofan), which is recorded in Sudan Intelligence Report (No. 90) dated 31 January 1902.<sup>1084</sup> Although omitted from the GoS Memorial, that Report makes important observations confirming the location of the Misseriya headquarters in the area of Muglad, some 70 miles north of the Abyei Area.

941. In his report, Mahon notes the locations of the Homr in Kordofan, with the Homr (Agari) having their “*headquarters*” at Muglad,<sup>1085</sup> who when the water supply gets short “go south to the Bahr el Arab.”<sup>1086</sup> As can be seen from the discussion that follows immediately

<sup>1080</sup> Sudan Intelligence Report, No. 74, dated 9 October 1900, Appendix A, at p. 3, **Exhibit-FE 17/8** (emphasis added).

<sup>1081</sup> Saunders refers to 48 miles in his full written report and to 47 ½ miles in his summary.

<sup>1082</sup> Sudan Intelligence Report, No. 74, dated 9 October 1900, Appendix A, at p 4 (travel log), **Exhibit-FE 17/8**.

<sup>1083</sup> GoS Memorial, at para. 311.

<sup>1084</sup> Sudan Intelligence Report, No. 90, dated 31 January 1902, Appendix E, at pp. 9-10, **Exhibit-FE 17/9**.

<sup>1085</sup> Sudan Intelligence Report, No. 90, dated 31 January 1902, Appendix E, at pp. 9-10, **Exhibit-FE 17/9**.

<sup>1086</sup> Sudan Intelligence Report, No. 90, dated 31 January 1902, Appendix E, at pp. 9-10, **Exhibit-FE 17/9**.

below of Mahon's subsequent treks, he is clearly referring to the Ngol/Ragaba ez Zarga when he refers to the Bahr el Arab.<sup>1087</sup> This is confirmed in the Expert Report by MENAS.<sup>1088</sup>

942. Mahon also refers to the "practically separate ... Homr (Feliti), whose headquarters are at Keilak,"<sup>1089</sup> and to the "Misseria" being at "El Eddaiya."<sup>1090</sup> All of the locations referred to by Mahon's report are precisely consistent with subsequent accounts of the Misseriya being located to the north of the *goz*, in the Muglad and Babanusa regions.<sup>1091</sup> This not only provides a direct basis for identifying where the Misseriya were located, but also indirectly permits location of the Ngok Dinka – who were consistently referred to as bordering or neighboring the Misseriya to the south – in the region of the *goz*.

(5) 1902 Trek by Mahon (Kordofan Governor) – Sudan Intelligence Report No. 92

943. The Government briefly cites the March 1902 trek by Mahon, mentioning his reports from the Sudan Intelligence Report (No. 92) in two passing sentences.<sup>1092</sup> The absence of serious attention to this report by the Government is noteworthy, because Mahon is the first source mentioned in the GoS Memorial that directly addresses the location of the Ngok Dinka – and yet the Government effectively ignores it. Similarly, the Government's cartographical expert (Macdonald) ignores Mahon's 1902 trek (as well as both his earlier and later treks).

944. As discussed in the SPLM/A Memorial, Mahon's 1902 report located "*Sultan Rob's country on the Bahr El Homr*, about 2 days from Lake Ambady."<sup>1093</sup> It is common ground that "Sultan Rob" was the Sudan Government's name for the Ngok Dinka Paramount Chief at the time, Arop Biong.

945. Considered in context, Mahon's reference to "Bahr El Homr" is almost certainly a reference to the Ngol/Ragaba ez Zarga. The Kiir/Bahr el Arab is located approximately 20 miles<sup>1094</sup> from Lake Ambady, while the Ngol/Ragaba ez Zarga is located approximately another 25 to 30 miles to the north of the Kiir/Bahr el Arab.

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<sup>1087</sup> See below at paras. 943-948. This also confirmed by Mahon mentioning his promise to meet the Arabs at the Bahr el Arab. This is evidence that the nomadic Arabs were grazing below the Ngol/Regaba ez Zarga at the time, and as reference to Bayldon's note several years later points out, the Misseriya were unlikely to be traveling to the Kiir/Bahr el Arab and the heart of the Ngok Dinka chiefdoms, as they considered it unsafe: Sudan Intelligence Report, No. 128, March 1905, Appendix C, at pp. 10-12 ("[Ngol/Ragaba ez Zarga]... to which in dry weather the Homr Arabs used to come down with their cattle. I say 'used to bring their cattle,' as now they say that it is safe for them to go into the Dinka country they go there, for better grazing and water."), **Exhibit-FE 2/8**.

<sup>1088</sup> MENAS Report, at paras. 24-31.

<sup>1089</sup> Sudan Intelligence Report, No. 90, dated 31 January 1902, Appendix E, at pp. 9-10, **Exhibit-FE 17/9**.

<sup>1090</sup> Sudan Intelligence Report, No. 90, dated 31 January 1902, Appendix E, at pp. 9-10, **Exhibit-FE 17/9**.

<sup>1091</sup> Although his report does not describe the Ngok Dinka, Mahon refers to cattle and merchants going between the "Bahr el Arab" and "Dar Jange." Sudan Intelligence Report, No. 90, dated 31 January 1902, Appendix E, at pp. 9-10, **Exhibit-FE 17/9**.

<sup>1092</sup> GoS Memorial, at para. 312. See also GoS Memorial, at para. 347.

<sup>1093</sup> Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 19, **Exhibit-FE 1/16** (emphasis added).

<sup>1094</sup> The SPLM/A Memorial incorrectly stated that the Kiir/Bahr el Arab was located 60 miles from Lake Ambady. SPLM/A Memorial, at para. 914. In fact, the reference was erroneous and should have been 20 miles.

946. As discussed below, Anglo-Egyptian administrators reported that the Ngok Dinka walked about 35 miles a day,<sup>1095</sup> which would put the Ngol/Ragaba ez Zarga somewhat less than two days walk (“about 2 days”) from Lake Ambady and which would make it unlikely that the Kiir/Bahr el Arab, which was only 20 miles away (less than one day’s walk by locals), was meant. It is conceivable that Mahon would have been referring to the distance travelled by the British administrators, but given that his report was based on what local informants said (which would have meant the distance they travelled in two days), this is highly unlikely. This is confirmed in the Expert Report by MENAS.<sup>1096</sup>

947. There are additional reasons to conclude that Mahon meant the Ngol/Ragaba ez Zarga when he referred to the Bahr el Homr.<sup>1097</sup> As discussed below, Mahon’s description of a subsequent trek to the region (in 1903) clearly indicates that he was referring to the Ngol/Ragaba ez Zarga when he said the “Bahr el Homr.”<sup>1098</sup>

948. Moreover, this conclusion is consistent with the incorrect references used by Wilkinson who, as discussed below, confused the Bahr el Arab (also referred to as the Bahr el Homr) with the Ngol/Ragaba ez Zarga.<sup>1099</sup> Mahon and Wilkinson were well-acquainted and travelled to the region at the same time during the 1902 and 1903 dry seasons;<sup>1100</sup> it is very likely that Mahon and Wilkinson would have shared both what they had learned of the region and the same geographical confusions.

949. However Mahon’s report is interpreted, it clearly provides first-hand observations firmly establishing Ngok Dinka territory (“Sultan Rob’s country”) on either the Ngol/Ragaba ez Zarga (most likely) or conceivably on the Kiir/Bahr el Arab, during the dry season of 1902, which is consistent with the Ngok’s dry season cattle grazing patterns.<sup>1101</sup> Notably, the evidence concerning Ngok grazing patterns demonstrates that the presence of the Ngok on either the Kiir/Bahr el Arab or the Ngol/Ragaba ez Zarga during the *dry season* meant that the Ngok would be located further to the north in the *wet season*.

950. As discussed in detail in the SPLM/A Memorial and above, the Ngok Dinka have historically taken their cattle herds south in the dry season from their permanent villages; that seasonal grazing brought the Ngok herds to the Kiir/Bahr el Arab during the dry season, away from their permanent settlements further to the north.<sup>1102</sup> Thus, Mahon’s dry season observation of the Ngok on either the Ngol/Ragaba ez Zarga or, less likely, the Kiir/Bahr el Arab, would be precisely consistent with the conclusion that, during the wet season, the Ngok inhabited the region further to the north.

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<sup>1095</sup> As discussed below, Percival recorded that the Ngok Dinka walked about 35 miles a day (which is substantial by British standards, but entirely in line with the distances covered by local inhabitants accustomed to lengthy treks). See Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 24-27 (1905) (“A day’s journey is according to them 35 miles I think”), **Exhibit-FE 17/13**.

See also below at paras. 996.

<sup>1096</sup> MENAS Report, at para. 26.

<sup>1097</sup> See below at paras. 979-980.

<sup>1098</sup> See below at paras. 975-982.

<sup>1099</sup> See below at para. 955.

<sup>1100</sup> See below at paras. 981-982. As discussed below at paras. 1038-1040 Lloyd, who was a Kordofan Province Inspector and later Governor, also incorrectly named the Ngol/Ragaba ez Zarga the “Bahr el Arab”. Lloyd would later refer to it as the “Bahr el Homr.” Given the number and rank of the Kordofan officials who made the same mistake it would appear that within Kordofan the Ngol/Ragaba ez Zarga was widely known as the Bahr el Arab.

<sup>1101</sup> See SPLM/A Memorial, at paras. 1073, 1074.

<sup>1102</sup> See SPLM/A Memorial, at paras. 196-205; see above at paras. 1322-1333.

951. As discussed in the SPLM/A Memorial, the Mahon report also noted that “**Rob’s place is a great trade centre for Bahr El Ghazal** and a lot of ivory comes there.”<sup>1103</sup> The report’s description of “Rob’s place” as a trading center is perfectly in line with other descriptions of the location of Abyei town as the center of Ngok commercial affairs.<sup>1104</sup>

952. Mahon did not specify precisely where “Rob’s place” was located in his 1902 report. It is almost certain, however, that the location of “Rob’s place” was either “**Rob’s new village,**” or “**Rob’s old village,**” both identified on map evidence from slightly later years.<sup>1105</sup> The two villages were located either on (Rob’s “old village”), or north (Rob’s “new village”) of, the Kiir/Bahr el Arab, not far from the location of the contemporary Abyei town.<sup>1106</sup>

(6) 1902 Wilkinson Trek Record

953. As discussed in the SPLM/A Memorial, Wilkinson made a now historic trek to “**Dar El Jange**” during the dry season of 1902, which he recorded in detailed notes.<sup>1107</sup> The Government’s Memorial devotes some attention to Wilkinson’s 1902 trek record, but entirely in the context of claiming that the influence of Wilkinson’s confusion of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga was supposedly “short-lived.”<sup>1108</sup> The Government ignores, however, Wilkinson’s fairly extensive notes about what he observed on his trek, and particularly what he observed regarding the Ngok Dinka and the Misseriya.

954. Wilkinson’s notes record that he travelled south from Kadugli (where he refers to “Arab villages”) to Lake Keilak.<sup>1109</sup> Thereafter, Wilkinson travelled more or less due south to reach Fauwel, just to the north of the Ngol/Ragaba ez Zarga. Wilkinson’s route is depicted on **Map 29** (Wilkinson’s Route, 1902).

955. From Fauwel, Wilkinson crossed what he called the “Bahr El Arab.” In fact, it is now common ground that the river which Wilkinson called the “**Bahr el Arab**” was the **Ngol/Ragaba ez Zarga**, not the Kiir/Bahr el Arab. This was the conclusion reached by the ABC,<sup>1110</sup> and is now acknowledged by the Government<sup>1111</sup> (although it was not accepted by the Government during the ABC proceedings). Wilkinson’s course and his confusion of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga are also shown on **Map 29** (Wilkinson’s Route, 1902).<sup>1112</sup>

<sup>1103</sup> See SPLM/A Memorial, at para. 915 (citing Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 20, **Exhibit-FE 1/16** (emphasis added)).

<sup>1104</sup> See SPLM/A Memorial, at paras. 961-967.

<sup>1105</sup> See below at paras. 979, 996, 1000, 1108, 1218, 1229.

<sup>1106</sup> “Rob’s Place” is shown on a 1907 map depicting Wilkinson’s trek. **Map 40** (*Northern Bahr el Ghazal: Sheet 65*, Survey Office Khartoum, 1907).

<sup>1107</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 151-157 (1905), **Exhibit-FE 2/15**.

<sup>1108</sup> GoS Memorial, at paras. 314-318.

<sup>1109</sup> On his way to Keilak, Wilkinson travelled to Jebel Kaffari where he notes a “large and important khor [pool]” which feeds Lake Keilak and “enters the Bahr el Arab.” Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 153 (1905), **Exhibit-FE 2/15**. This reference to water flowing into the “Bahr el Arab” is to water from the Khor entering the Ngol/Ragaba ez Zarga, as a river could not run from Keilak to the Kir without first being subsumed by the Ngol/Ragaba ez Zarga. This is evident from maps showing a watercourse from Keilak south to the Ngol, not to the Kiir/Bahr el Arab. See GoS **Map 4** (*Carte du Bahr el Ghazal*, 1898, Marchand), and contemporaneous to Wilkinson GoS, **Map 7** (*The Anglo-Egyptian Sudan*, Sept. 1904).

<sup>1110</sup> ABC Report, Part I, at p. 38, **Appendix B to SPLM/A Memorial**.

<sup>1111</sup> GoS Memorial, at para. 316.

<sup>1112</sup> See also **Map 40** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907); **Map 40a** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907 – Detail); **Map 41** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907 – Overlay).

956. Parenthetically, while the Government goes to some lengths to minimize the Ngol/Ragaba ez Zarga as a “creek,” it is unsurprising that Wilkinson mistook the watercourse for the Kiir/Bahr el Arab. Thus, he described the Ngol/Ragaba ez Zarga as “**120 yards broad, with water 3 to 3 feet 6 inches deep**”<sup>1113</sup> – hardly the dimensions of a creek.

957. After Wilkinson had crossed what was in reality the Ngol/Ragaba ez Zarga, he entered into “the country” of “**a Dinka chief called Rueng,**” and approximately 15 miles south from the Ngol/Ragaba ez Zarga, “**the first Dinka village of Bombo** is reached.” Wilkinson noted that “[t]his district **is now known as Bongo.**”<sup>1114</sup>

958. Wilkinson went on to report: “These villages, neatly built, are **used by the Dinka in the rains** and as long as the water lasts. At the present date, 2.2.02., all the inhabitants had left and were grazing their herds of cattle where grass and water were to be found,” with the villages being located a few miles distance from one another.<sup>1115</sup> Wilkinson’s trek record then goes on to recount that he:

“[r]eached Etai [Athai], where **the first Dinkas** were met. Here **there were large settlements**, and the people were most friendly. A chief named Lor [Alor] has his headquarters here. A large watercourse flows in from [the] N.E. and meets another watercourse, the Ragabet El Lau, which comes from N.W., and then joining [it] runs into the Kir, or Bahr El Jange, in a southerly direction.”<sup>1116</sup>

959. The descriptions of “villages” and “large settlements” of Dinka, “neatly built” houses, seasonal grazing movements, and the “headquarters” of a local chief are again consistent with the permanent character of Ngok villages and homes, the Ngok’s seasonal migrations and the centralized character of their political structure.<sup>1117</sup> At the same time, the absence of the Ngok Dinka cattle herds, and Ngok villagers responsible for herding the cattle during the dry season indicates that the Ngok presence in the area would have been even more obvious in the rainy season. In any event, however, Wilkinson’s report leaves no doubt that the Ngok Dinka were – contrary to the Government’s current claims – located well to the north of the Kiir/Bahr el Arab in numerous, large and permanent settlements in 1902.

960. Wilkinson next records that, 28 miles from the Ngol/Ragaba ez Zarga, he reached what he termed “the Kir River, or Bahr El Jange” and the “**settlements of Sultan Rob.**”<sup>1118</sup> It

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<sup>1113</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), **Exhibit-FE 2/15**. Lloyd, who travelled a long distance down the Ngol/Ragaba ez Zarga described it as a broad “river” “100 yards “ wide with “steep, well defined banks” “10 feet high:” Sudan Intelligence Report, No. 171, dated October 1908, Appendix D, at p. 5, **Exhibit-FE 17/29**. **Map 38** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907). *The Handbook of Anglo-Egyptian Sudan* 91-92 (1922), **Exhibit-FE 18/7** describes the Ngol/Ragaba ez Zarga “its average width is about 100 yards” and that “it is said to rise some 30 miles across the Darfur frontier.” See below at paras. 1400-1410 and see also MENAS Expert Report, at paras. 112-120.

<sup>1114</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), **Exhibit-FE 2/15** (emphasis added) and **Map 29** (Wilkinson’s Route, 1902); **Map 36** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904) (in Gleichen, 1905); **Map 40** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907).

<sup>1115</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), **Exhibit-FE 2/15**. As discussed in the SPLM/A Memorial, it is implausible that “all the inhabitants had left” such villages; as discussed above, only younger Ngok men and unmarried women accompanied Ngok cattle on seasonal grazing migrations during the dry season. SPLM/A Memorial, at paras. 207, 1075.

<sup>1116</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), **Exhibit-FE 2/15** (emphasis added).

<sup>1117</sup> See SPLM/A Memorial, at paras. 206-216.

<sup>1118</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 156 (1905), **Exhibit-FE 2/15** (emphasis added).

is now common ground that the river referred to by Wilkinson at this point was in fact the Kiir/Bahr el Arab.<sup>1119</sup> Wilkinson described his approach to Sultan Rob as follows:

“the Kir River, or Bahr El Jange [i.e., the Kiir/Bahr el Arab], is struck, as one reaches the settlements of Sultan Rob. The river here is a most pleasant sight.... *The district on N. bank is called Mareg. The district on S. bank is called Masian, and the Sultan Rob lives in the latter.* Much dura is cultivated.”<sup>1120</sup>

961. As noted above, the name of the district of “Mareg” on the north bank of the Kiir/Bahr el Arab is derived from one of the names used for the Ngok Dinka (*Mahriek*, *Mareig* or *mariekh*) and obviously referred to Ngok Dinka territory.<sup>1121</sup> That nomenclature is consistent with Wilkinson’s description, outlined above, of this territory being inhabited by the Ngok Dinka and with Mahon’s similar description of “Sultan Rob’s country” being located between the Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab.<sup>1122</sup>

962. The Government’s Memorial acknowledges that the “Mareg District” referred to the Ngok Dinka (noting that “Mareig is another name for the Ngok Dinka”<sup>1123</sup>). Without explanation, however, the Government implies that the Mareg District was on the southern bank of the Kiir/Bahr el Arab,<sup>1124</sup> presumably in an effort to support its claim that the Ngok were located entirely south of the Kiir/Bahr el Ghazal. In fact, however, Wilkinson clearly stated that “*the district on N. bank is called Mareg,*” obviously meaning the “*North bank.*” As already noted, the reason that the area to the north of the Kiir/Bahr el Arab was called Mareg district was because it was an area of the Ngok Dinka.

963. Wilkinson’s description of the location of Sultan Rob’s settlement on the south bank of the Kiir/Bahr el Arab by the name of “Masian” is very likely a reference to “Mithiang,” located to the southeast of the current location of Abyei town.<sup>1125</sup> The location of Masian/Mithiang is identified on **Map 13** (Ngok Dinka Chiefdoms, 1905) and **Map 29** (Wilkinson’s Route, 1902). The location is sometimes identified on contemporaneous maps as “Sultan Rob’s Old Village.”<sup>1126</sup>

964. As indicated on **Map 29**, Wilkinson then turned north from Masian and returned to Fauwel by a route roughly paralleling the course he had taken coming south. During this return trek, Wilkinson notes that, when “[l]eaving Sultan Rob’s settlement,” the “country here is open, *and much dura cultivated. Dinka dwellings are dotted about, and the country presents a most prosperous aspect.*”<sup>1127</sup> Wilkinson’s descriptions of the Ngok Dinka settlements in this area are precisely consistent with other evidence regarding both the Ngok

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<sup>1119</sup> This is indicated on **Map 29** (Wilkinson’s Route, 1902) which plots Wilkinson’s trip.

<sup>1120</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 156 (1905), **Exhibit-FE 2/15** (emphasis added).

<sup>1121</sup> See above at para. 911.

<sup>1122</sup> See above at paras. 944-945.

<sup>1123</sup> GoS Memorial, at para. 316 n. 200.

<sup>1124</sup> GoS Memorial, at para. 316 (“the settlement of Sultan Rob ... was in the Mareg District”).

<sup>1125</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 156 (1905), **Exhibit-FE 2/15**.

<sup>1126</sup> E.g., **Map 36** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904) (in Gleichen, 1905); **Map 36a** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904) (in Gleichen, 1905) – Detail; **Map 37** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904) (in Gleichen, 1905) – Overlay; **Map 40** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907); **Map 46** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910); **Map 46a** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910 – Detail); **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913).

<sup>1127</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 156 (1905), **Exhibit-FE 2/15** (emphasis added).

agricultural practices (cultivation of sorghum (*dura*)) and the Ngok's permanent, well-maintained settlements.<sup>1128</sup>

965. As discussed in the SPLM/A Memorial, Wilkinson's report provides extremely clear first-hand evidence that describes the Ngok Dinka inhabiting permanent settlements with extensive agricultural lands in the area between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. Throughout, Wilkinson's description is redolent of numerous Ngok Dinka ("Dinka dwelling are dotted about," "settlements," "large settlements") living in substantial, permanent villages ("headquarters") with well-maintained homes ("most prosperous aspect," "neatly built" houses) and extensive agricultural cultivation of the Ngok's staple crop of sorghum ("much *dura*," "much *dura* cultivated"). Wilkinson's account is consistent with and corroborates the earlier 1902 Mahon trip report, which also described prosperous Ngok agricultural populations throughout this area.<sup>1129</sup>

966. At the same time, like Mahon, Wilkinson's trek was made in the dry season (when Ngok cattle had largely moved to the south) and he therefore could not have observed the extent of the Ngok presence in the area during the remainder of the year. Further, as indicated on **Map 29** (Wilkinson's Route, 1902), Wilkinson followed one route through the Ngok territory – from Keilak to Fauwel (or Pawol), crossing the Ngol/Ragaba ez Zarga and moving directly to the "settlements of Sultan Rob" on the Kiir/Bahr el Arab river, then returning by largely the same route. Accordingly, while Wilkinson's report provides strong evidence of some of the places in which the Ngok were then located, his report necessarily cannot provide a comprehensive description of the full extent of the Ngok villages at the time.<sup>1130</sup>

967. Finally, Wilkinson's trek notes also strongly suggest the existence of Ngok Dinka villages well to the north of the Ngol/Ragaba ez Zarga. In his notes, Wilkinson observed no "Arab" villages further south than Lake Keilak. As noted above, Wilkinson referred to Arab "villages" north of Keilak,<sup>1131</sup> but contrasts this characterization with his reference to "Arab (Ferikgs) or settlements" at El Nila.<sup>1132</sup> In general, Wilkinson's notes distinguish between what he terms permanent Arab *villages* and temporary *ferigs*, which are Arab camps that he describes as "settlements" of the nomadic Misseriya.<sup>1133</sup>

968. Arriving at Keilak, Wilkinson notes the relative poverty of the Arabs: "*Keilak is a series of groups of tukls badly built and inhabited by Homr Arabs who ... appear to live on the Nubas.*"<sup>1134</sup> Wilkinson then leaves Lake Keilak, noting "numerous Arab *settlements* are passed situated at the outlet of the lake."<sup>1135</sup> Thereafter, Wilkinson reports seeing Homr "*settlements*" at El Geref, El Debekir, El Anga, H. Debib and Fauwel.<sup>1136</sup> Given other records

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<sup>1128</sup> See SPLM/A Memorial, at paras. 206-216.

<sup>1129</sup> See SPLM/A Memorial, at paras. 119-127, 1022-1034.

<sup>1130</sup> Wilkinson did not travel to the area now known as Abyei town, or beyond, where at the time Ngok were settled. Nor did Wilkinson venture northwest toward the *goz* area, or to the Ngok settlements east of Fauwel such as Ajaj or Miding [Arabic: Heglig]. See SPLM/A Memorial, at paras. 1015-1063.

<sup>1131</sup> He locates these villages at El Merekib, El Birket, Um Sessaban, Kururra, Sunngikai, H. El Birgid. See Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 151-157 (1905), **Exhibit-FE 2/15**.

<sup>1132</sup> See above at paras. 954.

<sup>1133</sup> See SPLM/A Memorial, at paras. 249-254.

<sup>1134</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 154 (1905), **Exhibit-FE 2/15**.

<sup>1135</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 154 (1905), **Exhibit-FE 2/15**.

<sup>1136</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 154-155 (1905), **Exhibit-FE 2/15**.

(and maps) of the time, these “Arab settlements” would have been no more than temporary nomadic *feriks* (and are marked on maps from the periods with a ferik symbol according to relevant map legends as discussed at para. 1228-1260 below).<sup>1137</sup>

969. After passing Fula Hamadai, about 29 1/2 miles north of the Ngol/Ragaba ez Zarga, Wilkinson observes for the first time “Small *villages* – mere collection of three or four huts passed at El Jaart and Um Geren,” in the Ngok Dinka area known as Pouth (larger Ngok villages may comprise several separate three or four hut groups, spread out over a broader area.).<sup>1138</sup> Wilkinson did not report either that these were “Arab” villages or that there were inhabitants in any of these villages (although the general pattern of his notes is to record encounters with local inhabitants when they occurred).<sup>1139</sup>

970. Given this, the strong inference is that the villages were Ngok Dinka villages of the Achaak section. Wilkinson’s description of “*small villages*” (i.e., permanent places of habitation) with clusters of houses (a collection of “*three or four huts*”) perfectly describes the Ngok Dinka village structure and plan.<sup>1140</sup> Moreover, in contrast to his earlier references, Wilkinson did not describe the villages as “Arab.” Furthermore, it is Ngok Dinka villages that would have likely appeared uninhabited or thinly inhabited in the dry season, as Wilkinson reported, when the Ngok cattle camps were further south.<sup>1141</sup>

971. In contrast, the Misseriya (a) did not inhabit villages, (b) would have been in the area during the dry season, and (c) did not build houses and instead carried their tents with them. The uninhabited huts could not have belonged to the Misseriya because they did not inhabit “*huts*” or any kind of permanent structure, but rather *tents*. Cunnison notes this, explaining that, for the Misseriya, “to arrive as a structure which, though itself mobile, constitutes a durable physical centre of residence we have to come down to the tent.”<sup>1142</sup>

972. Given the strong likelihood that the “uninhabited” villages Wilkinson observed to the north of the Ngol/Ragaba ez Zarga were Ngok Dinka villages, Wilkinson’s notes provide clear confirmation that the Ngok were permanently settled between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. In addition, Wilkinson’s record also provides strong evidence that the Ngok Dinka villages were located some 29½ miles north of the Ngol/Ragaba ez Zarga at El Jaart and Um Geren.

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<sup>1137</sup> Cunnison described the ferik or ferig as “[t]he camp” of the Misseriya “impl[ying] a unit of residence” and to “the tents of one extended family, i.e. to an arc of the camp’s circle.” I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 64 (1966), **Exhibit-FE 4/16**. Witness Statement of G. Michael Tibbs, at pp. 3-4, ¶22 (c.f. p. 3, ¶19).

<sup>1138</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), **Exhibit-FE 2/15**.

<sup>1139</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), **Exhibit-FE 2/15**.

<sup>1140</sup> SPLM/A Memorial, at para. 213. The Ngok typically lived in small homesteads or villages of two to three *tukuls*, within a wider settlement area that may contain a number of these smaller community units.

<sup>1141</sup> As stated in the SPLM/A Memorial, at paras. 200-201, 922, n. 1482, the Ngok may also have avoided contact with Wilkinson and his accompanying soldiers because of fears of slave-raiding. As acknowledged by Mahon, Wilkinson led the Camel Corps: Sudan Intelligence Report, No. 104, dated March 1903, Appendix E, at p. 22, **Exhibit-FE 1/21**.

This concern on the part of the Ngok Dinkas was expressly recognized in Percival’s November 1904 trek discussed below at paras 1007-1011, 1402.

<sup>1142</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 43 (1966), **Exhibit-FE 4/16**.



(7) 1903 Sudan Intelligence Report (No. 110)

973. The Government's Memorial does not refer to the September 1903 Sudan Intelligence Report (No. 110) which relates that followers of "Sheikh Rob," in the Dinka district of the "Gnak," (i.e., the Ngok) had complained about Humr cattle and slave raiding:

"Two runners who arrived at Fashoda on 13th September, from the Dinka district of Gnak (Sheik Rob Wad Rung), reported that some Homr under one Mohammed Khada **had raided their district about a month previously, and had killed two men and carried off 30 men and 1,000 head of cattle.** The Mudir of Kordofan investigated and settled this case. The Dinkas received back their men and cattle. One of the Homr was killed in the fighting."<sup>1143</sup>

974. As discussed in the SPLM/A Memorial, the report indicates sizeable numbers of Ngok Dinka, belonging to "Sheikh Rob" (an obvious, if not completely consistent, reference to "Sultan Rob," the Ngok Paramount Chief), with populations sufficient to permit the seizure of "30 men and 1,000 head of cattle" in a single raid. The locations that were raided are not identified, but it is noteworthy that the incident had been "investigated and settled" by the "Mudir of Kordofan" (rather than authorities in Bahr el Ghazal).

(8) 1903 Inspection by Mahon (Kordofan Governor) –  
Sudan Intelligence Report No. 104

975. The GoS's Memorial next briefly mentions a third visit by Mahon to the Ngok Dinka territory in the dry season of 1903. The Government notes that Mahon "again reported on Sultan Rob's country," but spends only a paragraph addressing the report, noting principally that "after having visited Sultan Rob, Mahon reportedly returned to the 'Bahr el Homr' where he arrested an Arab sheikh."<sup>1144</sup> To similar effect, Macdonald entirely omits Mahon's visit from his report.

976. It is important to consider Mahon's second report carefully, particularly in light of the geographical and terminological confusion of the time. When this is done, Mahon's 1903 report provides unequivocal confirmation that the Ngok Dinka lived in the area between the Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab immediately prior to 1905.

977. According to his 1903 report, Mahon travelled from Muglad through Turdo (almost certainly a reference to Turda) to Fauwel (Pawol), located north of the Ngol/Ragaba ez Zarga River, as indicated on **Map 28** (Excursions of British Authorities).<sup>1145</sup> From Fauwel (Pawol), Mahon went to "Um Semima" and then reported that he travelled "west" to reach "**Sultan Rob's.**"

978. As discussed in the SPLM/A Memorial, Mahon went on to describe his visit to "Sultan Rob" (as already noted, Paramount Chief Arop Biong):

**"I next went west to Sultan Rob's,** and was very well received; **invested Rob with a Second Class Robe of Honour.** From there I went south to the Riverain country, and north-west to Tosh and the Rizeigat country. The Dinkas everywhere thought I had come to collect tribute from them, and said they were willing to pay, but I told them I

<sup>1143</sup> Sudan Intelligence Report, No. 110, dated September 1903, at p. 1, **Exhibit-FE 1/24** (emphasis added).

<sup>1144</sup> GoS Memorial, at para. 348.

<sup>1145</sup> Sudan Intelligence Report, No. 104, dated March 1903, Appendix E, at p. 19, **Exhibit-FE 1/21.**

wanted nothing for last year, and that when the Government wanted tribute they would be warned beforehand. It would not be the slightest use trying to collect tribute from them until there is a Mamur and a post in that direction. Although they say they will pay, I know it would take months and a lot of troops to make them do so. ***They have large herds of cattle. The two chiefs, Lor and Rob, who I made make friends last year after 30 years' war, were on the best of terms,*** and one and all Dinkas said how pleased they were that Government had come, because they had not been raided by the Arabs since I was there last year. As a proof of that, I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year. On my return to the Bahr El Homr, I had Sheikh Abd El Khalil arrested as he had refused to come to me when ordered.”<sup>1146</sup>

979. Mahon’s description states that he travelled “west” from Um Semima<sup>1147</sup> to “Sultan Rob’s.” As the MENAS Expert Report explains, this places Sultan Rob at his “new village” of “***Burakol,***” as depicted on **Map 40** (Northern Bahr El Ghazal: Sheet 65, Survey Office Khartoum, 1907).<sup>1148</sup> It is clear that, proceeding from Um Semima, Sultan Rob’s “old village” is at least due south, if not slightly south-east, while Sultan Rob’s “new village” is to the southwest. Mahon’s description of “Sultan Rob’s” being “west” is thus far more consistent with Sultan Rob being located at “Rob’s new village,” near what is now Abyei town, rather than in “Rob’s old village,” just south of the Kiir/Bahr el Arab.

980. Mahon’s report goes on to record that he arrested an Arab sheikh on his “***return to the Bahr El Homr***” from Sultan Rob’s territory.<sup>1149</sup> Mahon’s reference to the “Bahr El Homr” fairly clearly signified the Ngol/Ragaba ez Zarga. That is because, returning from Sultan Rob’s, i.e. proceeding north, from Burakol and already north of the Kiir/Bahr el Arab, Mahon could only be referring to the Ngol/Ragaba ez Zarga on his “return” – it is the next river north of the Kiir/Bahr el Arab. The MENAS Expert Report reaches this same conclusion. As MENAS state, this result follows even if Mahon had been returning from Rob’s “old” village, though it is clear that he had not<sup>1150</sup> Additionally, this conclusion is confirmed by the fact Mahon’s report earlier referred to meeting with all the Homr sheikhs in the area just to the north of the Ngol/Ragaba ez Zarga (in either Debka or Fowel (Pawol) and Um Semima), leaving little doubt that this is where Sheikh Abd El Khalil would have been arrested.<sup>1151</sup>

981. Finally, this identification of the Bahr el Homr is corroborated by the fact that Wilkinson had only recently (in 1901) mistakenly identified the Ngol/Ragaba ez Zarga as the Bahr el Arab (also referred to as the Bahr el Homr).<sup>1152</sup> As noted above, it is almost certain that Mahon would have relied upon Wilkinson’s knowledge (and, indeed, Mahon’s 1903 trip report records having met Wilkinson at Um Semima).<sup>1153</sup> Thus, the very strong probability is that Mahon’s reference to the Bahr el Homr signified the Ngol/Ragaba ez Zarga.

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<sup>1146</sup> Sudan Intelligence Report, No. 104, dated March 1903, Appendix E, at p. 19, **Exhibit-FE 1/21** (emphasis added); Sudan Gazette No. 45, dated March 1903, **Exhibit-FE 1/22** (emphasis added).

<sup>1147</sup> This undoubtedly the place named “Um Seneini” on **Map 46a** (*Hasoba: Sheet 65 L*, Survey Office Khartoum, 1910 – Detail); and “Um Suneina” on **Map 54** (*Ghabat El Arab: Sheet 65 L*, Survey Office Khartoum, 1936).

<sup>1148</sup> MENAS Expert Report, paras. 27-29; *See also* **Map 23** (Ngok Dinka Migration to Abyei Area).

<sup>1149</sup> The Government’s Memorial acknowledges that “after having visited Sultan Rob, Mahon reportedly returned to the ‘Bahr el Homr,’ where he arrested an Arab sheikh.” GoS Memorial, at para. 348.

<sup>1150</sup> MENAS Expert Report, para. 27-29.

<sup>1151</sup> Sudan Intelligence Report, No. 104, dated March 1903, Appendix E, at p. 19, **Exhibit-FE 1/21**.

<sup>1152</sup> Macdonald Report, at para. 1.4.

<sup>1153</sup> *See above* at para. 981.

982. In sum, Mahon's 1903 report confirms that the Ngok Dinka lived in the area between the Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab during the dry season of 1903, immediately prior to 1905. This conclusion is precisely consistent with Wilkinson's very detailed report from 1902 and with Mahon's own earlier 1902 report. Taken together, these records again directly rebut the Government's claim that the Ngok Dinka lived entirely south of the Kiir/Bahr el Arab.

(9) Percival's November/December 1904 Trek

983. The GoS Memorial next briefly addresses a report of a 1904 trek by Captain Percival of the "Arab Mounted Infantry" (or Camel Corps). The Government's discussion omits the most important aspects of Percival's trek, which again makes it unmistakably clear that the Ngok Dinka lived above the Kiir/Bahr el Arab, extending north at least to the Ngol/Ragaba ez Zarga and in all likelihood well beyond.

984. The Government contends that, in December 1904, Percival "proceeded south via Keilak where he crossed what he thought was the Bahr el Arab 100 miles from its mouth. He reported to have crossed another river, some 50 miles south, which he reported to be the 'Kyr' [Kir] (sic)."<sup>1154</sup> The Government cites the Memorandum by Major General Sir R. Wingate in the Reports on the Finances, Administration and Condition of Sudan (1904) as support.<sup>1155</sup>

985. The full text of Wingate's memorandum states:

"A patrol ... recently left El Obeid for Wau, and *proceeding South via Keilak crossed the Bahr El Arab some 100 miles from its mouth; another river named the Kyr, 50 miles South, was met, and 50 miles beyond this again the Lol was crossed.* These are all described as large rivers with strong currents at this time of the year (December), but their courses are not definitely known, and unfortunately what appear to be the mouths of the Bahr el Arab are blocked with sudd, which must take some time to clear."<sup>1156</sup>

986. As is also detailed in the Expert Report by MENAS, having travelled some considerable distance from Keilak (as Wilkinson and Mahon previously had), the only river that Percival could have been referring to when he crossed a watercourse some 100 miles from its mouth at the Bahr el Ghazal River was the Ngol/Ragaba ez Zarga.<sup>1157</sup> From there, Percival correctly identifies the Kiir/Bahr el Arab and the Lol, accurately describing their relative distance to one another. It is thus beyond serious question that Percival made the same mistake as Wilkinson by referring to the Ngol/Ragaba ez Zarga as the "Bahr el Arab."<sup>1158</sup> In 1904, of course, no critique of Wilkinson's nomenclature had yet been written, so there is no reason to believe that Percival would not have followed Wilkinson's usage of the name "Bahr el Arab" to describe the Ngol/Ragaba ez Zarga.

987. The fact that Percival had incorrectly referred to the Ngol/Ragaba ez Zarga as the Bahr el Arab is conclusively confirmed by the full account of Percival's December 1904 trek

<sup>1154</sup> GoS Memorial, at para. 313.

<sup>1155</sup> GoS Memorial, at para. 313 (citing Reports on the Finances, Administration and Condition of the Sudan in 1904, at p. 8, **Exhibit-FE 2/4**).

<sup>1156</sup> Reports on Finances, Administration, and Condition of the Sudan in 1904, at p. 8, **Exhibit-FE 2/4** (emphasis added).

<sup>1157</sup> MENAS Report, at para. 36-42.

<sup>1158</sup> MENAS Report, at para. 36-42.

found in Gleichen's 1905 *Compendium*.<sup>1159</sup> The Government's Memorial omits reference to this report (despite referring to the summary of Percival's report in Wingate's Memorandum).

988. According to Percival's full notes, several days' journey from Keilak, he struck "**what I take to be the Bahr El Arab**, which varies from 80 to 150 yards in breadth and is about 5 to 8 feet deep. It is only just flowing and runs in a direction a little S. of E."<sup>1160</sup> As noted above, coming from Keilak the only river that Percival could have struck in the vicinity was the Ngol/Ragaba ez Zarga.<sup>1161</sup> Further, it is clear from Percival's report that he was relying on "Wilkinson's map,"<sup>1162</sup> making it completely unsurprising that he made the same error as Wilkinson. Again, this is confirmed in the Expert Report by MENAS.<sup>1163</sup>

989. After reaching the Ngol/Ragaba ez Zarga in the region of Fauwel, Percival notes that:

"I have been some miles up and down the river but can find **no trace of inhabitants**. The country between here and the Jebels would appear to be uninhabited, as I should think I would be bound to have found some traces of natives if any had been about lately."<sup>1164</sup>

990. The fact that Percival found the banks of the Ngol/Ragaba ez Zarga uninhabited arguably differs from the reports by Mahon and Wilkinson (who, as discussed above, reported a number of villages north and south of the Ngol/Ragaba ez Zarga). There are several obvious explanations for this.

991. First, Percival was leading a substantial contingent of the Arab Mounted Infantry – resembling in many respects an armed contingent of slave raiders – which would certainly have frightened the Ngok Dinka villagers that they encountered, particularly during the dry season when many of the Ngok men were further to the south. Indeed, Percival's notes describe exactly this reaction. Referring to an incident only a matter of miles later in relation to Ngok Dinkas that he encountered, Percival wrote: "**I surprised them, and they thought we were Arabs raiding**, but I found them very friendly and obtained a guide."<sup>1165</sup>

992. Second, Percival likely meant that he could not find signs of habitations in the immediate area on and around the southern bank of the Ngol/Ragaba ez Zarga, and not that the areas set further back from the river were uninhabited. That is clear from both a careful reading of Percival's notes and from the reports by Mahon and Wilkinson.

993. Percival's notes from his trek along the Ngol/Ragaba ez Zarga record (on "November 30," which must be November 20 and 21) that he observed a grass fire and found cattle tracks

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<sup>1159</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 24-27 (1905), **Exhibit-FE 17/13** (emphasis added).

<sup>1160</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13** (emphasis added).

<sup>1161</sup> See above at paras. 953-955.

<sup>1162</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 26 (1905), **Exhibit-FE 17/13**.

<sup>1163</sup> MENAS Report, at para. 36-42.

<sup>1164</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13** (emphasis added).

<sup>1165</sup> Given their locality between the Ngol and Kiir/Bahr el Arab Rivers certainly reference to Ngok Dinka: Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13** (emphasis added).

either on or close to the Ngol/Ragaba ez Zarga.<sup>1166</sup> Both the fire (which was characteristic of Ngok Dinka agricultural practices of burning fields following harvests)<sup>1167</sup> and the cattle tracks obviously confirmed the presence of local inhabitants. As explained in the Expert Report of MENAS, Percival was on the south bank of the Ngol/Ragaba ez Zarga when he made these observations.<sup>1168</sup>

994. Percival's report confirms this when his notes at "Amakok" (Dinka: Amukuk), not far from the Ngol/Ragaba ez Zarga, describe finding Ngok Dinkas "*who were driving cattle S. as hard as they could.*"<sup>1169</sup> This description of the Ngok herding their cattle south is precisely consistent with their dry season grazing patterns (although the reported urgency may also have been the result of fears of slave or cattle-raids).<sup>1170</sup>

995. More importantly, Percival's observations necessarily meant that the Ngok Dinka that Percival encountered near the Ngol/Ragaba ez Zarga, driving their cattle hard to the south, *were coming from the north*. In particular, consistent with the Ngok Dinka's seasonal grazing patterns (described elsewhere<sup>1171</sup>), the Ngok that Percival encountered had to have been moving south from their permanent villages which were necessarily located further to the north. Given that Percival reported that he had not found Ngok villages on the south bank of the Ngol/Ragaba ez Zarga in this area, it is very likely that the villages in question had to have been to the north of the river.

996. That is corroborated by the fact that the Ngok Dinka that Percival encountered were able to describe to him the locations of "Tawel,"<sup>1172</sup> which was "two days from here in direction 30°"<sup>1173</sup> (this is a reference to Fauwel/Pawol, although the suggested travel time would appear excessive from where Percival was at this time (i.e. south of the Ngol/Ragaba ez Zarga heading in the direction of Sultan Rob's new village<sup>1174</sup>)), "Nyat," which was "one day's journey in direction about 250°"<sup>1175</sup> (most likely a reference to El Niat)<sup>1176</sup> and "Lau," which was in the "same direction as Nyat and Bara, less than half-day's journey 20°"<sup>1177</sup> (Lau

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<sup>1166</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**. The date is relevant because it is prior to the time when Misseriya would have migrated south from their base at Mughlad for the dry season. SPLM/A Memorial, at para. 243.

<sup>1167</sup> Witness Statement of Malual Alei Deng (Mareng elder), at p. 3, ¶10.

<sup>1168</sup> MENAS Report, at para. 36-42.

<sup>1169</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

<sup>1170</sup> SPLM/A Memorial, at paras. 196-205, 1064-1081.

<sup>1171</sup> See above at paras. 950, 959; SPLM/A Memorial, at paras. 196-205, 1064-1081.

<sup>1172</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

<sup>1173</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

<sup>1174</sup> **Map 29** (Wilkinson's Route); **Map 13** (Ngok Dinka Chiefdoms, 1905).

<sup>1175</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

<sup>1176</sup> Wilkinson very likely encountered the same at El Jaart and Um Geren: Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 154-155 (1905), **Exhibit-FE 2/15**.

<sup>1177</sup> **Map 29** (Wilkinson's Route); **Map 13** (Ngok Dinka Chiefdoms, 1905). Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

must be reference to Lou).<sup>1178</sup> Percival reported that a day's journey was approximately 35 miles (using the amount of ground covered daily by the Ngok Dinka).<sup>1179</sup>

997. These various locations referred to in Percival's notes are depicted on **Map 36a** and **Map 40a**.<sup>1180</sup> The fact that the Ngok Dinka that Percival encountered were able to describe the precise locations and directions of the villages to the north suggests again that they likely resided somewhere in the region of the villages and hence were familiar with them.

998. Percival then travelled south-west and reached "**Achak**," "having passed through the **cattle-grazing country** ... en route."<sup>1181</sup> Again, Percival's description clearly places the Ngok cattle well north of the Kiir/Bahr el Arab (Achak is depicted on **GoS Map 13**<sup>1182</sup>). Percival also describes Achak as a "**biggish village**,"<sup>1183</sup> again evidencing the extent of Ngok habitation in the area during the dry season.

999. Percival proceeded from Achak about another 11 miles to the Kiir/Bahr el Arab (as Wingate notes, a total of some 50 miles south of the Ngol/Ragaba ez Zarga), where he marched north-west to its juncture with the Yamoi River<sup>1184</sup> (known to the Dinka as the Nyamora River<sup>1185</sup>). Percival then proceeded up the Yamoi "**through [a] village**" and then on via "**Bongo to village Burakol, where Sultan Rob is at present living** (4 ½ miles). The Yamoi is nearly as big as the Kir, which it joins, and comes from a N.W. direction."<sup>1186</sup>

1000. Percival's description of where he met Arop Biong ("Sultan Rob") in 1904 perfectly matches the site of "**Sultan Rob's new village**" of "**Burakol**," on the bank of the Yamoi/Nyamora/Ragaba Um Bieiro. This is plainly north of the Kiir/Bahr el Arab and it is in the vicinity of the contemporary Abyei town, consistent with this location's historic role as the center of Ngok Dinka political, commercial and cultural life. These various locations are depicted on **Map 40** (Northern Bahr El Ghazal: Sheet 65, Survey Office Khartoum, 1907).<sup>1187</sup>

1001. A number of aspects of Percival's report up until his meeting with Arop Biong ("Sultan Rob") at Burakol are significant and warrant emphasis:

- a. Percival did not locate Ngok Dinka living on the banks of that portion of the Ngol/Ragaba ez Zarga that he explored. Although Percival's report is not certain as

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<sup>1178</sup> **Map 13** (Ngok Dinka Chiefdoms, 1905). Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-1179** Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**. ("A day's journey is according to them 35 miles I think."). Willis (though notoriously unreliable, *see below* at para. 1366) equated a day's travel in the area to 25 miles. Sudan Intelligence Report, No. 178, dated May 1909, at p. 17, **Exhibit-FE 18/2**).

<sup>1180</sup> **Map 36a** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905) – Detail), **Map 40a** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907 – Detail), **Map 44a** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Detail), and **Map 46** (*Hasoba: Sheet 65-L*, Survey Office, Khartoum, 1910).

<sup>1181</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13** (emphasis added).

<sup>1182</sup> GoS map 13 (*Ghabat el Arab: Sheet 65-L*, Survey Office, Khartoum, 1914).

<sup>1183</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

<sup>1184</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

<sup>1185</sup> **Map 7** (Abyei Area); **Map 40a** (*Northern Bahr el Ghazal: Sheet 65*, Survey Office, Khartoum, 1907 – Detail); **Map 44a** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Detail); **Map 50a** (*Achwang: Sheet 65-K*, Survey Office, Khartoum, 1916 - Detail).

<sup>1186</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13** (emphasis added).

<sup>1187</sup> *See also Map 23* (Ngok Dinka Migration to Abyei Area).

to where he crossed the Ngol, it was likely either a few miles to the east or west of the areas where Mahon and Wilkinson had found Ngok Dinka villages. This discrepancy may have resulted from Ngok Dinka fears that Percival's Mounted Arab Infantry was a slave or cattle raiding party or because Percival only reported on the immediate area of the southern river bank.<sup>1188</sup>

b. Percival encountered substantial numbers of Ngok Dinka and permanent Ngok villages between the Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab. This included a "biggish" village at Achak, and an unnamed village before reaching a village at Bongo and a village at Burakol.

c. At Amakok, a point approximately 10 miles south of the Ngol/Ragaba ez Zarga, Percival encountered Ngok Dinka cattle herders proceeding rapidly south. This almost certainly demonstrates the existence of Ngok Dinka villages to the north of the Ngol/Ragaba ez Zarga, the only place from which the cattle herders could have come and with which they were very familiar (describing villages by name and the distances to them).

d. Percival met the Paramount Chief of the Ngok Dinka, Sultan Rob, at Burakol, located to the north of the Kiir/Bahr el Arab. The region immediately surrounding Burakol was well-populated, with Percival passing through a succession of Ngok villages before reaching Sultan Rob.

1002. Percival also recounted information that Sultan Rob supposedly provided to him. In particular, Percival noted that there "are no Dinkas W. of Burakol as far as I could see, and Sultan Rob told me that there are only Homr Arabs W. of him."<sup>1189</sup> This information must be treated with care, for a number of reasons.

1003. First, Percival's report of Sultan Rob's statement that "there are only Homr Arabs W. of him" meant that there were Humr Arabs directly to the west. It is clear that the Ngok Dinka (particularly the Abyior and Achueng chiefdoms) extend in a northwesterly direction to the Kordofan/Darfur border,<sup>1190</sup> generally spreading across the Kiir/Bahr el Arab and Nyamora/Ragaba Um Bieiro river systems (as depicted on **Map 13** (Nine Ngok Dinka Chiefdoms, 1905)). As can also be seen from **Map 13**, the Ngok only settled in a small area of land that is directly due west from Burakol (most of their land being north and north-west of the location of Abyei town) and the Ngok neighbors due west were the Homr Arabs.<sup>1191</sup>

1004. Second, Percival recounts Sultan Rob's statement that "[t]he Bahr El Arab is uninhabited," except for the "occasional wandered [sic] parties of Arabs."<sup>1192</sup> It is, of course, entirely possible that Sultan Rob said that during the dry season (when Percival visited) the area on the Bahr el Arab (meaning, of course, the Ngol/Ragaba ez Zarga) was largely empty, because the Ngok cattle camps had moved further south.

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<sup>1188</sup> This is indicated by the fact that Percival obviously did not recognise the Dinka's description of "Tawel," which is almost certainly a reference to Fauwel/Pawol, the area through which Wilkinson and Mahon passed through immediately before crossing the Kiir. That Percival does not mention any of the places visited by Wilkinson, when he had Wilkinson's map, also points to this.

<sup>1189</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

<sup>1190</sup> **Map 13** (Ngok Dinka Chiefdoms, 1905); SPLM/A Memorial, at paras. 1024-1025.

<sup>1191</sup> GoS Map 1 (*Eastern Equatorial Africa*, Royal Geographical Society, 1883); GoS Map 2 (*Province of Bahr El Ghazal*, Lupton, 1884); GoS Map 4 (*Carte du Bahr El Ghazal*, Marchand, 1898).

<sup>1192</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

1005. Alternatively, it is also likely that Sultan Rob would have been unwilling to reveal the locations of Ngok Dinka villages to Percival (and the Arab Mounted Infantry), for fear of exposing them to slave raids or other danger. Indeed, Sultan Rob's efforts to avoid disclosing the location of Ngok Dinka villages were observed on other occasions by the Anglo-Egyptian administration.

1006. For example, in March 1906 Huntley-Walsh reported on his journey up the Kiir/Bahr el Arab and his encounter with Sultan Rob, whom Huntley-Walsh had asked for guides to take him up the river. Huntley-Walsh reports that, upon his request, Sultan Rob "**for some reason did all he could to prevent my going ahead.**"<sup>1193</sup> Sultan Rob's efforts to prevent explorations of his territory continued:

**"Firstly, he told me none of his men knew the river, which they afterwards proved to know very well; and secondly, he told me the river was no use, there being no water, and the river, even when at its best, stopped at a day's march up his village. Finally he gave me one man and his second son, and the river proved to be as I have reported. The last day but one of my march up, the guides told me it was impossible to march near the river, the country being so bad, and that he knew a short cut, which I told him to take. When I arrived at water again it proved to be only 2 feet deep and no current, and it turned out eventually that he had intentionally led the party up a khor, and when asked why, he said he was afraid of Rob. I fancy the latter must have given him orders to do so ... both Bimbashi Bayldon and I have proved that [Sultan Rob] is a liar, and we have both found that HE DOES ALL HE CAN TO HINDER AND MISLEAD EXPEDITIONS SENT TO DISCOVER FACTS CONCERNING THIS PART OF THE COUNTRY."**<sup>1194</sup>

1007. According to Huntley-Walsh, this was not the first time Sultan Rob had obstructed or misled expeditions into the Ngok Dinka territory, stating that the same had happened to Bayldon. This behavior helps to explain Sultan Rob's statement that the Ngol/Ragaba ez Zarga was uninhabited when it plainly was not. Needless to say, given that Percival and other Anglo-Egyptian officials were accompanied by the "Arab Mounted Infantry," and that the Ngok had long been the victims of slave-raiding from the Arab north, it is hardly surprising that Sultan Rob would have wished to impede discovery of the locations of Ngok Dinka villages.

1008. After leaving Sultan Rob at Burakol, Percival's notes describe him returning back along the Kiir/Bahr el Arab to "**Sultan Rob's old residence (see Wilkinson's map).**"<sup>1195</sup> (Parenthetically, this note leaves no question but that Percival was working from Wilkinson's map, which included Wilkinson's mistake regarding the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab.<sup>1196</sup> In turn, that provides further confirmation that Percival also referred to what was the Ngol/Ragaba ez Zarga as the "Bahr el Arab.")

1009. Percival's notes are also significant because they do not indicate even a seasonal presence of Misseriya anywhere along either the Ngol/Ragaba ez Zarga or Kiir/Bahr el Arab. Percival was travelling at the start of the dry season and before the typical southward

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<sup>1193</sup> Sudan Intelligence Report, No. 140, dated March 1906, at p. 14, **Exhibit-FE 17/22**.

<sup>1194</sup> Sudan Intelligence Report, No. 140, dated March 1906, at pp. 14-15, **Exhibit-FE 17/22** (emphasis added).

<sup>1195</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 26 (1905), **Exhibit-FE 17/13**.

<sup>1196</sup> See above at para. 988.



migration of the Misseriya, and he did not note the presence of any Misseriya south of Keilak.<sup>1197</sup>

1010. In sum, the records of Percival's November 1904 trek unequivocally establish the existence of a number of Ngok Dinka villages (including Achak, Bongo and Burakol), some quite substantial ("biggish"), above the Kiir/Bahr el Arab and extending north to at least the region of the Ngol/Ragaba ez Zarga. Indeed, Percival specifically confirms that Sultan Rob, the Paramount Chief of the Ngok Dinka, resided and held court in Burakol, located north of the Kiir/Bahr el Arab. Percival's records also very strongly suggest that there were Ngok Dinka villages north of the Ngol/Ragaba ez Zarga, from which he encountered Ngok cattle herders taking their herds south during the dry season migrations.

1011. Percival's account entirely debunks the Government's claim that the Ngok were located only south of the Kiir/Bahr el Arab in 1905. Not only sizeable, numerous Ngok Dinka villages, but their Paramount Chief's village and court, were located to the north of the Kiir/Bahr el Arab in 1905.

(10) Letter from Governor of Bahr el Ghazal to Governor-General Wingate, 23 December 1904

1012. The Government's Memorial omits any mention of a letter written by W.A. Boulnois, Governor Bahr el-Ghazal province, to Governor-General Wingate on 23 December 1904, reporting on Percival's trek (described above). The letter states:

"Percival looking very fit, arrived yesterday with his M-I company. ... He is writing a report, but it can't be ready for this mail, so I am giving you a general idea of what he has done as I know that it will interest you. I don't want to spoil his report by sending it officially to D of I. ***Percival's march took him to Sultan ROB who is on the KYR River, which he crossed 50 miles S of Bahr el Arab.***

The KYR river is about 2/3 as broad as the JURAT WAU and 12 or 15 feet deep where he crossed. Marching due South, after crossing 3 small rivers which run NE to the KYR he reached the LOL River about 50 miles S of the KYR in the district of the big Dinka chief TUSH. The LOL was in full flood when he crossed its end (of in) Nov – 600 yards wide 20 ft deep in channel running fast."<sup>1198</sup>

1013. It is clear from Boulnois' letter that the Governor of Bahr el-Ghazal was also mistaken as to what river constituted the "Bahr el Arab" (and that Sultan Rob resided on the Kiir/Bahr el Arab). It is also apparent from this letter that Percival's report of his November/December 1904 trek from Keilak to Wau had not been circulated at the end of 1904.

(11) Percival's March 1905 Trek – Sudan Intelligence Report No. 130

1014. The Government's Memorial next addresses a description, in a May 1905 Sudan Intelligence Report, of Percival's 24 March 1905 trek from Wau (in Bahr el Ghazal) to

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<sup>1197</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 24-27 (1905), **Exhibit-FE 17/13**.

<sup>1198</sup> Letter from W.A. Boulnois, Governor Bahr el-Ghazal province, to Governor-General Wingate, dated 23 December 1904, **Exhibit-FE 17/10** (emphasis added).

Taufikia (in Upper Nile) through areas that included the Abyei region. According to the Government, Percival's report "puts Sultan Rob's country *squarely south of the Bahr el Arab and in the province of Bahr el Ghazal.*"<sup>1199</sup> In fact, the Government's interpretation is demonstrably mistaken and misleading.

1015. The GoS Memorial quotes the following text from Percival's report of his march in support of its conclusion:

"Sultan Rob appears to exercise a certain amount of authority over a large area of country extending from the Shilluk's boundary in the east to Chak Chak's boundary in the west, *with the Bahr el Arab as his Arab frontier on the north and the Lol river (both banks) and the Bahr al Ghazal on the south.* He extracts tribute from most of the bigger Sheikhs (both Dinka and Nuer tribes), many of whom visit him twice a year, every six months...."<sup>1200</sup>

1016. In fact, as demonstrated above, it is perfectly clear that – like Wilkinson, Mahon and Boulnois – Percival also made the error of referring to the Ngol/Ragaba ez Zarga as the "Bahr el Arab."<sup>1201</sup> Thus, when Percival reports that the "Bahr el Arab" is Sultan Rob's "Arab frontier," he was clearly referring to the Ngol/Ragaba ez Zarga as Sultan Rob's "Arab frontier." (As discussed elsewhere, this dry season observation was inaccurate, but it at least recognized that the Ngok territory extended north to the Ngol/Ragaba ez Zarga, rather than the Kiir/Bahr el Arab.)

1017. As the MENAS Expert Report explains, it is not surprising that Percival would have followed Wilkinson's error concerning the "Bahr el Arab" and Ngol/Ragaba ez Zarga, which had not yet been fully appreciated or corrected.<sup>1202</sup> Contrary to the Government's suggestions, the first "corrections" of Wilkinson's error were not until later in 1905 (at the earliest).<sup>1203</sup> It is, therefore, most unlikely that Percival (a military officer departing from Wau on 20 March 1905) would have had word of this geographic debate.

1018. Any doubt is removed, however, by the fact that Percival's November/December 1904 report both refers specifically to the fact that Percival relied on "*Wilkinson's map*"<sup>1204</sup> and to four rivers which Percival considered to be separate – the "Kir," the "Lol," the "Bahr

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<sup>1199</sup> GoS Memorial, at para. 349 (emphasis added).

<sup>1200</sup> GoS Memorial, at para. 349 (quoting Sudan Intelligence Report, No. 130, dated May 1905, Appendix A, at p. 4, **Exhibit-FE 17/16** (emphasis added by GoS).

<sup>1201</sup> See above at paras 986.

<sup>1202</sup> Bayldon's explorations and their results including his report on the confusion over the Ngol/Ragaba ez Zarga, was dated 20 March 1905, whilst Percival set off of his journey from Wau to Taufikia on 24 March 1905. See below at paras. 1023-1028. MENAS Expert Report, paras. 43-50.

<sup>1203</sup> *Ibid.* Aside from Bayldon, who was too late to assist those considering the transfer of the Ngok, and whose report was too late to prevent Percival making yet another error, the Government then turns to 1906, 1907 and subsequent sources that attempt to clarify the situation. Even if these officials did clarify the earlier confusion, that was quite plainly not "*before*" the transfer. The Government refers to a report by Lyons in Sudan Intelligence Report, No. 141, dated April 1906, Appendix C, at pp. 6-7, **Exhibit-FE 17/23**; Lloyd, *Some Notes on Dar Humr*, The Geographical Journal, 29 (January to June 1907), at pp. 649-654, **Exhibit-FE 3/4**; a letter from Percival with the Geographical Journal: *Correspondence*, The Geographical Journal, 20 (August 1907), at p. 219, **Exhibit-FE 17/28**; Comyn's *The Western Sources of the Nile*, The Geographical Journal, 30 (1907), at p. 524 (1907), **Exhibit-FE 17/27**, which is said to report on a trek undertaken in 1905, although the Government cites no earlier reference to Comyn's findings than this 1907 article; and a report by Lieutenant Huntley-Walsh from 1906 (incorrectly cited by the Government as reported in the November 1907 Sudan Intelligence Report – the correct record of Huntley-Walsh's trek being found in Sudan Intelligence Report, No. 140, dated March 1906, at p. 14, **Exhibit-FE 17/22**). The point is all of these were much after Percival's time and none could have enlightened his journey beginning 24 March 1905.

<sup>1204</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 26 (1905), **Exhibit-FE 17/13**.

el Arab,” and the “River Jur”<sup>1205</sup> – but never the Ngol or the Ragaba ez Zarga. That is critical, because it makes very clear that when Percival referred to the “Bahr el Arab” he could not be referring to the “Kir,” and, like Wilkinson and Boulnois, was referring to the Ngol/Ragaba ez Zarga. Further, Percival correctly described and named the Kiir, Lol and Jur rivers. As the Expert Report by MENAS confirms, the only possible interpretation is that what Percival called the “Bahr el Arab” was in fact the Ngol/Ragaba ez Zarga.<sup>1206</sup>

1019. Thus, the Percival report does not support – and instead again squarely contradicts – the Government’s claim that the Ngok Dinka were located solely to the south of the Bahr el Arab. Read correctly, the report clearly identified Sultan Rob’s “*Arab frontier*” as being the Ngol/Ragaba ez Zarga, not the Kiir/Bahr el Arab. It also bears repetition that Percival’s conclusions were again based on dry season observations, during which the Ngok had moved to the south of their permanent villages.

1020. It is also noteworthy that Percival described Sultan Rob as presiding over “*a large area of country*” that extended far to both the east and west.<sup>1207</sup> That description is directly contrary to the Government’s claim that the Ngok inhabited a narrow strip of land to the south of the Kiir/Bahr el Arab. Percival’s description also located Ngok Dinka territory extending west to at least Chak Chak’s boundary, past the southwestern area of the current Bahr el Ghazal/Kordofan boundary,<sup>1208</sup> and east to the boundary with the Shilluk, past the Achaak settlement of Miding.<sup>1209</sup> Indeed, those western and eastern boundaries are beyond those claimed in this proceeding.

1021. It is also relevant to address Percival’s correspondence with the *Geographic Journal*, published in August 1907.<sup>1210</sup> In a letter to the editor of the *Geographic Journal*, Percival sought to correct his earlier erroneous reference to the Ngol/Ragaba ez Zarga as the Bahr el Arab, by stating “the southern boundary [of Kordofan Province] is the Bahr el Arab, and the river Kir” and “the Bahr el Arab is the river Kir, and takes the name ‘Kir’ when it enters Dinka country either before or after the joining with rivers that join the Lol below Sultan Rob’s.”<sup>1211</sup>

1022. Percival’s 1907 acknowledgment that the Bahr el Arab is the Kiir/Bahr el Arab does nothing to alter the fact that his earlier reports clearly referred to the Ngol/Ragaba ez Zarga as the Bahr el Arab.<sup>1212</sup> To the contrary, Percival’s effort to clarify what the term “Bahr el Arab” referred to makes it clear that he was well aware of the past confusion on the point, and wanted to clarify it. The fact that he did not expressly acknowledge his own prior error in the letter to the editor is understandable, but does not alter the fact that the error had been made.

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<sup>1205</sup> Sudan Intelligence Report, No. 130, dated May 1905, at pp. 5-6, **Exhibit-FE 17/16**. Thus, Percival noted that “Jackson hartebeests ... [a]re thick between Lol, Kir and Bahr el Arab.”

<sup>1206</sup> MENAS Report, at para. 41-42.

<sup>1207</sup> Sudan Intelligence Report, No. 130, dated May 1905, Appendix A, at p. 4, **Exhibit-FE 17/16**.

<sup>1208</sup> The area at Chak Chak is depicted on **Map 36a** (The Anglo-Egyptian Sudan, Intelligence office, Khartoum, 1905 (in Gleichen, 1905) – Detail).

<sup>1209</sup> **Map 36a** (The Anglo-Egyptian Sudan, Intelligence office, Khartoum, 1905 (in Gleichen, 1905) – Detail); **Map 13** (Nine Ngok Dinka Chiefdoms, 1905).

<sup>1210</sup> Macdonald Report, at paras. 3.18-3.19.

<sup>1211</sup> Macdonald Report, at para 3.18.

<sup>1212</sup> *See above* at paras 1016.

(12) Bayldon Explorations – December 1904 and March 1905

1023. The Government’s Memorial next states that, in 1904, Sub-Lieutenant Bayldon “was ordered to explore the Bahr el Arab,” that he “reached Wau and reported on the Jur river” and “met Sheikh Rihan Gorkwei, of the District of the Tweit [Twic Dinka], which Gorkwei said was ‘between the Kir and Lol Rivers.’”<sup>1213</sup> The Government refers in particular to a 1905 report by Bayldon “on the Bahr el Arab.”<sup>1214</sup> The Government also relies on Macdonald to assert that Bayldon’s report corrected Wilkinson’s geographical confusion, identifying the “Bahr el Arab” as the Kiir/Bahr el Arab and referring to “what we now know as the Ragaba ez Zarga” as the “Bahr el Homr.”<sup>1215</sup>

1024. The Bayldon report is important against the backdrop of Percival’s November/December 1904 and March 1905 treks, which are discussed in detail above. As we have seen, Percival clearly confused the Ngol/Ragaba ez Zarga for the Bahr el Arab.<sup>1216</sup> The Government nonetheless falsely claims (in paragraph 313 of its Memorial) that Bayldon’s “correction” of Wilkinson’s error occurred in “*February 1905*” – and prior to both Percival’s March 1905 trek and the 1905 transfer of the Ngok Dinka.<sup>1217</sup> In fact, Bayldon’s report is dated *20 March 1905*, not “*February 1905*,” as claimed in the GoS Memorial, and thus was written after both the 1905 transfer and Percival’s departure on his trek.

1025. It is also obvious from reading Bayldon’s report, together with the reports of Wilkinson’s 1903 and Percival’s November 1904 treks, that Bayldon was correcting *both* Wilkinson and Percival’s incorrect references to the Ngol/Ragaba ez Zarga as the “Bahr el Arab.” Bayldon notes specifically that he was in possession of a report of Percival’s November 1904 trek from Keilak to Wau.<sup>1218</sup> As noted above, Percival was also in the possession of “Wilkinson’s map,” which had made the same error.<sup>1219</sup>

1026. Additionally, Bayldon’s report is of importance because it specifically confirms that Sultan Rob was at the time living at his new village in Burakol (north of the Kiir/Bahr el Arab).<sup>1220</sup> Parenthetically, Bayldon’s 20 March 1905 report was penned only several days before the first notice of the transfer of the Ngok to Kordofan.<sup>1221</sup>

1027. Finally, Bayldon reported that he met many “*Dinkas who have crossed it [the Ngol/Ragaba ez Zarga] going to and from El Obeid.*”<sup>1222</sup> This confirms the following points: (a) the Ngok did cross the Ngol/Ragaba ez Zarga, as also evident from the Percival trek notes; and (b) the Ngok were going to El Obeid to trade – almost certainly during the wet season, when they were heading in that direction with cattle. This corroborates Percival’s

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<sup>1213</sup> GoS Memorial, at para. 313. Apparently Sub-Lieutenant Bayldon was a Survey Department Officer. Macdonald Report, at para. 3.13.

<sup>1214</sup> GoS Memorial, at para. 313; Macdonald Report, at paras. 3.13-3.14 (citing Sudan Intelligence Report No. 128, dated March 1905, Appendix C, at pp. 10-12, **Exhibit-FE 2/8**).

<sup>1215</sup> Macdonald Report, at para. 3.13.

<sup>1216</sup> See above at paras. 986.

<sup>1217</sup> GoS Memorial, at para. 313.

<sup>1218</sup> Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 11, **Exhibit-FE 2/8**.

<sup>1219</sup> See above at para. 988.

<sup>1220</sup> Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 11 (“4. The River Yamoi is a branch from the Kir, which according to the Dinkas runs off from the Kir about two days’ march (Dinka) above Rob’s, and which rejoins it a short distance below Rob’s. Its character is that of a khor.”), **Exhibit-FE 2/8**. The reference to the Yamoi joining the Kir “a short distance below Rob’s” can only describe Rob’s location at Burakol, rather than his old village at Mithiang on the Kiir/Bahr el Arab.

<sup>1221</sup> Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 11, **Exhibit-FE 2/8**.

<sup>1222</sup> Sudan Intelligence Report, No. 128, dated March 1905, Appendix C, at p. 11, **Exhibit-FE 2/8**.

observations of Ngok Dinka heading southwards with their cattle herds during the dry season, only a few miles from the Ngol/Ragaba ez Zarga, again very likely because they resided in villages to the north of the river.<sup>1223</sup>

1028. Bayldon's report again contradicts suggestions that the Ngok were confined to an area between the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga (much less to an area south of the Kiir/Bahr el Arab). They plainly lived north of the Kiir/Bahr el Arab extending up to and beyond the Ngol/Ragaba ez Zarga, while travelling further north across the *goz* into Misseriya territory. Again, this is consistent with the discussion of the preceding Condominium records.

(13) Gleichen's 1905 *Compendium*

1029. The Government only briefly (and inaccurately) refers to Gleichen's 1905 *Compendium*. The passage cited by the Government is from a description of Bahr el Ghazal and reads "[t]he Dinkas occupy the lowlands in the north of the province [Bahr el Ghazal], their southern limit being the edge of the tableland, where good grazing and pasture land terminate."<sup>1224</sup> Based on this quotation, the Government then claims "[n]o Dinkas are mentioned as living in the Province of Kordofan, i.e., to the north of the Bahr el Arab."<sup>1225</sup>

1030. The Government's quotation is misleading. It refers to "the Dinkas" generically, without specifying which of the numerous tribes comprising the Dinka who inhabited Bahr el Ghazal it means (including, for example, the Rueng, Rek and Twic). Equally, even apart from the fact that the quoted reference apparently has nothing to do with the Ngok Dinka, the "southern limit" referred to is by no means necessarily in Bahr el Ghazal; the description is environmental in character ("where good grazing and pasture land terminate") and was not necessarily confined to Bahr el Ghazal Province.

1031. More striking, the Government omits to mention that the 1905 version of Gleichen's *Compendium* included references to the Ngok Dinka that described "***Sultan Rob and Dar Jange belonging to Kordofan***,"<sup>1226</sup> while also describing the southern boundary of the province as "***southwards to the Bahr el Arab*** leaving the Maalia and Rizeigat to Darfur, and the Homr and ***Dar Jange to Kordofan***."<sup>1227</sup> This language from the specifically relevant portion of Gleichen's *Compendium* squarely contradicts the Government's claim regarding the publication (that "[n]o Dinkas are mentioned [in Gleichen] as living in the Province of Kordofan, i.e., to the north of the Bahr el Arab"<sup>1228</sup>); it also squarely contradicts the Government's more general claim that the Ngok Dinka lived entirely to the south of the Kiir/Bahr el Arab.

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<sup>1223</sup> See above at paras. 886-916.

<sup>1224</sup> GoS Memorial, at para. 351.

<sup>1225</sup> Southall, *Nuer and Dinka Are People: Ecology, Ethnicity and Logical Possibility*, 11(4) Man, New Series 463 464 (1976) ("The Nuer call the Dinka *Jaang* (Evans-Pritchard 1958: 126, 234-5) which is obviously a cognate form of Jieng (Lienhardt 1958:107), which is what the Dinka call themselves and which, again, means 'people'."), **Exhibit-FE 16/26**.

<sup>1226</sup> E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. I, 337 (1905), **Exhibit-FE 2/14**.

<sup>1227</sup> E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. I, 337 (1905), **Exhibit-FE 2/14** (emphasis added).

<sup>1228</sup> Southall, *Nuer and Dinka Are People: Ecology, Ethnicity and Logical Possibility*, 11(4) Man, New Series 463 464 (1976) ("The Nuer call the Dinka *Jaang* (Evans-Pritchard 1958: 126, 234-5) which is obviously a cognate form of Jieng (Lienhardt 1958:107), which is what the Dinka call themselves and which, again, means 'people'."), **Exhibit-FE 16/26**.

1032. On the contrary, the *Compendium* specifically places the Ngok Dinka to the north of the Bahr el Arab, in the province of Kordofan. In addition, the Sudan Government map included in the *Compendium*<sup>1229</sup> depicts what appears to be Wilkinson's route and marks "Lar" north of the Kiir/Bahr el Arab (called the "Kiir or G nol" but differentiated from the "Bahr el Arab" (which is in fact the Ngol/Ragaba ez Zarga)) and "Sultan Rob" north of that waterway.

(14) Comyn's 1905 Exploration (Published in 1907)

1033. The Government also cites a "1905" exploration by Lieutenant Comyn, who was a member of the "Black Watch," a Royal Highland regiment of the British Army.<sup>1230</sup> Comyn did not publish his findings until 1907 and it is uncertain what year his trek actually took place.<sup>1231</sup>

1034. Comyn's travels took him far from the Abyei region (to the west and source of the Kiir/Bahr el Arab), but he recounted local reports that the Kiir/Bahr el Arab "entered the Dinka country and changed its name from Bahr el Homr to Kir."<sup>1232</sup> Again, while no decisive inference can be drawn, the description of the Kiir/Bahr el Arab "enter[ing] Dinka country" is entirely consistent with the Ngok Dinka occupying both the southern and the northern regions around the river, and inconsistent with the Ngok occupying only one shore of a river which served as their frontier.

(15) 1904-1906 Journeys by Lloyd (1907)

1035. The Government states that Lloyd (a British Inspector and future governor of Kordofan) "made four journeys in the area near Sultan Rob" between 1904 and 1906.<sup>1233</sup> Notwithstanding this, the Government relies only on an article written by Lloyd in 1907.

1036. The actual reports of these four journeys reveal that Lloyd only visited the Abyei region (i.e. below 10.35°N latitude) on one of his four journeys (the other journeys were to different parts of Kordofan). Even on this journey, Lloyd was travelling in the dry season (when many Ngok and their cattle had moved to southern cattle camps), and stopped only at Hasoba (which is on the Ngol/Ragaba ez Zarga, north of Burakol) and did not venture to Burakol itself.<sup>1234</sup> As confirmed by Professor Daly's Expert Report, Lloyd's map and general statements in his reports are not a credible source for locating the whereabouts of either the Ngok or the Misseriya).<sup>1235</sup>

1037. Based on his observations, Lloyd said that when the Homr travel southwards towards the Kiir/Bahr el Arab during the dry season, they enter into Dinka land: "when the roads are

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<sup>1229</sup> See below at paras. 1029-1032. **Map 36** (The Anglo Egyptian Sudan, Intelligence office Khartoum, 1904 (in Gleichen, 1905)).

<sup>1230</sup> GoS Memorial, at paras. 318-319 (citing Comyn, *The Western Sources of the Nile*, The Geographical Journal, 30 (1907), at p. 524, **Exhibit-FE 17/27**). See also Excerpt from <http://www.theblackwatch.co.uk/>.

<sup>1231</sup> Comyn, *The Western Sources of the Nile*, The Geographical Journal, 30 (1907), at p. 524, **Exhibit-FE 17/27**.

<sup>1232</sup> GoS Memorial, at para. 352 (quoting Comyn, *The Western Sources of the Nile*, The Geographical Journal, 30 (1907), at p. 530, **Exhibit-FE 17/27**).

<sup>1233</sup> GoS Memorial, at para. 353.

<sup>1234</sup> Sudan Intelligence Report, No. 140, dated March 1906, Appendix E, at p. 18, **Exhibit-FE 17/22** which reports his journey to Hasoba. The other three journeys are reported at Sudan Intelligence Report, No. 121, dated August 1904, **Exhibit-FE 17/12**; Sudan Intelligence Report, No. 127, dated February 1905, **Exhibit-FE 17/14**; and Sudan Intelligence Report, No. 135, dated October 1905, **Exhibit-FE 17/17**. See above at paras 1036.

<sup>1235</sup> Daly Supplemental Expert Report, at p. 38-39 and 56-57.

open they go south [from Muglad] to *Dar Jange*.<sup>1236</sup> (Dar Jange was a reference to Ngok Dinka territory (“Jange” or “Jaenge” being one of the names for the Ngok.<sup>1237</sup>) Lloyd also observed that the “southern boundary [of Dar Homr] is *between the Bahr el Arab and the river Kir*, the latter being *occupied by the Dinkas under Sultan Rob*.”<sup>1238</sup>

1038. It is plain, therefore, that in 1907 Lloyd considered the “Bahr el Arab” and the “Kir” to be two different rivers. The Government takes the position that Lloyd’s reference to the “Kir” is in fact a description of the Kiir/Bahr el Arab, with its Memorial stating “Captain W. Lloyd made four journeys in the area near Sultan Rob: *he refers to the River Kir (i.e. the Bahr el Arab)* as ‘being occupied by the Dinkas under Sultan Rob.’”<sup>1239</sup>

1039. Applying the Government’s acknowledgement, three conclusions may be drawn from Lloyd, both of which contradict the Government’s claims.

1040. First, it is clear that Lloyd referred in 1907 to the Ngol/Ragaba ez Zarga as the “Bahr el Arab.” This is confirmed by Lloyd’s reference to a Khor (Khor Shalango) which “[w]hen east of Turda it breaks into several small channels, and finally loses itself near Fauel [Fauwel or Pawol] in the swamps which are connected with the Bahr el Arab.”<sup>1240</sup> As can be seen from **Map-65** (Abyei Area: Wet Season Detail) and **Map-67** (Abyei Area: Dry Season - Detail), the swamps near Fauwel/Pawol are connected to the Ngol/Ragaba ez Zarga, not the Kiir/Bahr el Arab. This existence of water is confirmed by Lloyd’s 1907 map (**Map 38** (Map of Dar Homr, Lloyd, 1907)), which depicts “water” at El Kumi, Turda, “Naama” (which must be reference to Nyama) and Subu, and ponds or lakes near Turda at Kakran.

1041. This was, of course, two years after Bayldon’s supposed “correction” of the confusion which had been exhibited by Wilkinson, Percival and Boulnois. Contrary to the Government’s suggestion that the confusion was “short-lived” and corrected by 1905,<sup>1241</sup> it in fact persisted until at least 1907, highlighting the extent and persistence of the confusion.

1042. Second, Lloyd places the southern boundary of “Dar Homr” in the dry season *between* the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. Lloyd’s conclusions (published only a few months before he became Governor of Kordofan) clearly indicate that the Ngok Dinka were present to the north of the Kiir/Bahr el Arab during the dry season. Of course, as noted above, Lloyd had little interest in or understanding of the Ngok and his observations were based on one dry season excursion to the area (he had only been below 10°35’ N once when he travelled to Hasoba near Fauwel/Pawol, on the Ngol/Ragaba ez Zarga). Despite this, Lloyd’s account once more contradicts the Government’s location of the Ngok Dinka to the south of the Kiir/Bahr el Arab.

1043. Third, this account of the boundary being “between” the rivers also refutes the Government’s argument that the southern boundary of Kordofan Province must necessarily have been on the course of a river (in particular the Kiir/Bahr el Arab). The fact that Lloyd did not report seeing Ngok Dinka to the north of the Ngol/Ragaba ez Zarga on his single trip

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<sup>1236</sup> Lloyd, *Some Notes on Dar Homr*, The Geographical Journal, 29 (January to June 1907), at p. 654, **Exhibit-FE 3/4** (emphasis added).

<sup>1237</sup> SPLM/A Memorial, at para. 906.

<sup>1238</sup> Lloyd, *Some Notes on Dar Homr*, The Geographical Journal, 29 (January to June 1907), at p. 649, **Exhibit-FE 3/4**. The Government omits Lloyd’s further observation that there were sometimes disputes with the Ngok when the Homr travelled to the region in the dry season, “usually as a result of elephant poaching by the Arabs” who refused to acknowledge that they had “*no right to hunt in another tribe’s country*.” *Ibid* 652.

<sup>1239</sup> GoS Memorial, at para. 353 (emphasis added).

<sup>1240</sup> Lloyd, *Some Notes on Dar Homr*, The Geographical Journal, 29 (January to June 1907), at p. 650.

<sup>1241</sup> GoS Memorial, at para. 318.

is not surprising, given that he was travelling with “64 men of No. 1 Company Camel Corps.”<sup>1242</sup> As with Percival, these forces would likely have appeared as armed slave raiders and the Ngok would have been wary of Lloyd’s expedition.

1044. Nevertheless, it is also notable that, on two separate occasions Lloyd observed crop burning practices. In December 1905 Lloyd was at Turda and noted that there were much fewer Arabs there because of the later start to the dry season. He goes on record that “[t]he grass is not yet burnt,” a clear reference to back-burning having yet to take place.<sup>1243</sup> The Misseriya were not present in the area,<sup>1244</sup> and in any event did not cultivate crops to burn.<sup>1245</sup> This corroborates Ngok (Aleï section typically) permanent settlement around Turda in 1905.<sup>1246</sup>

1045. On a later trip in early December 1907, Lloyd witnessed a “forest fire” on the north bank of the Ngol/Ragaba ez Zarga.<sup>1247</sup> As discussed above (in the context of Percival’s report<sup>1248</sup>), such a fire was almost certainly a sign of human inhabitation – and in particular the Ngok Dinka back-burning their crops to improve their harvest<sup>1249</sup> (their larger crops were typically near forests<sup>1250</sup>). This was also in early December, at the beginning of the Misseriya seasonal grazing movement southward. Only Ngok would have been present in the area at this time of year,<sup>1251</sup> and indeed it was their harvest time, explaining the back-burning.<sup>1252</sup>

1046. The Government’s Memorial ignores this and instead refers to a 1910 map which was attached to illustrate Lloyd’s notes (GoS Figure 13 and **GoS Map 11**; SPLM/A **Map 44**).<sup>1253</sup> According to the GoS, the 1910 Lloyd map merely shows that Kordofan had been enlarged to include the Ngok Dinka, with a “curved line” forming an “extension southwards of the Kordofan Darfur boundary.”<sup>1254</sup>

1047. What the Government omits to mention is that the 1910 Lloyd map very clearly identifies the portions of the Abyei region which Lloyd explored well to the north of the Kiir/Bahr el Arab as “*Dar Jange*” (Ngok Dinka territory, as noted above) and “*Dinka*.”<sup>1255</sup> Like other Condominium reports, the “*Dar Jange*” reference on the 1910 Lloyd map is shifted to the south because Lloyd only visited the area in the dry season, when cattle and many village inhabitants would have started to move further south. The Lloyd map also identifies “*Sultan Rob’s Old Village*” as located to the north of the Kiir/Bahr el Arab (again,

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<sup>1242</sup> Sudan Intelligence Report, No. 140, dated March 1906, Appendix E, at p. 17, **Exhibit-FE 17/22**.

<sup>1243</sup> Sudan Intelligence Report No. 137, December 1905, Appendix E, p. 10, **Exhibit-FE 17/19**.

<sup>1244</sup> SPLM/A Memorial, paras. 242-243.

<sup>1245</sup> SPLM/A Memorial, paras. 233-237.

<sup>1246</sup> SPLM/A Memorial, paras. 1030-1031. **Map 13** (Nine Ngok Dinka chiefdoms, 1905).

<sup>1247</sup> Sudan Intelligence Report, No. 162, dated January 1908, Appendix G, at p. 55, **Exhibit-FE 17/30**. Lloyd’s trek was in November and December 1907 and he marched from El Obeid to Muglad and then took a western road to Dawas, Dawas is within the Ngok Dinka exclusive land use area determined by the ABC. **Map 10** (*Abyei Area Boundaries: Map 1*, Abyei Boundaries Commission, 2005).

<sup>1248</sup> See above at para. 993.

<sup>1249</sup> See above at paras. 993.

<sup>1250</sup> Witness Statement Nyankiir Chol Piok Bar (Ngok Woman), at p. 2, ¶7 (“We try to plant these larger crops near forest areas because the dropped foliage makes the ground more fertile. In the larger crops we plant different types of sorghum called *ruath*, *amarak* or *makuac*.”).

<sup>1251</sup> SPLM/A Memorial, at para. 243 (citing Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 10 (1960), **Exhibit-FE 4/8**).

<sup>1252</sup> Witness Statement Nyankiir Chol Piok Bar (Ngok Woman), at p. 2, ¶8.

<sup>1253</sup> GoS Memorial, at paras. 373-374.

<sup>1254</sup> GoS Memorial, at para. 374.

<sup>1255</sup> **Map 44** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910); **Map 44a** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Detail); **Map 45** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Overlay).



inconsistent with the Government's claim that the Ngok were located to the south of the Bahr el Arab).

1048. The Government also fails to mention the 1907 Lloyd map, which was prepared at the time of his one journey to the Abyei Area and accompanied his 1907 piece in the *Geographic Journal*. As this map shows, above Tebeldiya the northwest of the Abyei region, Lloyd marked two arrows labeled "To *Dar Junge*," one located just outside Muglad (at approx 10°50'N) pointing due south and the second in the area of Tebeldiya pointing southeast, directly into the heart of the Abyei region.<sup>1256</sup>

1049. The descriptions of the Ngok Dinka on Lloyd's maps are consistent with Lloyd's reports and with the views of Mahon, Wilkinson, Percival and Gleichen (detailed above).<sup>1257</sup> This evidence is entirely contrary to the Government's claim that the Ngok Dinka lived only south of the Kiir/Bahr el Arab, and indeed corroborates Ngok settlement of areas up to 10°35' N.

1050. The Government also omits to mention (and its detail of the Lloyd map obscures) the fact that the "*Homr*" are located substantially to the north of the *goz*, in the region of Muglad, which both parties acknowledge is the "headquarters" of the Misseriya. Instead, the Government comments only that the "Awlad Kamil, one of the Humr sections or omodiyas, are shown just north of the Ragaba ez Zarga."<sup>1258</sup>

1051. Again, careful attention to the map reveals that what the GoS calls in its Memorial "Awlad Kamil"<sup>1259</sup> is in fact depicted on Lloyd's map as "Walad Kamil." According to Cunnison, Awlad Kamil is one Humr section and "Awlad Umran," described by Lloyd as "Walad Omran," is another. Both of these Humr sections are identified twice on the map (the Awlad Kamil once somewhat north of the Ngol/Ragaba ez Zarga and once north of the *goz* near Muglad). The explanation is that these groups of the Humr were referred to on the map with both their wet season and dry season locations.

1052. The location of the Misseriya above the *goz* on the 1910 Lloyd map is confirmed by the reference (also not mentioned by the Government's Memorial) to the "Misseriya" on a latitude north-east of Muglad at the Nuba Mountains, and a second reference to the "Misseriya" farther north again at El Sinut, far to the north of the *goz*. It is further confirmed by the more generic reference to "Dar Homr," also not mentioned by the GoS Memorial, again centered on the area of (and to the north of) Muglad, ending in the south-east roughly at the latitude of the ABC Experts' northern boundary of the Abyei Area.

1053. The 1910 map reference is corroborated by the evidence of Professor Cunnison. Cunnison outlined the movement of the various Misseriya omodiyas during the 1950s. The markings on the 1910 map largely reflect the dry season movement of both Awlad Kamil and

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<sup>1256</sup> **Map 38** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907); **Map 39** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907 – Overlay).

<sup>1257</sup> See above at paras. 940-942, 953-972, 983-1011, 1014-1022, 1029-1032.

<sup>1258</sup> GoS Memorial, at para. 373(d)

<sup>1259</sup> GoS Memorial, at para. 373(d). Note that Cunnison also uses the spelling "Awlad" rather than "Walad". Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 196 (1966), **Exhibit-FE 4/16**.

Awlad Omran described by Cunnison.<sup>1260</sup> In both instances, the specific references to the Misseriya on the Government's 1910 Lloyd map place the Misseriya to the north of the *goz*, in Muglad.

(16) 1905 Sudan Intelligence Report (No. 128)

1054. The GoS Memorial cites reports from the Sudan Intelligence Report regarding raids against the Ngok Dinka (as well as the neighboring Twic Dinka to the south<sup>1261</sup>), which resulted in a decision by the Anglo-Egyptian Government to ensure that both the victims and the perpetrators of the raids would be under the administration of the same authorities.<sup>1262</sup> Accordingly, in March 1905, a Sudan Intelligence Report (No. 128) noted that a decision had been made that the Paramount Chief of the Ngok Dinka (referred to again as "Sultan Rob") and his "people" would be transferred to the administration of the province of Kordofan:

"It has been decided that *Sultan Rob, whose country is on the Kir river*, and Sheikh Rihan of Toj ... *are to belong to Kordofan Province*. These people have, on certain occasions, complained of raids made on them by southern Kordofan Arabs, and it has therefore been considered advisable to *place them under the same Governor as the Arabs of whose conduct they complain*."<sup>1263</sup>

1055. Once more, the Sudan Government report places the Ngok Dinka country (under "Sultan Rob") in a location "*on the Kir river*." As discussed above, by 1905, Arop Biong ("Sultan Rob") was residing at Burakol, north of the Kiir/Bahr el Arab, while Percival, Wilkinson and Mahon had all located Ngok villages well to the north of the Kiir/Bahr el Arab. The Government argues that the presence of the Ngok Dinka "*on the Kir river*" during the dry season must be considered in the context of the GoS's claim that "*in the wet season [the Ngok Dinka] went south to the River Lol, not north*."<sup>1264</sup> As discussed elsewhere, that allegation is demonstrably wrong: it reverses the course of the Ngok Dinka (and Misseriya) seasonal grazing patterns and, as a consequence, fundamentally distorts consideration of the location of the Ngok Dinka (and Misseriya) during the wet season.<sup>1265</sup>

1056. It is understandable why the Government would wish to reverse the directions of the seasonal grazing patterns. In particular, the Government's reversal of the grazing patterns would artificially and implausibly shift the Ngok Dinka's position in the wet season from above the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab to south of those rivers. As already discussed, the evidence contradicts this suggestion and instead places the Ngok to the north in the rainy season, not to the south, of their dry season locations.<sup>1266</sup>

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<sup>1260</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 196 (1966), **Exhibit-FE 4/16**. Cunnison notes that Awlad Umran "have most of their cultivations" in "the Muglad" and "near the Wadi el Ghalla [which runs through and north of the Muglad area]." I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 196 (1966), **Exhibit-FE 4/16**. Cunnison also notes that the Awlad Kamil "recently opened numerous gardens in the neighbourhood of Tibbun [in the Babanusa]." I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 196 (1966), **Exhibit-FE 4/16**.

<sup>1261</sup> Raids on the Twic Dinka were described in Sudan Intelligence Report, No. 127, dated February 1905, at p. 2, **Exhibit-FE 2/6**. See GoS Memorial, at para. 358.

<sup>1262</sup> Sudan Intelligence Report, No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8**.

<sup>1263</sup> Sudan Intelligence Report, No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

<sup>1264</sup> GoS Memorial, at para. 359.

<sup>1265</sup> See above at paras. 949-950.

<sup>1266</sup> See above at paras. 949-950, 958-959.

(17) 1905 Bahr el Ghazal and Kordofan Annual Reports

1057. The Government also refers to the Annual Reports for Bahr el Ghazal and Kordofan for 1905 describing the transfer in 1905 of Arop Biong (“Sultan Rob”) from Bahr el Ghazal to Kordofan.<sup>1267</sup> The two Annual Reports provided:

- a. 1905 Kordofan Annual Report: “The *Dinka Sheikhs, Sultan Rob* and Sultan Rihan Gorkwei are *now included in Kordofan instead of the Bahr El Ghazal;*”<sup>1268</sup> and
- b. 1905 Bahr el Ghazal Annual Report: “In the north the territories of *Sultan Rob* and Sheikh Gokwei *have been taken from this Province and added to Kordofan.*”<sup>1269</sup>

1058. As discussed in the SPLM/A Memorial, and below, both Reports explicitly proceeded on the basis that Arop Biong (“Sultan Rob”) and his people were included in and administered by Bahr el Ghazal prior to 1905 and that, in 1905, they were transferred to Kordofan.<sup>1270</sup> The precise basis for the Sudan Government officials’ view in these instruments, that the Ngok Dinka were included in Bahr el Ghazal, is impossible to reconstruct from the documentary record.<sup>1271</sup>

1059. Prior to 1905, the Sudan Government’s administrators may have: considered the Ngok Dinka people (“Sultan Rob’s” people) to be subject to the same administration as other, ethnically similar tribes in Bahr el Ghazal; regarded the Bahr el Ghazal/Kordofan boundary as extending north of the Bahr el Ghazal for purposes of administering the Ngok Dinka; recognized that the Bahr el Ghazal/Kordofan boundary was indeterminate and simply treated the Ngok as part of Bahr el Ghazal; or had some other reasoning for considering the Ngok not to have been administered under Kordofan before 1905.<sup>1272</sup>

1060. It is unnecessary to hypothesize the rationale for the Sudan Government’s Annual Reports for Kordofan and Bahr el Ghazal in 1905. The essential point for the evidentiary purpose of determining where the Ngok Dinka were geographically located at the time is that these 1905 Government reports did not purport to describe visits to the Abyei region and they were not meant to provide (and could not have provided) a factual description of where Ngok Dinka villages were actually located. Previous first-hand descriptions by Mahon, Wilkinson, Percival, Lloyd and others had provided detailed descriptions of the Ngok Dinka living in the Bahr region, to the north of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, and the Reports in no way contradicted these descriptions.

1061. The Reports were instead administrative decisions meant to announce a change to the governmental treatment of the Ngok Dinka by the Sudan Government.<sup>1273</sup> As such, the 1905 Annual Reports do not contradict the earlier (and subsequent) documentary record that does address in some detail the factual question of where the Ngok Dinka and their villages were actually located as a geographic matter.

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<sup>1267</sup> See SPLM/A Memorial, at paras. 346-358, 1096-1122.

<sup>1268</sup> Annual Report on the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13** (emphasis added).

<sup>1269</sup> Annual Report on the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13** (emphasis added).

<sup>1270</sup> See SPLM/A Memorial, at paras. 1112-1118; see below at paras. 1485-1487.

<sup>1271</sup> See Daly Expert Report, at pp. 41-42.

<sup>1272</sup> See Daly Expert Report, at pp. 41-42.

<sup>1273</sup> Daly Expert Report, at pp. 4, 41-42.

1062. In sum, the reports and notes prepared by the Anglo-Egyptian administrators prior to and during 1905 consistently describe the Ngok Dinka, under the Paramount Chiefdom of Arop Biong (“Sultan Rob” or “Sheikh Rob”), as located widely throughout the Bahr region, centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, and extending further north beyond the Ngol/Ragaba ez Zarga. Sultan Rob is specifically described, based on first hand meetings, as residing and holding court north of the Kiir/Bahr el Arab, in the village of Burakol. The pre-1905 Condominium reports also consistently describe the Ngok Dinka as occupying a substantial number of permanent, prosperous villages dotted through the Bahr region with well-maintained homes, substantial cultivated fields and large cattle herds.

1063. This Anglo-Egyptian documentation was contemporaneously prepared, based generally on first-hand observations, and is remarkably consistent in its treatment of the Ngok and their territories. A number of different reports by different British officials over a period of years provide similar descriptions of the Ngok Dinka, typically based on observations made during treks or inspections in the region. These reports provide valuable evidence as to the location and extent of the Ngok Dinka lands in 1905. These observations are also entirely consistent with the ABC Report’s conclusions, reached unanimously by the five impartial experts in Sudanese history, geography and ethnography.

1064. At the same time, and as noted above, the Anglo-Egyptian administrators had limited access to the entirety of the Bahr region, particularly in the rainy season, and therefore had an inevitably incomplete understanding of the Ngok territories.<sup>1274</sup> Among other things, the Anglo-Egyptian authorities never ventured into the western parts of the Abyei region, barely set foot in the center of the region, and followed only very limited routes in the eastern parts of the region. Equally, there is persuasive evidence that the Ngok were wary or fearful of Condominium troops, and took steps to avoid or mislead the Anglo-African authorities about their locations.

1065. The consequence was that, while the pre-1905 Sudan Government records can provide affirmative evidence of where the Ngok Dinka *were* definitely located, these records cannot comprehensively detail the *full extent or scope of the Ngok territories*, particularly in the rainy season. However, given the seasonal grazing patterns of the Ngok Dinka, which took them south of their settlements in the dry season and north of their settlements in the rainy season, it is clear that the Ngok territory extends further north than would have been observed by any travellers during the dry season.<sup>1275</sup>

1066. In sum, it is beyond debate that the pre-1905 Condominium records flatly and completely contradict the Government’s claim that “[p]rior to 1905, the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab.”<sup>1276</sup> In fact, the Condominium records show clearly that the Ngok’s Paramount Chief himself lived north of the Kiir/Bahr el Arab, in the vicinity of the current Abyei town, while Ngok territory extended up to and beyond the Ngol/Ragaba ez Zarga. At the same time, although virtually never mentioned in the GoS Memorial, the Misseriya were recorded only in their

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<sup>1274</sup> See above at paras. 921-924; SPLM/A Memorial, at paras. 910-911. Equally, the Sudan Government administrators’ geographic understanding of the Bahr region and the “Bahr el Arab” river system was understandably imperfect. See SPLM/A Memorial, at paras. 908-912.

<sup>1275</sup> See above at paras. 950; SPLM/A Memorial, at paras. 196-205, 1064-1081.

<sup>1276</sup> GoS Memorial, at para. 332.

“headquarters,” to the north of the *goz* in Muglad. Again, all of this is precisely in line with the ABC Experts’ findings regarding the respective locations of the Ngok and the Misseriya.

2. The Government’s Claim That the Ngok Dinka Did Not Use and Occupy Territory North of the Kir/Bahr el Arab in 1905 Is Conclusively Refuted by the Post-1905 Documentary Record

1067. The Government’s treatment of post-1905 documentary evidence is as flawed and selective as its discussion of pre-1905 evidence. The GoS Memorial comments that “it is strictly unnecessary to consider what happened to the Ngok Dinka and their Baggara neighbours in the years since 1905,”<sup>1277</sup> but then presents a discussion of at least some evidence from that period.

1068. The Government claims that the post-1905 documents “consistently” describe “*the area to the north of the Bahr el Arab [as] the territory of the Baggara cattle herders* [i.e., Misseriya].”<sup>1278</sup> The Government’s conclusion is again plainly wrong. Its discussion ignores many of the detailed post-1905 documents, specifically addressing the respective locations of the Ngok and the Misseriya, while instead providing a limited and misleading account of less pertinent and focused materials.

a) The Government’s Position Regarding the Lack of Continuity of the Ngok Dinka and Misseriya’s Territories is Manifestly Wrong

1069. Preliminarily, the Government’s Memorial suggests that evidence of the post-1905 locations of the Ngok Dinka and Misseriya territories is irrelevant. As discussed above, the Government claims that the ABC Experts exceeded their mandate by “ignoring the stipulated date of 1905,”<sup>1279</sup> and criticizes the ABC Experts for considering post-1905 evidence.<sup>1280</sup> The Government then presents a limited selection of post-1905 materials (including its only witness evidence, being Professor Cunnison’s observations from the 1950s), with the caveat that “it is strictly unnecessary to consider what happened to the Ngok Dinka and their Baggara neighbours in the years since 1905.”<sup>1281</sup> The Government also suggests, without attempting to prove, that “the Dinka tended to move north of the Bahr el Arab” after 1905.<sup>1282</sup>

1070. The Government’s claims about the irrelevance of post-1905 evidence and its suggestion that the Ngok Dinka “tended to move north” after 1905 are wrong. To the contrary, the evidence demonstrates that there was a substantial continuity in the historic territories of the Ngok Dinka and the Misseriya, and that the post-1905 locations of the two peoples are highly probative of their pre-1905 locations. The only exceptions to this are that, during the middle of the 20<sup>th</sup> century, government-sponsored irrigation and agricultural projects brought Misseriya and other Sudanese south into parts of the Abyei Area where they

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<sup>1277</sup> GoS Memorial, at para. 384.

<sup>1278</sup> GoS Memorial, at para. 386.

<sup>1279</sup> GoS Memorial, at para. 82, Heading (iii).

<sup>1280</sup> GoS Memorial, at para. 242.

<sup>1281</sup> GoS Memorial, at para. 384.

<sup>1282</sup> GoS Memorial, at para. 366.

had not historically been located, while the civil war displaced Ngok Dinka from significant portions of their historic lands.<sup>1283</sup>

1071. Thus, the ABC Experts specifically concluded that there was a continuity of the locations of the Ngok Dinka and Misseriya peoples in the years following 1905. The ABC Report explained:

“The administrative record of the Condominium period and testimony of persons familiar with the area *attest to the continuity of Ngok Dinka settlements in, and use of, places north of the Bahr el-Arab between 1905 and 1965*, as claimed by the Ngok and the SPLM/A.”<sup>1284</sup>

1072. The ABC Experts noted that “it is evident that over a period of years successive administrators accepted a continuity of settlement and use, even if they did not observe it personally.”<sup>1285</sup> The ABC Report cited a number of sources for this proposition, including Tibbs, who “states categorically that *there was continuity of the Ngok settlements up to the end of the Condominium*”<sup>1286</sup> and Cunnison, who “was equally definite in stating that the general area in which the *Ngok maintained their permanent settlements remained the same over the years*.”<sup>1287</sup>

1073. As discussed below, both Cunnison’s published works and witness statement in these proceedings provide even greater support for the continuity over a substantial period of time of the territory inhabited and used by the Misseriya and the Ngok Dinka than identified by the ABC Experts in their report. Thus, Cunnison’s witness statement concludes by explaining that he had access to the files of the Anglo-Egyptian administration and that the statements about the Misseriya in those files were consistent with his own observations in the 1950s. As a consequence, Cunnison concludes: “I believed – and still believe – that *the position I described was of [sic] long standing*.”<sup>1288</sup>

1074. As also discussed below, Cunnison made numerous other comparable comments in his published works and witness statement, which emphasized the “traditional” character of the Ngok and Misseriya “homes” and the fact that the Misseriya followed the same routes and practices as their “forefathers.” Thus, Cunnison remarked in his published works prior to his current witness statement that the area of the Bahr to the south of the *goz* “is the *traditional land of Dinka*,”<sup>1289</sup> that the Misseriya’s cattle-grazing routines and locations were “*long standing*,”<sup>1290</sup> and that Muglad was where the Misseriya “cultivate and store their grain

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<sup>1283</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 77 (1966) (“Cotton demands different patterns of residence and co-operation. Most [Misseriya] cultivate millet, but the recently [writing in the mid 20<sup>th</sup> century] introduced cotton is a matter of choice. A few people have given up the cultivation of millet entirely, and depend on the proceeds of their cotton crop to buy grain....During the season (May to August for planting and weeding, and November onwards for harvesting and selling) they live in villages, also called *hilla*, of grass huts, or tents if available. At one cotton centre, Seidana [north of Abyei], the village consisted of members of half of dozen *surras*, each group forming their own small circle of tents or huts within the village ... Cotton has thus led to a new form of residential arrangement, to which we may relate the scarcity of suitable high ground in the Bahr region and the fact that very few Humr cultivate cotton and those who do seek the company of their fellows.”), **Exhibit-FE 4/16**.

<sup>1284</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial**.

<sup>1285</sup> ABC Report, Part I, at pp. 18-19, **Appendix B to SPLM/A Memorial**.

<sup>1286</sup> ABC Report, Part I, at p. 19, **Appendix B to SPLM/A Memorial**.

<sup>1287</sup> ABC Report, Part I, at p. 19, **Appendix B to SPLM/A Memorial**.

<sup>1288</sup> Witness Statement of Ian Cunnison, at p. 3, ¶12.

<sup>1289</sup> Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 10 (1960)

<sup>1290</sup> Witness Statement of Ian Cunnison, at p. 1, ¶6.

*as their forefathers did.*<sup>1291</sup> Similarly, Cunnison said that “[t]he way in which the tribal sections move *seems not to have varied much since the Reoccupation.*”<sup>1292</sup>

1075. Michael Tibbs shares the same view. His witness statement explains:

“In making this statement I should note that I believe the descriptions I give of the Humr and Ngok Dinka areas within the province to have existed for some considerable time prior to my arrival in Kordofan, with the obvious exception of the increased Humr cultivation of cotton particularly at Nyama and Subu.”<sup>1293</sup>

1076. More generally, it would be very unusual if there were in fact not continuity in the locations of the Ngok Dinka and Misseriya in the decades following 1905. As discussed in the SPLM/A Memorial, the Sudan Government brought a substantial measure of security and law and order to the Abyei region, while deliberately insulating the area from most external influences.<sup>1294</sup> In these circumstances, there would have been little impetus for either the Ngok Dinka or the Misseriya to uproot their traditional settlements or to adopt new grazing patterns, particularly when doing so would have infringed upon traditional rights of their neighbors. Rather, as the ABC Experts and all other authorities that addressed the issue (Cunnison and Tibbs) have concluded, the two peoples continued to occupy and use their historic territories in their traditional ways of life.

1077. This conclusion is also confirmed, as discussed below, by the very close congruity between the Ngok Dinka territory described by Mahon, Percival, Wilkinson, Gleichen and Lloyd prior to 1905, and the Ngok Dinka territory described by Cunnison, Tibbs, the *Kordofan Province Handbook*, Henderson, Santandrea and Howell after 1905.<sup>1295</sup> The Ngok are consistently described in all of these materials, regardless of the time period in question, as residing in the Bahr region, extending north from the Kiir/Bahr el Arab to the Ngol/Ragaba ez Zarga and beyond.

1078. The same conclusion (of continuity) is also supported by the evidence of environmental and cultural practices. The Ngok Dinka and Misseriya cattle and animal husbandry practices, agricultural practices, methods of building settlements (or not) and seasonal activities are all specifically adapted to their respective geographical regions.<sup>1296</sup> The Ngok cattle, crops, houses and other cultural practices are all adapted to the damper area of the Bahr, while the Misseriya cattle, crops, nomadism and other cultural practices are equally adapted to the drier area of the Muglad and Babanusa.<sup>1297</sup> None of these basic environmental and cultural characteristics changed between 1905 and 1956, again strongly corroborating the continuity in geographic locations of the Ngok.

1079. The only significant shifts in population that occurred during the 20<sup>th</sup> century are well-documented (further contradicting the GoS’s suggestion that the Ngok surreptitiously expanded to the north after 1905). First, during the middle of the 20<sup>th</sup> century the Government instituted several large-scale agricultural projects in Lakes Keilak and Abyad;

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<sup>1291</sup> Cunnison, “*Humr and their Land*,” 35(2) SNR 54- 55 (1954), **Exhibit-FE 4/5** (emphasis added).

<sup>1292</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 26 (1966), **Exhibit-FE 4/16** (emphasis added).

<sup>1293</sup> Witness Statement of G. Michael Tibbs, p. 6, ¶27.

<sup>1294</sup> SPLM/A Memorial, at paras. 361-365.

<sup>1295</sup> See below at para. 1195.

<sup>1296</sup> SPLM/A Memorial, at paras. 176-216, 233-254; see below at para. 1308.

<sup>1297</sup> SPLM/A Memorial, at paras. 176-216, 233-254; see below at para. 1308.

the Firshai and near Abyei.<sup>1298</sup> These projects brought numerous Sudanese from outside the Abyei Area into the region, as well as settling some Misseriya in agricultural life-styles that had not historically existed.

1080. Second, as described in the SPLM/A Memorial, the 40-year long civil war caused substantial displacement of Ngok Dinka from the Abyei Area,<sup>1299</sup> as also inevitably occurred in other parts of Sudan. As a consequence, numerous Ngok Dinka fled from their homes in the Abyei Area, either to camps for displaced persons or other parts of Sudan.<sup>1300</sup>

1081. The Government's sole basis for suggesting that there was not continuity of the locations of the Ngok Dinka and Misseriya is a July 1921 Sudan Intelligence Report (No. 324) which described Arab and Dinka relations as remaining good and remarking that "the Dinka (Bongo section) have shown confidence in the Arabs by extending their permanent

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<sup>1298</sup> The Government also provides buying centers and weighing machines at convenient locations. I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 23 (1966), **Exhibit-FE 4/16**. The Ngok also participated in these projects: Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), p. 2, ¶¶4-6.

<sup>1299</sup> J. Burr & R. Collins, *Requiem for the Sudan* 3-4 (1995) ("By mid-[1980s] drought had struck the South, where crop failures and the scarcity of forage were made more painful by the depredation of the Arab Baqqara militias from Kordofan – the *murahileen*, who had previously been armed by the Sudan government but were now uncontrollable. Together drought and war caused the death and displacement of hundreds of thousands of Nilotic peoples, particularly the Dinka....Even more terrifying was the employment by the Sudan government of the *murahileen* and ethnic in support of its armed forces...which was instrumental in provoking the displacement of millions of Southern Sudanese. The survivors...were then threatened by a series of droughts that plagued the South, and the famine that followed resulted in even more deaths and displacement than those from battle. Once villages were burned, once villagers experienced debilitating drought, once herders suffered the destruction of countless of their beloved cattle, the Nilotes were forced to flee or starve. They sought food and refuge beyond their devastated homelands, mostly in the greater Khartoum area where they were greeted with hostility and prejudice by their fellow Sudanese and their government."), **Exhibit-FE 19/2**.

<sup>1300</sup> International Crisis Group, *Policy Briefing Sudan: Breaking the Abyei Deadlock*, Africa Briefing No. 47, 12 October 2007, at p. 2 ("Displacement of the Ngok Dinka, which had begun during the first civil war and continued throughout the 1970s, escalated during the second war. Today the bulk of Abyei's Dinka population has been displaced."), **Exhibit-FE 15/11**; E. Rackley, *Displacement, Conflict, and Socio-Cultural Survival in Southern Sudan in Journal of Humanitarian Assistance* p. 3 (1 June 2000) ("In terms of displacement, the Women's Commission of Refugee Women and Children estimated in 1993 that as much as 85 per cent of Sudan's southern population had been displaced. According to the 1996 *World Refugee Survey*, approximately four million Sudanese had been internally displaced by the end of 1995, and 465,000 were refugees in neighboring countries. Of these four million internally displaced, 1.8 million are located in encampments around Khartoum, where the Sudanese government continues its policy of squatter-camp demolition and forced relocation."), **Exhibit-FE 19/5**; see also examples of the Ngok witness testimony: Witness Statement Mijak Kuot Kur (Achaak elder), p. 2, ¶3 ("When I was a boy there was no permanent settlement for my family because of the fighting and displacement. When I was young the fighting would force us from Alor Tuong, but we would fight back and we would be able to return to our home at a later time, but in 1963 we were permanently displaced to Abyei town."); Witness Statement of Deng Chier Agoth (Abyior elder), p. 3, ¶12,13 ("I was originally a farmer, but I participated in the fighting in the 1970s and since then I have been living in Abyei town. The Abyior were displaced from our traditional lands in 1965. Where people had returned during the peace in the 1970s, they were displaced a second time in 1977 and have not been able to return."); Witness Statement Alor Kuol Arop (Abyior elder), p. 4, ¶¶25, 35 ("You know, Misseriya people were very peaceful to us in the beginning. All of a sudden the Misseriya were armed and being pushed by the government to fight the Ngok. They found themselves with arms and they started violence against us, including trying to burn the houses of our people when they found themselves with firearms. They started to do terrible things. Some of our children were even stolen." "We have suffered a long time. I am Alor Jok and I am Ngok Dinka. I am an elder of my people so I must share what I know to help. What I say to you is the truth so I hope you will tell it to the Tribunal. If the international community does not help us, then we feel as though we have no rights, that we are no better than animals. That is what we feel from the international community."); Witness Statement of Bagat Makuac (Chief of Manyuar), p. 2, ¶¶4,5 ("I was born in Abyei Town in 1977... Because our people have been displaced since before I was born I have no experience of our traditional towns. For this reason I have asked two of the Manyuar elders who are knowledgeable about our lands, Adol Kuol Malual and Mijak Kuol Lual Deng, to give statements to the tribunal giving the history of our chiefdom. The settlements of the Manyuar that I have visited are Tajalei, Todach and Noong, which are all north of Abyei Town. I have visited these places since 2005 so that I can begin learning of our traditional settlements that we will one day return to."); Human Rights Watch Report, *Sudan, Oil and Human Rights*, 2003, at p. 102, **Exhibit-FE 11/2**.



villages farther north of the Gurf.”<sup>1301</sup> The Government’s Memorial suggests in passing that this comment shows that “the Dinka tended to move north of the Bahr el Arab.”<sup>1302</sup>

1082. It is, of course, remarkable to base the claim of a major population shift on a single sentence in a single 1921 report. Had some such displacement occurred, it would have been noted more broadly and would have attracted more detailed comment and explanation. No such comment exists in the historical record and it is therefore very difficult to conceive that any such event actually occurred. In any case, the GoS’s interpretation of even this single 1921 report is misleading and inaccurate.

1083. First, the Government plainly misreads the language of the 1921 report, which does not say that the Bongo extended their permanent villages “*north* of the Bahr el Arab” but instead “*farther to the north* of the Gurf.” The clear meaning of the actual words of the 1921 report was that the Bongo were *already* located to the north of the Kiir/Bahr el Arab and that they had then extended their villages “*farther* to the north.” Far from supporting the Government’s claim that the Ngok were initially located to the south of the Kiir/Bahr el Arab, the text shows the opposite. It is also noteworthy that the Kiir/Bahr el Arab, to the west, extends almost to 10°N latitude, well north of its latitude of 9°35’N at Abyei.

1084. Moreover, it bears emphasis that the Bongo Chiefdom was not the northernmost of the Ngok Dinka Chiefdoms, but was to the south of the Alei, Achaak, Mareng and Manyuar, and not as far to the north-west as the Abyior: **Map 13** (Nine Ngok Dinka, 1905).<sup>1303</sup> The fact that the Bongo extended “*their* villages” further north does not contradict the fact that other sections of the Ngok were located even further to the north. Further, given the described location of the Ngok Dinka and their cattle on the “lower reaches of the Ragaba Um Biero” during the dry season (March), the very strong inference is that the Ngok’s permanent villages were located farther north.<sup>1304</sup>

1085. The 1921 report must also be considered with care, in the context of Anglo-Egyptian reports, because, from immediately prior to and following 1905, relations between the Ngok and the Misseriya were good.<sup>1305</sup> Given this, the 1921 report should not be interpreted to suggest any dramatic change in relations between the Ngok Dinka and the Misseriya following 1905. As discussed above, even in 1903, Mahon reported that “one and all Dinka said how pleased they were that Government had come, because they had not been raided by the Arabs since I was there last year. As a proof of that, I met several herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year.”<sup>1306</sup>

1086. There is therefore no reason at all to conclude that there was any significant change in Misseriya and Ngok Dinka relations after 1905, such that the historic locations of the two peoples would have been materially altered. To the contrary, all of the evidence in the record confirms that the areas inhabited and used by the two peoples would have remained substantially similar in the decades after 1905.

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<sup>1301</sup> GoS Memorial, at para. 366.

<sup>1302</sup> GoS Memorial, at para. 366.

<sup>1303</sup> See also **Map 14** (Abyior Chiefdom, 1905); **Map 15** (Achaak Chiefdom, 1905); **Map 17** (Alei Chiefdom, 1905); **Map 19** (Bongo Chiefdom, 1905); **Map 21** (Manyuar Chiefdom, 1905); **Map 22** (Mareng Chiefdom, 1905).

<sup>1304</sup> Sudan Intelligence Report, No. 324, dated 1921, at p. 6, **Exhibit-FE 18/5**.

<sup>1305</sup> See SPLM/A Memorial, at para. 930; see also above at paras. 1081-1085. For example, see SPLM/A Memorial, at paras. 933-934. There were still tensions regarding slave-raiding and hunting rights. SPLM/A Memorial, at para. 389.

<sup>1306</sup> Sudan Intelligence Report, No. 104, dated March 1903, Appendix E, at p. 19, **Exhibit-FE 1/21** (emphasis added); Sudan Gazette No. 45, dated March 1903, **Exhibit-FE 1/22** (emphasis added).

1087. As a consequence, the post-1905 documentary and other evidence is probative and important to ascertaining the respective locations of the Ngok Dinka and the Misseriya in 1905. Naturally, material from immediately following 1905 is generally and presumptively of greater evidentiary weight than later material, but all of the material discussed below provide important evidence which can be evaluated in light of the rest of the factual record.

b) MacMichael's *A History of the Arabs in Sudan* (1912)

1088. The GoS Memorial refers briefly to MacMichael's 1912 "*A History of the Arabs in Sudan*," for the comment that "[t]he Humr country" lies in the "neighborhood of el Odaya to the Bahr el 'Arab, or 'Bahr el Humr."<sup>1307</sup> As the Government acknowledges, this observation places the Misseriya "well to the north" of the Kiir/Bahr el Arab.<sup>1308</sup>

1089. Nonetheless, the Government's selective extract from MacMichael omits his comment, in the same paragraph, that "[i]n the rains the HUMR *are between Muglad and the confines of the HAMAR to the north*, but in the dry season they and their cattle move *southwards to the Bahr el 'Arab*, where they come into contact *with the DINKA*."<sup>1309</sup> This passage makes it very clear that the Misseriya *only* move south of Muglad to graze during the dry season, at which point the Misseriya encounter the Dinka "*southwards to the Bahr el 'Arab*." As with the pre-1905 Condominium records, MacMichael's comments place the Ngok in the Bahr region north of the Kiir/Bahr el Arab.

1090. Elsewhere in the same chapter, speaking more generally, MacMichael also observed that in the "dry season of the year the Bakkara [Baggara] move with all their cattle to the rivers of the south," and when the rains come they "move northwards to the clean pastures of the higher ground."<sup>1310</sup> This further confirms that the Misseriya's use of the area south of Muglad is limited to seasonal grazing.

1091. MacMichael's account is perfectly consistent with descriptions of the Misseriya and Ngok Dinka in the ABC Report and SPLM/A Memorial.<sup>1311</sup> Based on observations only a few years after 1905, MacMichael's account describes the Misseriya as being centered in the region of Muglad, and seasonally migrating for part of the year (three or four months in the dry season) south to the Bahr region, where the Ngok were located. This puts the Ngok exactly in the area centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, where Mahon, Wilkinson, Percival, Gleichen and Lloyd had placed them, even in the dry season – naturally putting them even further north in the wet season.

c) *Kordofan Province Handbook* (1912)

1092. The Government's Memorial only briefly discusses the 1912 *Kordofan Province Handbook*, notwithstanding the *Handbook's* description of the Ngok Dinka in the province. The *Handbook* reported as follows about Kordofan:

*"Country - to the south of Dar Nuba and living in the open plains (locally called fawa) which extend to the Bahr el Arab there is a considerable Dinka population. In the rains the tribesmen collect for the most part in the neighbourhood of Lake Abiad*

<sup>1307</sup> GoS Memorial, at para. 386.

<sup>1308</sup> GoS Memorial, at para. 386.

<sup>1309</sup> H. MacMichael, *A History of the Arabs in Sudan*, Vol. I, 286 (1922), **Exhibit-FE 18/6** (emphasis added).

<sup>1310</sup> H. MacMichael, *A History of the Arabs in Sudan*, Vol. I, 272 (1922), **Exhibit-FE 3/9**.

<sup>1311</sup> ABC Report, Part I, at pp. 12-13, **Appendix B to SPLM/A Memorial**; SPLM/A Memorial, at paras. 238-254.

*and near Doleiba*, where they have semi permanent villages and a little cultivation. As the country dries up and the mosquitoes disappear *they move slowly south, watering at the various rain pools, to the Arab or Gurf river, along the banks of which they form innumerable small settlements of two or three huts each.*<sup>1312</sup>

1093. As discussed in the SPLM/A Memorial, this description must have referred to the Ngok Dinka, given its reference to “the Arab or Gurf,” clearly a reference to the Kiir/Bahr el Arab. This is made clear by the map attached to the *Kordofan Province Handbook Map 48* (*Kordofan Province*, Survey Office Khartoum, 1913),<sup>1313</sup> which marks “*Dar Jange*” as extending from the Bahr el Arab, through the Ngol/Ragaba ez-Zarga River to Turda in the north and past Miding [Arabic: Heglig] to Lake Abyad in the north-east.<sup>1314</sup>

1094. This depiction is again consistent with the earlier reports by Mahon, Wilkinson, Percival, Gleichen and Lloyd – every one of whom placed the Ngok Dinka territory squarely in the region between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga. It is also consistent with descriptions of the “Bahr el Arab” as encompassing the region of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga (discussed in greater detail below<sup>1315</sup>). At the same time, like earlier descriptions by Wilkinson and MacMichael, and the 1910 Lloyd map, this places the Misseriya above the uninhabited *goz*, coming south only in the dry season to graze in Ngok Dinka territory.

d) July 1921 Report – Sudan Intelligence Report No. 324

1095. The Government cites a July 1921 Sudan Intelligence Report (No. 324), discussed above, which described Arab and Dinka relations as remaining good and remarking that “the Dinka (Bongo section) have shown confidence in the Arabs by extending their permanent villages farther to the north of the Gurf.”<sup>1316</sup> According to the GoS Memorial, this comment shows that “the Dinka tended to move north of the Bahr el Arab,”<sup>1317</sup> implying that the Ngok had not lived about the Kiir/Bahr el Arab previously.

1096. As discussed above, the Government’s interpretation of the 1921 report is misleading and inaccurate.<sup>1318</sup> First, it bears emphasis that the 1921 report clearly places one of the nine Ngok Dinka Chiefdoms (the Bongo) substantially north of the Kiir/Bahr el Arab, in the area of the Ragaba um Biero (running between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, as shown on **Maps 50a, 52 and 52a**).

1097. Second, the Government misreads the 1921 report, which does not say that the Bongo extended their permanent villages “*north* of the Bahr el Arab” but instead “*farther to the north* of the Gurf.” As already discussed, the very clear meaning of the actual words of the 1921 report was that the Bongo were already located to the north of the Kiir/Bahr el Arab and that they had then extended their villages “farther north.” Far from supporting the Government’s claim that the Ngok were initially located to the south of the Kiir/Bahr el Arab, the text shows the opposite. As noted above, given the location of the Ngok and their cattle

<sup>1312</sup> *Kordofan Province Handbook* 73 (1912), **Exhibit-FE 3/8a** (emphasis added).

<sup>1313</sup> **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913); **Map 49** (*Kordofan Province*, Survey Office Khartoum, 1913 – Overlay).

<sup>1314</sup> The reference to semi-permanent villages is clearly wrong – as discussed above the Ngok inhabited permanent villages, with only the young men (and sometimes young women) joining the cattle camps during dry and wet seasons. See SPLM/A Memorial, at para. 199.

<sup>1315</sup> See below at paras. 1118-1122.

<sup>1316</sup> GoS Memorial, at para. 366.

<sup>1317</sup> GoS Memorial, at para. 366.

<sup>1318</sup> See above at paras. 1069-1070.

on the “lower reaches of the Ragaba Um Biero” during the dry season (March), the very strong inference is that the Ngok’s permanent villages were located farther north.<sup>1319</sup>

e) Henderson’s *Notes* (1939)

1098. Writing in the 1930s, Henderson placed the Misseriya in the Muglad-Baraka area and the Ngok Dinka as having settled at Debbat el Mushbak, near Hasoba on the Ngol/Ragaba ez Zarga.<sup>1320</sup> Specifically, in a discussion of “Non-Baggara Inhabitants of [South-west Kordofan],” Henderson introduced the Ngok and by way of establishing their continued presence in southwest Kordofan, described their early migration: “[u]nder Kwaldit [Kwoldit] of the Abyor [Abyior] section the Ngok ... *moved west along the Gnal [Ngol/Ragaba ez Zarga], driving the Shatt before them, and settled from Tebusayya to Hugnet Abu Urf.*”<sup>1321</sup>

1099. Henderson notes that the Ngok took over the Ngol/Ragaba ez Zarga “one generation before the Baggara came south to Turda. Deing of Torjok [Ale] was then their leading man, and his headquarters were at Debbat El Mushbak, a prominent mound near Hasoba.”<sup>1322</sup> Henderson then describes how in later generations Paramount Chief “Alor [Alor Monydhang] subsequently moved south to Kerreita,” and then refers to “Biong [Biong Alor] son of Alor” having “moved further west to the site now called Sultan Arob after his son.”<sup>1323</sup> This description is consistent with the pre-1905 references to Ngok settlements on the Ngol/Ragaba ez Zarga.<sup>1324</sup>

f) Santandrea’s *The Luo of the Bahr El Ghazal* (1968), Describing Observations from 1930s

1100. The Government’s Memorial omits any reference to Stefano Santandrea,<sup>1325</sup> who lived and worked in Southern Sudan for over 20 years starting in the 1930s. In a subsequently published book, Santandrea described “the very place where the Ngok live” as “*north of the Kir,*” “*Abyei*” or the “*Abyei area.*”<sup>1326</sup> He also observed that Abyei was “*the ‘capital’ of the Ngok.*”<sup>1327</sup> These accounts are again consistent with the uniform view of Anglo-Egyptian administrators over the preceding three decades.

g) Robertson’s *Transition in Africa* (1954), Describing Observations from 1933-1953

1101. The Government’s Memorial refers briefly to records of Sir James Robertson’s travels in the Bahr region during his tenure as Civil Secretary between 1945 and 1953. Robertson

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<sup>1319</sup> See also **Map 14** (Abyior Chiefdom, 1905); **Map 15** (Achaak Chiefdom, 1905); **Map 17** (Ale] Chiefdom, 1905); **Map 19** (Bongo Chiefdom, 1905); **Map 21** (Manyuar Chiefdom, 1905); **Map 22** (Mareng Chiefdom, 1905).

<sup>1320</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 49, 58-60 (1939), **Exhibit-FE 3/15**.

<sup>1321</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 49, 58-60 (1939), **Exhibit-FE 3/15** (emphasis added).

<sup>1322</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 49, 58-60 (1939), **Exhibit-FE 3/15**.

<sup>1323</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 49, 58-60 (1939), **Exhibit-FE 3/15**.

<sup>1324</sup> See SPLM/A Memorial, at paras. 913-914, 919-922.

<sup>1325</sup> Santandrea was a missionary and teacher in Southern Sudan from 1928 to 1957 who worked as a member of the Verona Fathers.

<sup>1326</sup> S. Santandrea, *The Luo of the Bahr El Ghazal* 192 (1968), **Exhibit-FE 4/18**.

<sup>1327</sup> S. Santandrea, *The Luo of the Bahr El Ghazal* 192 (1968), **Exhibit-FE 4/18**.

arrived in Sudan in 1922 and first served on the Blue and White Nile; in 1933, he was stationed in Western Kordofan.<sup>1328</sup> The GoS quotes Robertson's statement that the "Humr section of the Messeria [are] centred around Muglad and Keilak in the rainy season, migrating in the late autumn southwards to the green pastures of the Bahr el Arab," where they "mingled with the tall Nilotic Dinkas."<sup>1329</sup>

1102. This description once more places the Misseriya solidly ("**centred around**") in the region of Muglad and Lake Keilak, both of which are well to the north of the *goz*. This is perfectly in line with the conclusions of the ABC Report, which located the Misseriya to the north of the *goz* during the wet season,<sup>1330</sup> as well as with the observations of MacMichael and Henderson. Robertson's description should also be read in light of the common use of the term "Bahr el Arab" to refer to the entire region of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga (discussed below<sup>1331</sup>); this places the "green pastures" of the Ngok Dinka during the dry season in precisely the regions reported in pre-1905 Condominium records.

1103. While citing Robertson, the Government omits to mention that, during his tenure in Western Kordofan, Robertson "trekked southward [from En Nahud] to the Ragaba Zerga [Ngol/Ragaba ez Zarga], a tributary of the Bahr el Arab [Kiir], with the idea of seeing how far the Humr Baggara penetrated the south."<sup>1332</sup> Upon arrival at the Ngol/Ragaba ez Zarga, "with its abundant pools of water," Robertson reported that he did not come across any Misseriya or even sign of their "hunters' camps."<sup>1333</sup> That again confirms the Misseriya's location to the north of the *goz*, save for periodic dry season grazing to the south.

1104. The Government also omits to mention that Robertson confirmed that the Ngok Dinka were established to the north of the Ngol/Ragaba ez Zarga:

"One year in late June, after the rains had begun, *I ventured down to Abyei* by car to meet the D.C. of Western Nuer District in Upper Nile Province, *whose people had crossed the Ragaba and built their big luarks - thatched huts - on the Kordofan side of the river, thereby trespassing on the Ngok Dinka lands.*"<sup>1334</sup>

This is obviously a reference to the Nuer<sup>1335</sup> moving north from their territory and trespassing in the Ngok's territory above the "Ragaba" (i.e. the Ngol/Ragaba ez Zarga). The location of the Nuer to the south of the eastern course of the "Ragaba" is depicted particularly clearly on the contemporary maps.<sup>1336</sup> Again, consistent with all prior observers, the Ngok are located well above the Kiir/Bahr el Arab, extending north to and beyond the Ngol/Ragaba ez Zarga.

h) Howell's Notes (1951)

1105. The Government also cites to Howell, who wrote about the Ngok Dinka in 1951. In its Memorial the Government mentions, but does not attempt to explain, Howell's comment

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<sup>1328</sup> J. Robertson, *Transition in Africa* 42 (1974)

<sup>1329</sup> GoS Memorial, at para. 388 (quoting J. Robertson, *Transition in Africa* 42, 44, 50 (1974)).

<sup>1330</sup> See above at para. 536; ABC Report, Part I, at pp. 12-13, 26, **Appendix B to SPLM/A Memorial**.

<sup>1331</sup> See below at paras. 1118-1122.

<sup>1332</sup> J. Robertson, *Transition in Africa* 49 (1974), **Exhibit-FE 5/10**.

<sup>1333</sup> J. Robertson, *Transition in Africa* 50 (1974), **Exhibit-FE 5/10**.

<sup>1334</sup> J. Robertson, *Transition in Africa: From Direct Rule to Independence* 51 (1954), **Exhibit-FE 18/28** (emphasis added). Robertson was Civil Secretary of the Sudan Government.

<sup>1335</sup> The Nuer were to the south of the Ngok in an area between the Kiir/Bahr el Ghazal and Ngol/Ragaba ez Zarga near their respective mouths with the Bahr el Ghazal.

<sup>1336</sup> GoS Map 19 (*Ghabat el Arab: Sheet 65-L*, Survey Office, Khartoum, 1922).

that the Ngok occupy an area “on the Bahr el Arab *extending northwards along the main watercourses of which the largest is the Ragaba Um Biero.*”<sup>1337</sup>

1106. That comment is consistent with the uniform earlier views of all the Anglo-Egyptian administrators, who placed the Ngok Dinka in the area of the Kiir/Bahr el Arab, but extending northwards along the watercourses of the Bahr. In particular it describes the location of the Abyior and Bongo chiefdoms with accuracy,<sup>1338</sup> extending toward the north-western areas of the Abyei region.

1107. Howell described the Ngok settlements near the rivers and watercourses, not limited to the Kiir/Bahr el Arab, as follows:

“[Ngok] [v]illages are usually built *close to the river or to one of the main watercourses*, since water is more easily available during the early part of the dry season, either in pools or shallow wells dug in the river bed. Clusters of homesteads each consisting of several living-huts (*ghot*) and one or more cattle byres (*luak*) are *built in an almost continuous line along these rivers.*”<sup>1339</sup>

1108. Howell also noted that the “[p]ermanent villages, and cultivations” of the Ngok “are set along the higher ground *north of the Bahr el Arab.*”<sup>1340</sup> He reported that Ngok “country is on the whole better drained than the areas further south,” contrasting Ngok Dinka land in the north with the swampy *toich* of the Dinka tribes south of the Bahr el Arab.<sup>1341</sup>

1109. Howell’s reference to “*permanent*” villages, “*clusters of homesteads*” and agricultural “*cultivation*” is consistent with both the Anglo-Egyptian administrators’ pre-1905 descriptions of Ngok Dinka settlements,<sup>1342</sup> as well as more general ethnographic evidence regarding Ngok villages and culture.<sup>1343</sup> Again, Howell’s descriptions of the location of Ngok villages extending north from the Kiir/Bahr el Arab along the watercourses of the Bahr region (“*extending northwards along the main watercourses of which the largest is the Ragaba um Biero*”) is irreconcilable with the Government’s claim that the Ngok were confined to territory beneath the Kiir/Bahr el Arab.

i) Cunnison – Various Writings and Witness Statement

1110. The Government places substantial emphasis on the views of Professor Ian Cunnison, attaching a witness statement and quoting substantially from his published writings.<sup>1344</sup> Professor Cunnison’s testimony is based on research that he conducted among the Misseriya

<sup>1337</sup> GoS Memorial, at para. 390 (quoting Howell, “*Notes on the Ngork Dinka of West Kordofan,*” 32(2) SNR 239, 243 (1951), **Exhibit-FE 4/3** (emphasis added).

<sup>1338</sup> **Map 14** (Abyior Chiefdom, 1905); **Map 19** (Bongo Chiefdom, 1905).

<sup>1339</sup> Howell, “*Notes on the Ngork Dinka of West Kordofan,*” 32(2) SNR 243 (1951), **Exhibit-FE 4/3** (emphasis added).

<sup>1340</sup> Howell, “*Notes on the Ngork Dinka of West Kordofan,*” 32(2) SNR 239, 243 (1951), **Exhibit-FE 4/3** (emphasis added).

<sup>1341</sup> Howell, “*Notes on the Ngork Dinka of West Kordofan,*” 32(2) SNR 245 fn 2 (1951), **Exhibit-FE 4/3** (emphasis added).

<sup>1342</sup> See SPLM/A Memorial, at paras. 916, 918.

<sup>1343</sup> See SPLM/A Memorial, at paras. 206-216.

<sup>1344</sup> Witness Statement of Ian Cunnison; GoS Memorial, at paras. 392-394.

between 1952 and 1955. In particular, Professor Cunnison describes how he “lived and fed” as a “member” of “the camp of Hurgas Merida” in the Mezaghna omodiya.<sup>1345</sup>

1111. It is surprising that the Government would place reliance on Cunnison, particularly as its sole witness of fact to date. In fact, in his published works, Professor Cunnison’s opinions are almost completely consistent with and supportive of the conclusions of the ABC Report and the SPLM/A’s Memorial, while squarely contradicting the Government’s position. Cunnison’s witness statement shades a few points, and omits others, but is also largely consistent with and supportive of the SPLM/A case.

(1) The Meaning of the “Bahr” in Cunnison’s Writings

1112. As noted above, there was often confusion in the geographical nomenclature used with regard to the physical features, and especially the rivers, of the Abyei region. Professor Cunnison’s witness statement and published works make important points concerning the “Bahr” and the Abyei region generally. These points underscore the geographic and terminological confusion surrounding the term “Bahr el Arab,” while also confirming the Ngok Dinka presence throughout the Bahr region.

1113. Professor Cunnison devotes considerable care in his published work to specify clearly what is meant by the term “Bahr.” Preliminarily, Cunnison draws a clear distinction between four topographically distinct regions.<sup>1346</sup> The four adjoining “zones” are as follow – described from north to south:

- a. The **Babanusa**, which Cunnison describes as the “sandy area in the north and north-west of the country, which is used [by the Misseriya] for grazing during the rains;”<sup>1347</sup>
- b. The **Muglad**, which Cunnison describes as stretching from the end of “the Babanusa,” “well marked by a watercourse, the Hajiz” to the “Wadi el Ghalla” and “the Goz beyond;”<sup>1348</sup>
- c. The **Goz**, which Cunnison describes as “lying between the Muglad and the Wadi el Ghalla in the north and the river system in the south”<sup>1349</sup> and a “transit stage between the Muglad and the Bahr;”<sup>1350</sup>

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<sup>1345</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* vi, (1966), **Exhibit-FE 4/16**. The Mezaghna omodiya travelled from Muglad to Lau in the dry season, following a single route along the west of the Abyei region (Lau itself being about 12 miles east of Abyei town). Consequently, Professor Cunnison’s personal observations were limited to a narrow section of the Bahr. I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 196 (1966), **Exhibit-FE 4/16** Professor Cunnison noted that he took “trips to see most of the parts of Dar Humr which are used in the different seasons, and to visit all the omodiyas.” I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* vi (1966), **Exhibit-FE 4/16**. In fact, Cunnison took one additional trip from Lau, due north to Lake Keilak. His various routes skirted the outer regions of the Abyei region but he never visited the heart of Ngok lands. Moreover, Cunnison qualified his overall work product with the caveat that he depended “far more upon observation and participation than is usual, and far less upon regular informants and ethnographic texts” which “presumably affects the value of the findings.” I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* vi (1966), **Exhibit-FE 4/16**.

<sup>1346</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 15-19 (1966), **Exhibit-FE 4/16**; Cunnison, “*The Humr and their Land*,” 35(2) SNR 52 (1954), **Exhibit-FE 4/5**; Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 10-11(1960), **Exhibit-FE 4/8**.

<sup>1347</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 15 (1966), **Exhibit-FE 4/16**.

<sup>1348</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 16 (1966), **Exhibit-FE 4/16**.

d. The **Bahr**, described as “[t]he southern part of the country,” “characterized by dark, deeply cracking clays and numerous winding watercourses.” Cunnison notes that “to the north [of the Bahr]” is “the Goz,” in describing where “the Humr make their earliest dry-season camps.”<sup>1351</sup>

1114. In his book, Cunnison stated that “[t]he Bahr is the name which the Humr give to *the whole of this dry season watering country*.”<sup>1352</sup> Cunnison further divides the Bahr region to incorporate the following watercourses:

- a. the Kiir/Bahr el Arab, being “*all river beds between the Regeba ez Zerga*” and the Kiir/Bahr el Arab;
- b. the river system of the Ngol/Ragaba ez Zerga to its border with the north-eastern regabas in the neighborhood of Kwak and Keilak;
- c. the river system of the Nyamora/Ragaba Um Bieiro to its border with the *goz*; and
- d. Lakes Keylak [Keilak] and Lake Abyad.<sup>1353</sup>

1115. As confirmed below, Cunnison’s description of the “Bahr” is exactly consistent with the environmental and climatic evidence discussed below and in the SPLM/A Memorial,<sup>1354</sup> and describes perfectly the area defined in the MENAS Report as being hospitable to the Ngok Dinka agro-pastoral lifestyle.<sup>1355</sup> Conversely, as the same authorities show, that area is ill-suited and inhospitable to permanent settlement by the Misseriya.<sup>1356</sup>

1116. This conclusion is repeated, in more summary form, in Cunnison’s witness statement. There, he describes the movement of the Misseriya by reference to the physical geography of Kordofan. Cunnison opines that the Misseriya “moved south through the extensive sandy Goz to the area called the Bahr: this is the area around the Bahr el-Arab and the Regeba Zerga, here, water and good summer grazing to be found. [The Humr] lived in scattered camps across this region during the summer months (January-May).”<sup>1357</sup>

1117. In particular, Cunnison’s description of the “Bahr” to the south of the *goz* is consistent with the MENAS Expert Report.<sup>1358</sup> Based on a geographical and soil analysis of the region from Babanusa to the Bahr el Arab, the MENAS Expert Report confirms that the *goz* extends south from Muglad in a geographical feature from beyond the Kordofan/Darfur border east to an approximate longitude of 28°20’ E (which is west of Nyama) and to an approximate latitude of 10°10’ N. (The *goz* does not uniformly stretch across the entire east/west breadth

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<sup>1349</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 17 (1966), **Exhibit-FE 4/16**.

<sup>1350</sup> Cunnison, *The Social Role of Cattle*, 1(1) *Sudan J. Veterinary Science and Animal Husbandry* 10 (1960), **Exhibit-FE 4/8**.

<sup>1351</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 18 (1966), **Exhibit-FE 4/16**.

<sup>1352</sup> As indicated below at para. 1128, 1326, Cunnison goes on to say that “much of the Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab.” I. Cunnison, *Baggara Arabs– Power and the Lineage in a Sudanese Nomad Tribe* 18-19 (1966), **Exhibit-FE 4/16**.

<sup>1353</sup> I. Cunnison, *The Humr of Their Land* 51, **Exhibit-FE 4/5**.

<sup>1354</sup> SPLM/A Memorial, at paras. 89-105, 168-189 and 1005-1014.

<sup>1355</sup> MENAS Expert Report, at paras. 154-162.

<sup>1356</sup> See below at paras 1308.

<sup>1357</sup> Witness Statement of Ian Cunnison, at p. 1, ¶6 (emphasis added).

<sup>1358</sup> MENAS Expert Report, at paras. 131-134, 138-145.



of the Abyei Area, but is most prominent in the northwestern part of the district. The areas of the *goz* and the Bahr region within the Abyei Area are depicted on **Map 68** (Bahr Region).<sup>1359</sup> The environmental evidence is discussed in greater detail below.<sup>1360</sup>

(2) The Meaning of the “Bahr El Arab”

1118. Professor Cunnison also uses the term “Bahr el Arab” to mean an area less extensive than the “Bahr,” as described above, but an area substantially more extensive than the Kiir/Bahr el Arab river itself. Cunnison was explicit that the “Bahr El Arab” was not limited to a single river. Rather, it was the term that he and the Misseriya applied to the whole river system from the Kiir/Bahr el Arab to the Ngol/Ragaba ez Zarga, including all tributaries thereof.

1119. Writing in 1953, Cunnison said:

“The river system is known to the Arabs as the Bahr, although they subdivide the area into the Regeba (consisting of the Regeba ez zerga and the Regeba Umm Bioro) and ***the Bahr, or the Bahr al Arab which consists of all river beds between the Regeba ez Zerga and the main river.*** ... The nomenclature [of the rivers] is confusing. The river which is generally shown on maps as the Bahr el Arab – and in one section as the Jurf – is always known by the Arabs as the Jurf. They point out that ***it is not the Bahr al Arab, for the Arabs do not settle by it at this part, but the Bahr ed Deynka.***”<sup>1361</sup>

1120. He repeated this description in 1958 as follows:

“Giraffe move from [the Upper Nile Province] in the early rains and distribute themselves ***over the wide area known as the Bahr el Arab, penetrate north over the Regeba Zerga and Regeba Umm Bioro,*** enter the Goz district between there and Muglad, and reach the north-eastern regebas in the neighbourhood of Kwak and Keylak (sic).”<sup>1362</sup>

1121. Cunnison’s explanation of the term “Bahr el Arab,” which he obtained from the Misseriya, is unambiguous in describing the Ngok Dinka as “sett[ing]” on “***the Bahr al Arab which consists of all river beds between the Regeba ez Zerga and the main river.***” This sheds light on statements during the Condominium era that the Ngok Dinka were located or living “on” the Bahr el Arab.<sup>1363</sup> Applying Cunnison’s explanation, what those statements meant was that the Ngok Dinka were living in the area “***between the Regeba ez Zerga and the main river.***”

1122. Finally, it is also noteworthy that Cunnison’s Misseriya hosts did not, in the early 1950s, even call the Kiir/Bahr el Arab by that name, but instead called it the “Bahr ed Deynka,” an obvious reference to the Ngok Dinka.<sup>1364</sup> Equally noteworthy is Cunnison’s

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<sup>1359</sup> This area is also depicted on **Maps 64-70**, which show satellite images of the Abyei Area from the wet season and dry season. Tibbs also corroborates this: Witness Statement of G. Michael Tibbs, at pp. 4-5, ¶¶22-23.

<sup>1360</sup> See below at paras. 1312-1318.

<sup>1361</sup> Cunnison, “*The Humr and their Land*,” 35(2) SNR 50, 51 (1954), **Exhibit-FE 4/5** (emphasis added).

<sup>1362</sup> Cunnison, “*Giraffe Hunting among the Humr Tribe*,” 35 SNR 49, 49-50 (1958), **Exhibit-FE 18/22** (emphasis added).

<sup>1363</sup> See above at paras. 1023-1028.

<sup>1364</sup> Cunnison, “*The Humr and their Land*,” 35(2) SNR 51 (1954), **Exhibit-FE 4/5**.

explanation for this – “*for the Arabs do not settle by it at this part.*”<sup>1365</sup> It bears emphasis that this explanation (again) contradicts the Government’s current claim that the Ngok Dinka resided only south of the Kiir/Bahr el Arab.

(3) Continuity of Misseriya and Ngok Dinka Locations and Cultural Practices

1123. Preliminarily, both Cunnison’s published works and witness statement provide powerful support for the continuity over a substantial period of time of the territory inhabited and used by the Misseriya and the Ngok Dinka, as well as the two peoples’ cultural practices. This is consistent with the conclusions of the ABC Report (discussed above<sup>1366</sup>) and with the other evidence in the record (including the witness statement of Michael Tibbs<sup>1367</sup>).

1124. Professor Cunnison’s witness statement concludes by explaining that he had access to the files of the Anglo-Egyptian administration and that the statements about the Misseriya in those files were consistent with his own observations. As a consequence, Cunnison concludes: “I believed – and still believe – that *the position I described was of long [sic] standing.*”<sup>1368</sup>

1125. Cunnison made numerous other comparable comments in his published works and witness statement, which emphasized the “traditional” character of the Ngok and Misseriya “homes” and the fact that the Misseriya followed the same routes and practices as their “forefathers.” Thus, Cunnison remarked prior to his current witness statement that the area of the Bahr to the south of the *goz* “is the *traditional land of Dinka,*”<sup>1369</sup> that the Misseriya’s cattle-grazing routines and locations were “*long standing,*”<sup>1370</sup> and that the Muglad was where the Misseriya “cultivate and store their grain *as their forefathers did.*”<sup>1371</sup> Similarly, Cunnison said that “[t]he way in which the tribal sections move seems *not to have varied much since the Reoccupation.*”<sup>1372</sup> Michael Tibbs’ testimony that his description of the Ngok Dinka had “existed for some considerable time prior to my arrival in Kordofan”<sup>1373</sup> is to the same effect.

1126. These conclusions are strongly corroborated by the fact that Cunnison’s observations regarding the locations of the Ngok Dinka and Misseriya (discussed in detail below<sup>1374</sup>)

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<sup>1365</sup> Cunnison, “*The Humr and their Land,*” 35(2) SNR 51 (1954), **Exhibit-FE 4/5**.

<sup>1366</sup> See above at paras. 1071-1072.

<sup>1367</sup> Witness Statement of G. Michael Tibbs, at p. 6, ¶27; see also F. Deng, *Tradition and Modernization* 271 (1971) (“The land of the Dinka was originally occupied either by peaceful settlement where there were no prior inhabitants or by conquest. In their migrations the Dinka were led by members of dominant clans whose lineages founded (and still hold) tribal or sectional chieftanships. The conquering leader in a tribe distributed land among his original followers and thereby formed the subtribes... Thus, rights in land, grazing, and fishing and drinking pools are *held by the descendants of the original settlers of the areas.*”), **Exhibit-FE 5/2** (emphasis added); S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 42 (2004) (“The Ngok Dinka moved into a land plagued by the harshest climate in Southern Sudan. Known today as Southern Kordofan Province, they found that the region swung from the desert in one season to swamp in another. The date of the arrival of the multiple Western Ngok clans to their *final homeland*, which represented the last major Dinka migration into Southern Sudan, is estimated to be the *early eighteenth century.*”), **Exhibit-FE 19/8**.

<sup>1368</sup> Witness Statement of Ian Cunnison, at p. 3, ¶12 (emphasis added).

<sup>1369</sup> Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 10 (1960), **Exhibit-FE 4/8** (emphasis added).

<sup>1370</sup> Witness Statement of Ian Cunnison, at p. 1, ¶6.

<sup>1371</sup> Cunnison, “*The Humr and their Land,*” 35(2) SNR 54-55 (1954), **Exhibit-FE 4/5** (emphasis added).

<sup>1372</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 26 (1966), **Exhibit-FE 4/16** (emphasis added).

<sup>1373</sup> Witness Statement of G. Michael Tibbs, at p. 6, ¶27.

<sup>1374</sup> See below at paras. 1110-1170.

correspond exactly with the observations of the Anglo-Egyptian administrators – including Mahon, Wilkinson, Percival, Lloyd and Gleichen.<sup>1375</sup> Similarly, Cunnison’s observations about various cultural aspects of the Ngok and the Misseriya are also consistent with historic observations (e.g., character of Ngok houses and villages, agricultural practices of Ngok).<sup>1376</sup> For all these reasons, while Cunnison’s observations were made in the period from 1952 to 1955, they capture cultural practices, grazing and land use patterns and areas of habitation and settlement that existed for many decades before – and certainly both prior to and at 1905.

(4) Permanent Ngok Dinka Settlements in the Bahr

1127. Cunnison’s published work and witness statement also confirm the existence of substantial numbers of permanent Ngok Dinka settlements in what he terms the Bahr region, centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, and extending further to the north. This conclusion once again squarely contradicts the Government’s claims that the Ngok Dinka were located entirely south of the Kiir/Bahr el Arab.

1128. Cunnison’s published work observed in unequivocal terms that:

*“Much of the Bahr has permanent Dinka settlements ...the Nuer and Dinka have permanent homes from which they move for part of the year.”*<sup>1377</sup>

Cunnison’s commentary specifically affirms the fact (discussed in detail in the SPLM/A Memorial) that the Ngok Dinka resided in permanent houses and permanent villages.<sup>1378</sup> Equally clearly, Cunnison’s commentary confirms that the Ngok Dinka villages were located throughout much of what he defined as the “*Bahr*” – the area below the *goz*, consisting of the river system centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, but extending further north to the *goz*.

1129. Cunnison also confirmed the historic character of the Ngok Dinka occupation of the Bahr in earlier work. He remarked in comments made in 1960 that it might theoretically be possible for the Misseriya to cultivate land in the Bahr, south of the *goz*, but that this would intrude on the Ngok Dinka’s traditional territory:

*“In the south it might be possible, but this is the traditional land of Dinka who return there and cultivate during the rains.”*<sup>1379</sup>

1130. Cunnison’s clearest articulation of Ngok Dinka settlement across the Bahr region was in a paper responding to the Government’s proposal in the 1960s to “settle” nomads, including the Misseriya in the Abyei region.<sup>1380</sup> In respect of the “Baggara Humr,” Cunnison’s response to this proposal was as follows:

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<sup>1375</sup> See above at paras. 1062-1066.

<sup>1376</sup> SPLM/A Memorial, at paras. 176-189, 206-216.

<sup>1377</sup> Cunnison, “Some Social Aspects of Nomadism in a Baggara Tribe” in The Effect of Nomadism on the Economic and Social Development of the People of the Sudan, Proceedings of the Tenth Annual Conference 11th-12th January 1962, 112, **Exhibit-FE 4/11** (emphasis added).

<sup>1378</sup> SPLM/A Memorial, at paras. 206-216.

<sup>1379</sup> Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 10 (1960), **Exhibit-FE 4/8** (emphasis added).

<sup>1380</sup> Cunnison, Hill & Asad, “Settlement of Nomads in the Sudan: A critique of Present Plans,” in Agricultural Development in the Sudan, Proceedings of the Thirteenth Annual Conference 3-6 December 1966, 102, **Exhibit-FE 18/27**.

“It is proposed that the sites should be ‘on the border of the desert [i.e. Goz] and the sown [i.e. Bahr].’ The concept of desert and sown - the land and the nomads merging into the land of the cultivators [i.e. the Ngok] - is more applicable to other parts of the Middle East than to Dar Humr, for there are *settled farms [of the Ngok] throughout much of the land*, and all areas are used for grazing by nomad herds. It could be argued that Babanusa, bordering the Hamar people in the north, might satisfy this condition.”<sup>1381</sup>

1131. Simply put, Cunnison concludes that there is no room on the Bahr available for “settlement” by the Misseriya because it is already occupied by “[Ngok] *settled farms throughout much of the land*.”<sup>1382</sup> The only area he suggests might be suitable is north of Muglad, on the other side of the goz, in Babanusa.

1132. Cunnison’s witness statement further confirms the existence of permanent Ngok Dinka settlements throughout the Bahr region:

“During the wet season, the Humr lived in settled camps to the north in Babanusa, as indicated on the map. As the dry season came, [the Humr] moved first briefly to the Muglad where the cattle grazed on the remains of the millet harvest. *Then they moved south through the extensive sandy Goz to the area called the Bahr: this is the area around the Bahr el-Arab and the Regeba Zerga*, here, water and good summer grazing to be found. *[The Humr] lived in scattered camps across this region during the summer months* (January-May). For part of the time *they shared the area* with Dinka, *whose permanent houses were dotted around*; but shortly after the arrival of the Humr sections, most of the Dinka would decamp further south to their dry season areas.”<sup>1383</sup>

Cunnison again very clearly confirms the existence of Ngok “permanent houses” that were “dotted around” the Bahr region – that is, as discussed above, according to Cunnison’s description, the region extending north from the Kiir/Bahr el Arab to the goz area in the west of the Bahr region, and toward Lake Keilak in the east.<sup>1384</sup>

1133. Cunnison’s witness statement comments in passing that, during the dry season, “*most of the Dinka would decamp further south to their dry season areas*.”<sup>1385</sup> Cunnison’s reference is to the Ngok Dinka seasonal cattle grazing patterns, which involved movement of the Ngok cattle herds south – further contradicting the Government’s confused suggestion that the Ngok Dinka moved south in the wet season.<sup>1386</sup> Cunnison’s observations regarding the Ngok Dinka “decamp[ing]” to the south during the dry season are precisely consistent with pre-1905 Condominium reports of empty villages and apparently uninhabited regions (discussed above<sup>1387</sup>).

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<sup>1381</sup> Cunnison, Hill & Asad, “*Settlement of Nomads in the Sudan: A critique of Present Plans*,” in Agricultural Development in the Sudan, Proceedings of the Thirteenth Annual Conference 3-6 December 1966, 112-113, **Exhibit-FE 18/27** (emphasis added).

<sup>1382</sup> Cunnison, Hill & Asad, “*Settlement of Nomads in the Sudan: A critique of Present Plans*,” in Agricultural Development in the Sudan, Proceedings of the Thirteenth Annual Conference 3-6 December 1966, 112, **Exhibit-FE 18/27**.

<sup>1383</sup> Witness Statement of Ian Cunnison, at p. 1, ¶6 (emphasis added).

<sup>1384</sup> The Bahr region is depicted on **Map 68** (Bahr Region) and in the MENAS Expert Report, paras. 138-141, 146-149.

<sup>1385</sup> Witness Statement of Ian Cunnison, at p. 1, ¶6.

<sup>1386</sup> See above at paras. 950.

<sup>1387</sup> See above at paras. 958, 970-972.

1134. Cunnison's suggestion that "most" Ngok Dinka moved south in the dry season is somewhat of an exaggeration (which is understandable given his limited interaction with the Ngok when his omodiya came to graze in the Abyei region). In fact, a number of the Ngok remained in their permanent villages in the north during the dry season, while the Ngok cattle herds were taken south by younger members of the sections. This is detailed in the SPLM/A Memorial and is not seriously open to dispute.<sup>1388</sup>

1135. Cunnison's own published work makes clear that the Ngok Dinka permanent villages remained inhabited year round by significant numbers of Ngok people. Thus, Cunnison explains the Misseriya dry season visit to the Ngok territory of the Bahr:

"It is useful [for the Misseriya] to *camp regularly near a Dinka settlement with whose members one might become friendly and even make 'brotherhood.'* Ono [sic] can then exchange milk for grain from them to avoid sending back to the Muglad for one's own grain; or buy wild honey; or use their houses for leaving baggage in if occasion should arise to go on a visit elsewhere."<sup>1389</sup>

It would hardly have been possible for the Misseriya to make friends with the "members" of the Dinka settlements if those settlements were deserted, nor could the fairly active trading and other interchanges between the Ngok and the Misseriya have been possible were all the Dinka gone to the south.

1136. Cunnison also observes elsewhere that "[Misseriya] ... *who have made friends with Dinka in the south, from time to time leave some possessions with them in their permanent homes,*"<sup>1390</sup> and "[Misseriya] generally take all their belongings with them wherever they go, except for a few with close kinsmen in Muglad, or *who have made friendly relations with Dinka in the south: from time to time those leave some of their heavier stuff behind, in real houses belonging to other people.*"<sup>1391</sup> Again, the obvious point is that the Misseriya could not have "made friends" with Dinka in the Bahr during the Misseriya's dry season visits if all of the Dinka were gone further south, nor would the Misseriya have been willing to leave their possessions in the Ngok's permanent homes if those homes were empty.

1137. Cunnison's comments about the nature and traditional location of the Ngok Dinka's settlements are directly contrary to the Government's case, and equally supportive of the SPLM/A's case. He unequivocally confirms the existence of numerous permanent Ngok Dinka houses and villages throughout the region of the Bahr, to the south of the *goz*. That is consistent with the SPLM/A Memorial, which places the Ngok Dinka in the Bahr region, with their historic headquarters in the region of Abyei town, and contradicts the Government's claims that the Ngok were located only south of the Kiir/Bahr el Arab.

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<sup>1388</sup> SPLM/A Memorial, at para. 205.

<sup>1389</sup> Cunnison, "The Humr and their Land," 35(2) SNR 62 (1954), **Exhibit-FE 4/5** (emphasis added).

<sup>1390</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 29 (1966), **Exhibit-FE 4/16**.

<sup>1391</sup> Cunnison, "Some Social Aspects of Nomadism in a Baggara Tribe" in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan*, Proceedings of the Tenth Annual Conference 11 - 12 January 1962, 105, **Exhibit-FE 4/11** (emphasis added).

(5) Nomadic Character of the Misseriya

1138. Cunnison's works and witness statement also confirm the nomadic character of the Misseriya and the fact that they have no permanent settlements. This is again consistent with the SPLM/A's Memorial.<sup>1392</sup>

1139. Cunnison's witness statement acknowledges, the nomadic character of the Misseriya and the fact that this has been the case for a considerable period of time:

**"Their [the Misseriya's] *semi-migratory life revolves around the movement of their cattle* (I refer to the 1950s, but there is reason to believe that *this pattern of life is long standing*)."**<sup>1393</sup>

1140. Cunnison's published works are more detailed and direct in their discussion of the Misseriya's nomadic life-style. He wrote:

**"The tribesmen are continually on the move, and do not have permanent houses anywhere and so they are obliged to carry all their household possessions about with them. ...All the baggage and nearly all the people of a household are transported from place to place on bulls."**<sup>1394</sup>

"Humr transport their belongings on bulls. With most families tent and household equipment and wife and young children can be carried on the backs of two animals. **People generally take all their belongings with them wherever they go**, except for a few with close kinsmen in Muglad, or who have made friendly relations with Dinka in the south: from time to time those leave some of their heavier stuff behind, in real houses belonging to other people. **Each Humr family has a kind of centre where it cultivates and builds granaries, and this cultivation centre may regard [sic] as kind of 'home' [in the Muglad]. But such a place is not permanent for more than a few years at a time**, and the group exploiting it is seldom composed of precisely the same people in successive years. ... **it is a mistake to suppose that Humr are moving about from some firmly established base: they are continuously on the move and where they are is their home.** ...The camp in which I lived for two years moved to about **60 fresh sites in the course of each year ... the average duration at one site was about six days.**

"[D]iscussion about whether [Misseriya] cattle could or could not exist without annual migrations has little point to the Humr. **Nomadism is the only way of life to which they are attuned, and they are masters of it.**"<sup>1395</sup>

1141. During the 1960s, Cunnison also participated in multiple conferences in Sudan about nomadism where he gave speeches about the Misseriya. Among other things, he described the Misseriya as "one of the Sudan Baggara, **who have long been nomadic.**"<sup>1396</sup>

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<sup>1392</sup> SPLM/A Memorial, at paras. 233-237.

<sup>1393</sup> Witness Statement of Ian Cunnison, at p. 1, ¶6 (emphasis added).

<sup>1394</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 29-30 (1966), **Exhibit-FE 4/16** (emphasis added).

<sup>1395</sup> Cunnison, "The Humr and their Land," 35(2) SNR 55 (1954), **Exhibit-FE 4/5** (emphasis added).

1142. Cunnison also describes the (very limited) agriculture practised by the Misseriya, restricted to the growing of millet:

“Bulrush millet, which is grown almost to the exclusion of other crops, *does best on sand, and the Humr use the sand ridges in the Muglad for this purpose...* Other areas used are *parts of the Goz and the Babanusa near Muglad*, and the land which lies close to the Wadi el Ghalla eastwards. ... While the staple food is bulrush millet, few families cultivate enough of this to last them for a year, and milk and its products are a necessary addition to the diet. Members of some omodiyas even make a practice of doing without grain for a few weeks on the Bahr when they are far from their granaries and from markets; then they rely wholly on milk.”<sup>1397</sup>

1143. These descriptions leave no doubt as to the nomadic character of the Misseriya, which contrasts with the permanent houses and settlements of the Ngok Dinka. It also underscores the fact that the Misseriya were not an agricultural people, but instead nomadic cattle-herders, and that the Misseriya’s only (occasional) crop was millet; in contrast, the Ngok were agriculturalists whose main crop was sorghum.<sup>1398</sup> This point is of importance to identifying the areas in which the Misseriya and the Ngok were located, because millet is adapted to the arid, sandy region of Muglad, while sorghum is adapted to the wetter regions of the Bahr.<sup>1399</sup>

(6) Muglad and Babanusa as Misseriya’s Headquarters

1144. Cunnison’s published works and witness statement also make it clear that the historic center of the Misseriya was the Muglad (and Babanusa, to the north). In his published works, Cunnison wrote:

“*The Muglad is regarded by the Humr as their home. Their arrival there from the Bahr is the occasion for great rejoicing and anticipation. This is almost the only place where the people have anything like permanent homes. It is where they cultivate and store their grain as their forefathers did.* If people are away they want to return to it. There are always some cattle in the Muglad in summer and if there is much water lying very many cattle may remain there.”<sup>1400</sup>

Parenthetically, it is again noteworthy that Cunnison’s remarks underscore the continuity over time of the Misseriya’s territory (with Muglad being where the Misseriya return “as their forefathers did”).

1145. Similarly, Cunnison commented:

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<sup>1396</sup> Cunnison, “*Some Social Aspects of Nomadism in a Baggara Tribe*” in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan*, Proceedings of the Tenth Annual Conference 11-12 January 1962, at p. 104, **Exhibit-FE 4/11** (emphasis added); Cunnison, Hill & Asad, “*Settlement of Nomads in the Sudan: A Critique of Present Plans*” in *Agricultural Development in the Sudan*, Proceedings of the Thirteenth Annual Conference 3-6 December 1966, at p. 102, **Exhibit-FE 18/27**.

<sup>1397</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 23, 29 (1966), **Exhibit-FE 4/16** (emphasis added).

<sup>1398</sup> SPLM/A Memorial, at paras. 233-237.

<sup>1399</sup> SPLM/A Memorial, at paras. 236, 1012.

<sup>1400</sup> Cunnison, “*The Humr and their Land*,” 35(2) SNR 54-55 (1954), **Exhibit-FE 4/5** (emphasis added).

“On the arrival in the Muglad, the cattle separate, each owner taking his beasts to manure his garden. ... The cattle spend July, August, and most of September in the Babanusa.”<sup>1401</sup>

“*Nearly all the [Misseriya] cultivations are in the Muglad*, although a few are on suitable *sites in the Babanusa*: thus the gardens may be over a hundred miles from a man’s summer and rains pasture.”<sup>1402</sup>

1146. Cunnison’s witness statement acknowledges the same points, albeit without fully describing the central role of the Misseriya’s gardens and camps in the Muglad:

“During the wet season, *the Humr lived in settled camps to the north in Babanusa*, as indicated on the map. As the dry season came, *[the Humr] moved first briefly to the Muglad where the cattle grazed on the remains of the millet harvest*. Then they moved south through the extensive sandy Goz to the area called the Bahr: this is the area around the Bahr el-Arab and the Regeba Zerga, here, water and good summer grazing to be found.”<sup>1403</sup>

1147. Once more, Cunnison’s descriptions directly support the SPLM/A’s Memorial and the ABC Report’s conclusions that the Misseriya were centered on the Muglad and Babanusa, to the north of the *goz*. In Muglad, the Misseriya maintained gardens for millet and what Cunnison terms the closest things to “homes” that the Misseriya had. In Cunnison’s simple terms: “*The Muglad is regarded by the Humr as their home*.”<sup>1404</sup>

#### (7) Period of Time Spent by Misseriya in Bahr

1148. Cunnison’s published work also makes clear that the Misseriya spent only a limited period of time each year in the Bahr region, with the bulk of each year being spent north of the *goz* in the Muglad and Babanusa areas. Cunnison’s witness statement is drafted to put a somewhat more favorable spin on these facts, but does not obscure the basic division of the Misseriya’s time.

1149. Cunnison’s published work makes clear that the Misseriya that he observed spent very little time in any single location (other than at their headquarters in the Muglad) and that the bulk of the Misseriya’s time was spent in the Muglad and Babanusa area. A table that Cunnison prepared (excerpted below) shows that during 1954, the cattle of one section of the Mezaghna omodiya spent 174 days in the Muglad and Babanusa and 49 days were spent getting to the Bahr through the *goz*.<sup>1405</sup>

1150. Cunnison’s witness statement describes the same statistics as showing that the Misseriya with whom he travelled “spent more time, and more continuous time, in the Bahr (142 days) than in any of the four main areas of Dar Humr.”<sup>1406</sup> Thus, 223 days of the year were spent outside the Bahr region by Cunnison’s section of the Misseriya. As we have seen, Cunnison also remarked that:

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<sup>1401</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 21 (1966), **Exhibit-FE 4/16**.

<sup>1402</sup> Cunnison, “*The Humr and their Land*,” 35(2) SNR 53 (1954), **Exhibit-FE 4/5** (emphasis added).

<sup>1403</sup> Witness Statement of Ian Cunnison, at p. 1, ¶6 (emphasis added).

<sup>1404</sup> Cunnison, “*The Humr and their Land*,” 35(2) SNR 54-55 (1954), **Exhibit-FE 4/5**.

<sup>1405</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 22 (1966), **Exhibit-FE 4/16**.

<sup>1406</sup> Witness Statement of Ian Cunnison, at p. 2, ¶9.



“The camp in which I lived for two years moved to about sixty fresh sites in the course of each year....the average duration at one site was about six days.”<sup>1407</sup>

1151. More fundamentally, Cunnison’s remark that his Misseriya section spent 142 days in the Bahr region must be seen in the context of Cunnison’s statements that “*The Muglad is regarded by the Humr as their home. Their arrival there from the Bahr is the occasion for great rejoicing and anticipation. This is almost the only place where the people have anything like permanent homes.*”<sup>1408</sup>

(8) Misseriya Requests to Use Ngok Dinka Sites

1152. Cunnison’s witness statement addresses the need for the Misseriya to obtain Ngok Dinka permission to use watering-holes and other sites with delicacy. His statement says that: “I never observed the Humr asking permission from Dinka to come to the Bahr, and they do not consider themselves as visitors there.”<sup>1409</sup>

1153. It is not surprising that Cunnison “never observed” the Misseriya asking permission “to *come to the Bahr,*” given that the region bordered on the uninhabited *goz* and was sparsely populated. More importantly, Cunnison’s witness statement does not address the question of Misseriya requests to use particular locations in the Bahr region, where the Ngok Dinka had established traditional rights (e.g., water-holes, grazing lands). As to this, more important, question, the Ngok Dinka testimony is unequivocal. As detailed in the SPLM/A Memorial and accompanying witness statements, the Misseriya were required to and did request permission to use specific Ngok Dinka locations.<sup>1410</sup>

1154. More generally, Cunnison’s comment in his recent witness statement that the Misseriya did not “consider themselves visitors there [in the Bahr]” must be evaluated in the context of his earlier remarks that the Bahr “*is the traditional land of Dinka who return there and cultivate during the rains*”<sup>1411</sup> and that “[t]he *Muglad is regarded by the Humr as their home.*”<sup>1412</sup> Further, Cunnison’s comment must be considered in the context of his remarks to the ABC on 22 May 2005 where he stated: “[t]he [Ngok] Dinka were not considered as interlopers; it was the other way around. The Humr would say, ‘We go and live among the Dinka in the hot season.’”<sup>1413</sup>

(9) The *Goz* and the ABC Experts’ Shared Rights Area

1155. The one area in which Cunnison would seem to disagree with the ABC Report is in his view of the ABC Experts’ “shared rights” area, with which he says the *goz* overlaps. According to Cunnison’s witness statement, the ABC Experts’ conception of the “share rights” area was “fundamentally mistaken,”<sup>1414</sup> and, if the “effect of the ABC’s decision

<sup>1407</sup> Cunnison, “*Some Social Aspects of Nomadism in a Baggara Tribe*” in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan*, Proceedings of the Tenth Annual Conference 11-12 January 1962, at p. 105, **Exhibit-FE 4/11**.

<sup>1408</sup> Cunnison, “*The Humr and their Land,*” 35(2) SNR 54-55 (1954), **Exhibit-FE 4/5**.

<sup>1409</sup> Witness Statement of Ian Cunnison, at p. 2, ¶9.

<sup>1410</sup> The Ngok oral traditions record that when the Misseriya brought cattle to graze in the Abyei Area during the dry season they would seek and obtain the permission of the Ngok to do so. In particular, the Paramount Chief of the Ngok would grant permission for the Misseriya to graze in Ngok lands. SPLM/A Memorial, paras. 1078-1080.

<sup>1411</sup> Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 10 (1960), **Exhibit-FE 4/8**.

<sup>1412</sup> Cunnison, “*The Humr and their Land,*” 35(2) SNR 54-55 (1954), **Exhibit-FE 4/5**.

<sup>1413</sup> ABC Report, Part I, at p. 161, **Appendix B to SPLM/A Memorial**.

<sup>1414</sup> Witness Statement of Ian Cunnison, at p. 2, ¶9.

would be to exclude the Humr from their summer grazing and living areas in the Bahr [this would be] fundamentally unjust.”<sup>1415</sup>

1156. Cunnison’s views rest on a faulty premise. When that premise is corrected, he appears to have no cause for disagreement with the ABC Experts. On the contrary, for all the reasons already discussed, Cunnison in fact has expressed views that are fully supportive of the ABC Experts’ conclusions about where the Ngok Dinka and Misseriya were historically located.

1157. Cunnison’s discussion of the “shared rights” subject focuses on the *goz* – which he describes in his witness statement as an “extensive sandy” region south of the Muglad and north of the Bahr region.<sup>1416</sup> Cunnison’s published works are more detailed and observe that “[t]he district *south of Muglad is called simply the Qoz. It stretches some seventy miles south until the river system is reached.*”<sup>1417</sup> Thus, as discussed elsewhere, the *goz* extending into the Abyei Area is, from Muglad, a narrow roughly 70 mile strip of sandy, arid territory extending to the northern edge of the Bahr region. This narrow strip of *goz* extends east from the Darfur/Kordofan boundary stopping before Nyama: the *goz* is depicted on **Map 68** (Bahr Region). This is also discussed in detail below at paragraphs. 1308-1320 and in the MENAS Report.<sup>1418</sup>

1158. Cunnison also described the difficulties that the Misseriya encountered traversing the *goz*, in moving from the Muglad into the Bahr during the dry season. His witness statement notes that “there might be *little water and not much fodder* for the substantial herds in the intervening *goz*,”<sup>1419</sup> and notes that it was “*seldom used for camps of long duration*, but it is the means of getting from the rains area to the dry-season areas and back again.”<sup>1420</sup> (Cunnison described the *goz* as the area on his route to the west of the Abyei region;<sup>1421</sup> he does not refer to *goz* to the east of Nyama or Turda, which is consistent with what the satellite images (**Map 68** (Bahr Region) and the MENAS Report demonstrate:<sup>1422</sup> there is obviously no *goz* at or past these Ngok villages.)

1159. The *goz* was similarly described by the ABC Experts, who observed:

“There is general agreement from other sources, however, that the band of Goz intervening between Humr permanent territory and the Ngok permanent settlements is settled by nobody; that it is an area to be traversed, rather than occupied; and that there is regular seasonal use of the Goz by both peoples.”<sup>1423</sup>

1160. Thus, it is clear that, with regard to descriptions of the regional geography and the locations of the Ngok Dinka and Misseriya, Cunnison appears to be in agreement with the ABC Experts. Like the ABC Experts, Cunnison concluded that (a) the traditional center of the Misseriya was the Muglad and Babanusa regions; (b) the traditional home of the Ngok Dinka was the Bahr, which extended from the edges of the *goz* to the Kiir/Bahr el Arab,

<sup>1415</sup> Witness Statement of Ian Cunnison, at p. 3, ¶11.

<sup>1416</sup> Witness Statement of Ian Cunnison, at p. 1, ¶6.

<sup>1417</sup> Cunnison, “*The Humr and their Land*,” 35(2) SNR 51 (1954), **Exhibit-FE 4/5**.

<sup>1418</sup> MENAS Expert Report, paras. 142-145, 150-153.

<sup>1419</sup> Witness Statement of Ian Cunnison, at p. 2, ¶8.

<sup>1420</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 17 (1966), **Exhibit-FE 4/16** (emphasis added).

<sup>1421</sup> See above at para. 1113, n. 1117.

<sup>1422</sup> MENAS Expert Report, paras. 138-145.

<sup>1423</sup> ABC Report, Part I, at p. 43 (citing Cunnison, Appendix 4.3, pp. 160-162; Tibbs, Appendix 4.3, pp. 158-160), **Appendix B to SPLM/A Memorial**.

including within it the Ngol/Ragaba ez Zarga; and (c) the *goz* was an arid strip of sandy terrain lying between the Bahr and the Muglad regions, some 70 miles in length (north to south).<sup>1424</sup>

1161. Cunnison nonetheless concludes that “[he] did not observe [the *goz*] as an area of shared rights at all.”<sup>1425</sup> He commented that the Ngok Dinka might travel across the *goz* – taking cattle to markets in the north, seeking employment or trading in the north, or otherwise.<sup>1426</sup> However, Cunnison denied that the Ngok “exercise[d] regular grazing or similar rights” in the *goz*.<sup>1427</sup> Instead, he concluded, the “real area of sharing was further south, in the Bahr,” where the Ngok and Misseriya “co-existed for a fairly short season.”<sup>1428</sup>

1162. There is no real difference between Cunnison’s views and those of the ABC Experts. Contrary to Cunnison’s implication, the ABC Experts did not suggest that the Ngok grazed their cattle in the *goz*; that would be unlikely, because the *goz* itself is sandy, arid terrain with little or no water or fodder. What the ABC Experts instead said was that *neither* the Ngok or the Misseriya were settled in the *goz* and that *both* used the *goz* merely as an intervening zone to be crossed on their way to other places: “the band of Goz intervening between Humr permanent territory and the Ngok permanent settlements is settled by nobody; that it is an area to be traversed, rather than occupied; and that there is regular seasonal use of the *goz* by both peoples [i.e. the Misseriya and the Ngok].”<sup>1429</sup>

1163. When the ABC Experts referred to “shared rights” in the *goz*, it is important to note that they referred to “shared *secondary rights*.”<sup>1430</sup> By “secondary” rights, the ABC Experts meant “seasonal” rights, as distinguished from “permanent” or “dominant” rights.<sup>1431</sup> Accordingly, what the ABC Experts said, in referring to the *goz* as an area of “shared secondary rights,” was that *neither* the Misseriya nor the Ngok Dinka enjoyed dominant or permanent rights of occupation and use in the *goz*, and instead that they *shared* seasonal rights, essentially involving transit across the territory, for the Ngok to reach northern markets and the Misseriya to reach southern grazing areas. There is no meaningful difference between this and Cunnison’s observations regarding the *goz*.

1164. Nor did the ABC Report suggest that there was not “real ... sharing” further south in the Bahr, when the Misseriya took their herds south during the dry season. On the contrary, the ABC Report specifically concluded that the “Misseriya have clear ‘secondary’ (seasonal) grazing rights to specific locations north and south of Abyei town,” while also concluding that the Misseriya did not have “‘dominant (permanent) rights to these places.’”<sup>1432</sup> This is precisely the same as Cunnison’s views (discussed above) that the Ngok had permanent

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<sup>1424</sup> The Bahr region and the *goz* are shown on **Map 68** (Bahr region) and are discussed in the MENAS Expert Report. See MENAS Expert Report, at paras. 138-145. Further, as discussed in the SPLM/Memorial, it is clear that the Ngok were permanently settled in the lower parts of the *goz*, and used the *goz* extensively for wet season cattle grazing. See SPLM/A Memorial, at paras. 1022-1034, 1064-1081.

<sup>1425</sup> Witness Statement of Ian Cunnison, at p. 2, ¶9.

<sup>1426</sup> Witness Statement of Ian Cunnison, at p. 2, ¶9.

<sup>1427</sup> Witness Statement of Ian Cunnison, at p. 2, ¶9.

<sup>1428</sup> Witness Statement of Ian Cunnison, at p. 2, ¶9.

<sup>1429</sup> ABC Report, Part I, at p. 43, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>1430</sup> ABC Report, Part I, at pp. 16, 19, 20, **Appendix B to SPLM/A Memorial**.

<sup>1431</sup> ABC Report, Part I, at p. 16, **Appendix B to SPLM/A Memorial**.

<sup>1432</sup> ABC Report, Part I, at p. 21, **Appendix B to SPLM/A Memorial**. The ABC Experts also concluded that “The secondary rights of the Misseriya to all of these locations visited by the Commission, however, were established...” ABC Report, Part I, at p. 16, **Appendix B to SPLM/A Memorial**.

villages throughout the Bahr, and that the Misseriya grazed their cattle there three or four months each year.<sup>1433</sup>

1165. There thus appear to be no differences of factual or geographical observation between Cunnison and the ABC Experts. Cunnison's real point of disagreement appears to be the fact that he was:

“informed that the effect of the ABC's decision would be to exclude the Humr from their summer grazing and living areas in the Bahr [and that he believed that this would be] fundamentally unjust.”<sup>1434</sup>

1166. It is not entirely clear why the Government wished – wrongly – to inform Professor Cunnison that “the effect of the ABC's decision would be to exclude the Humr from their summer grazing and living areas in the Bahr.” As discussed in detail above, that is *NOT* what the ABC Experts decided nor what the ABC Report provides.<sup>1435</sup> On the contrary, the ABC Report goes out of its way to reiterate – as specifically provided in the Abyei Protocol – that the Misseriya would retain their traditional grazing rights:

“The experts ... want to stress that the boundary that is defined and demarcated will not be a barrier to the interaction between the Misseriya and Ngok Dinka communities. The decision should have no practical effect on the traditional grazing patterns of the two communities as those patterns were followed for many years until they were disrupted by armed conflict.”<sup>1436</sup>

Similarly, the ABC Experts' decision included, at point 5, a savings provision that read: “The Ngok Dinka and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary,”<sup>1437</sup> underscoring that the ABC Experts' delimitation of the boundaries of the Abyei Area was without prejudice to the other land use rights of the Misseriya and Ngok.

1167. Consequently, Professor Cunnison's concern that the ABC Experts' decision would exclude the Misseriya from their traditional grazing rights is simply misplaced. It is not his fault, of course, that he was misinformed by the Government. But the fact that he was so misinformed removes the premise for his only substantive disagreement with the ABC Experts.

#### (10) Conclusions Regarding Professor Cunnison

1168. In sum, Cunnison's published works and witness statement describe the existence of substantial numbers of permanent Ngok Dinka settlements and homes dotted throughout the region of the Bahr and the Bahr el Arab. That region was specifically and carefully described by Cunnison to include the entire region south of the *goz*, and in particular the area centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab.

1169. Cunnison also made very clear that this territory was the “traditional” homeland of the Ngok people, which he considered had been the case since at least the Reoccupation (in

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<sup>1433</sup> See above at paras. 1127-1137.

<sup>1434</sup> Witness Statement of Ian Cunnison, at p. 3, ¶11.

<sup>1435</sup> See above at paras. 671-675.

<sup>1436</sup> ABC Report, Part I, at p. 9, **Appendix B to SPLM/A Memorial.**

<sup>1437</sup> ABC Report, Part I, at p. 22, **Appendix B to SPLM/A Memorial.**

1898). At the same time, Cunnison also squarely confirmed the nomadic character of the Misseriya, who moved south from their home territories in the Muglad and Babanusa only during the dry season.

1170. Cunnison also confirms that the Misseriya spent only four months or so of the dry season south of the *goz*, moving frequently from place to place (often in the vicinity of Ngok permanent settlements, which were important sources of sustenance). All of these aspects of Cunnison's work precisely support the ABC Report's conclusions regarding the locations of the Misseriya and the Ngok and squarely contradict the Government's claim that the Ngok were located only south of the Kiir/Bahr el Arab.

j) Michael Tibbs – Witness Statement

1171. Michael Tibbs, a former District Commissioner for the Dar Misseria district of Kordofan Province in the 1950s, provides useful (though again limited) evidence of the Ngok territories. Although Mr Tibbs was in Kordofan between 1949 and 1954 he believes that his understanding of the Ngok territory “to have existed for some considerable time prior to my arrival in Kordofan.”<sup>1438</sup> Preliminarily, Mr Tibbs makes clear that:

*“I should emphasise that although the new district was named Dar Misseria, this was not intended to confer any particular rights on the Misseria tribe over the other inhabitants of the district, the Nuba, Dagu and the Ngok Dinka. The Government of Sudan (“GoS”) sent me a copy of its 18 December 2008 Memorial in the proceedings. I note at page 129 of that Memorial, that the GoS has reproduced a hand-sketched map of Dar Misseria that was drawn by my wife Anne. This map was intended to convey an impression as to the overall representative size and shape of the new district, really for our grandchildren. It is a sketch: it was not drawn to scale and the detail is rough and incomplete. I certainly would not expect anyone to rely on it in legal proceedings for any purpose.”*<sup>1439</sup>

1172. As Mr Tibbs acknowledges, “the conditions made it impossible for us to penetrate the district at all between May and November.”<sup>1440</sup> As a consequence, he “never visited the Ngok during that period.” As a result, Mr. Tibbs' knowledge of the Ngok lands and usage during the rainy season (May-November) is extremely limited. He simply did not observe the Ngok during the wet season.

1173. His evidence is limited in the same important respects as that of earlier Condominium officials (and this is notwithstanding Mr Tibbs travelled for the most part by lorry,<sup>1441</sup> rather than by foot, donkey, horse or steamer like the early officials).

1174. Nevertheless, based on his knowledge from his visits to the area in the dry season, Mr Tibbs records his observation of the Ngok territories as follows:

- a. To the west the Ngok went all the way to the boundary with Darfur. As I note in *Sudan Sunset*, Grinti (which I believe, though am not sure, is on the north bank of the Kiir/Bahr el Arab river) is within the Ngok territories.

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<sup>1438</sup> Witness Statement of G. Michael Tibbs, p. 6, ¶2.

<sup>1439</sup> Witness Statement of G. Michael Tibbs, p. 2, ¶8 (emphasis added).

<sup>1440</sup> Witness Statement of G. Michael Tibbs, p. 3, ¶11.

<sup>1441</sup> Witness Statement of G. Michael Tibbs, p. 2, ¶10.

Travelling from Abyei town to Grinti I would see Ngok villages (just clusters of 2 or 3 tukuls) and luaks to the north of the watercourse we travelled along.

b. I find myself unable to give an eastern boundary to the Ngok's lands, as my travels throughout the district did not take me through the eastern part of the Ngok's lands. I visited Lake Abyad on a number of occasions but the Ngok did not live near the Lake. When we travelled from Abyei to Lake Abyad we went via Abiemonm and Bentiu in Upper Nile Province.

c. The northern boundary of the Ngok is obviously at issue in these proceedings. As I have previously stated, there was no defined boundary between the Ngok and the Misseria. Abyei was the centre of the Ngok, as Muglad was the headquarters of the Misseria. South of Muglad there was the stretch of land called the *goz*, where I do not recall seeing any tribe permanently settled. Tebeldiya, where there was a rest house, was within what I would say is the *goz* which continued down to about Antilla but it was around Antilla that the countryside changed and one would meet the ragabas (what were really streams in the dry season). I always considered the area south from Antilla, on our direct road route from Muglad to Abyei, to be within Ngok territory. From that road, as soon as we reached Antilla I would see Ngok *luaks* (which were permanent round cattle byres for Ngok cattle herds, otherwise referred to as "dug dug") and typical Ngok villages dotted about. A typical Ngok village, as indicated above, consists of 2 or 3 luaks, the unique Dinka construction that house both people and animals with small tukuls as grain stores, dotted around with areas of permanent cultivation.

23 I understand that at some time a post was placed at Tebeldiya that marked the spot up to which the Ngok were responsible for making up the road after the rains. It is certainly possible that Tebeldiya was considered a boundary. Although I describe the *goz* between Tebeldiya and Antilla as a "no man's land," I was aware that both the Misseria and the Ngok would use lands in that area for both passage and grazing (the Misseria in the early and late dry season and Ngok in the rains). There were large shady trees in Tebeldiya, a well and a small garden kept by the ghaffir of the rest house.

24. A visit that took in Nyama and Subu is described in 'A Sudan Sunset.' Nyama lies 80 miles south east of Muglad and Subu another 18 miles further. I believe these places were once called "Nyam Wells" and "Subu Wells" on maps, no doubt because notable wells (water holes) were located there. Both were names rather than places but there was increasing settlement of Messeria who had started cultivating cotton. These Messeria would leave this area during the wet season and return north after the cotton was harvested and the stalks burnt. The fact that I saw no Ngok does not exclude the possibility that they may have been around the area."<sup>1442</sup>

1175. In summary, Mr. Tibbs was able to offer the following views as to Ngok occupation and use of the Abyei Area:

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<sup>1442</sup> Witness Statement of G. Michael Tibbs, pp. 4-5, ¶22-24.

- a. The western boundary of the Ngok “*Ngok went all the way to the boundary with Darfur;*”<sup>1443</sup>
- b. “at some time a post was placed at Tebeldiya that marked the spot up to which the Ngok were responsible for making up the road after the rains. *It is certainly possible that Tebeldiya was considered a boundary;*”<sup>1444</sup>
- c. “I always considered the area south from Antilla, on our direct road route from Muglad to Abyei, to be within Ngok territory;”<sup>1445</sup> and
- d. “the Ngok would use lands in that area [the *goz*] for both passage and grazing...in the rains.”<sup>1446</sup>

1176. Recognising both his limited interaction with the Ngok and his limited understanding of their lands, Mr Tibbs also notes that:

“The fact that I saw no Ngok [in areas I travelled to] does not exclude the possibility that they may have been around the area.”<sup>1447</sup>

“The above represents the extent of my knowledge of where the Ngok lived in 1905. I cannot conclude that the Ngok did not live in other places, as I simply was not able to travel throughout the whole region during the limited time available in the dry season.”<sup>1448</sup>

1177. Mr Tibbs also provides some further insights into matters of interest, for example that:

- a. the Misseriya migrating to the Ngok territory during the dry season were nomadic, with their headquarters in Muglad, and they “had no settled homes” and that they “did not go to villages, but simply set up camp in meadows near rivers or water holes;”<sup>1449</sup>
- b. the term “dug dug” was terminology used to refer to a Ngok Dinka cattle byre, or *luak*;<sup>1450</sup> and
- c. “the Ngok in and around the settlement moved freely from one side of the Kiir/Bahr el Arab to the other. They did so by using canoes or the ferry, or even swimming or by foot. The river was certainly not a barrier for the Ngok people and was very much a part of their way of life.”<sup>1451</sup>

1178. Thus whilst Mr Tibbs’ evidence relates to the 1950s, and is limited in important and material respects, it provides a good account of Ngok life which during the Condominium which is consistent with the other evidence of Ngok occupation and use of the Abyei Area in 1905. Mr Tibbs provides an accurate depiction of Ngok use of the whole of the Abyei Area (permanently settled villages with *luaks* or dug dugs for their cattle, and wet season grazing

<sup>1443</sup> Witness Statement of G. Michael Tibbs, pp. 4, ¶22 (emphasis added).

<sup>1444</sup> Witness Statement of G. Michael Tibbs, pp. 4, ¶22 (emphasis added).

<sup>1445</sup> Witness Statement of G. Michael Tibbs, pp. 4, ¶22. **Map 62** (Abyei Area: Ngok Presence).

<sup>1446</sup> Witness Statement of G. Michael Tibbs, pp. 4, ¶22.

<sup>1447</sup> Witness Statement of G. Michael Tibbs, pp. 4-5, ¶22-24.

<sup>1448</sup> Witness Statement of G. Michael Tibbs, p. 5, ¶26.

<sup>1449</sup> Witness Statement of G. Michael Tibbs, p. 3-4, ¶18-19.

<sup>1450</sup> Witness Statement of G. Michael Tibbs, p. 5, ¶22.

<sup>1451</sup> Witness Statement of G. Michael Tibbs, p. 5, ¶25.

within the *goz* toward Muglad), and a useful – though limited – account of the Ngok territory in Kordofan province.

k) Governor of Kordofan Transfer Discussion (1951)

1179. The GoS fails to mention the discussion that took place prior to Sudan’s independence concerning the return of the Ngok Dinka to Bahr el Ghazal province. The documentary records of these discussions show the British administration as assuring the Ngok Dinka leaders that the decision where they were to belong was for the Ngok alone to make.<sup>1452</sup> The same records make it clear that a transfer of the Ngok to Bahr el Ghazal would mean that the Misseriya’s “summer water and grazing” access may not be assured.<sup>1453</sup> These grazing areas were, of course, to the north of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, confirming the location of the Ngok in these areas in 1951.

l) Abyei Agreements (1965 and 1966)

1180. The GoS Memorial refers to the 1965 Abyei Agreement only to argue that it was “superseded” by the subsequent 1966 Agreement (although it does not explain the relevance of this).<sup>1454</sup> What the GoS crucially fails to acknowledge is that *both* the 1965 and the 1966 agreements, and the accounts of the conferences which culminated in the signing of these two Agreements, *all* support the conclusion that the area inhabited by the Ngok Dinka had exhibited considerable continuity over time and that the area included the region of the Ngol/Ragaba ez Zarga.

1181. The 1965 Agreement recorded the Misseriya and Ngok Dinka’s mutual acknowledgement that “the Ngok could *return to their homesteads* at ‘Ragaba Zarga and other places where *they used to live*,”<sup>1455</sup> demonstrating that in 1965 the Misseriya recognized that the Ngok Dinka “used to live” around the Ngol/Ragaba ez Zarga.<sup>1456</sup> The 1966 Agreement reiterated the parties’ understanding the Ngok Dinka had permanent settlements in the Ragaba ez Zarga.<sup>1457</sup> Further, the accounts of the 1966 conference which lead to the signing of the 1966 Agreement note that this was “*the first time that claims on territory known as Ngokland have been tabled by Misiriyya openly in a conference.*”<sup>1458</sup> All of this material provides further evidence that, by 1965, there was already considerable continuity over time with respect to the area inhabited by the Ngok Dinka, and that that area included the region of the Ngol/Ragaba ez Zarga.

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<sup>1452</sup> Letter from G. Hawkesworth (Governor Kordofan) to Editor Kordofan Magazine, dated 3 April 1951, at **Exhibit-FE 18/17**.

<sup>1453</sup> Letter from Governor’s Office, El Obeid re The Future of Ngok Dinka, dated 26 March 1951, **Exhibit-FE 18/16**.

<sup>1454</sup> GoS Memorial, at para. 246.

<sup>1455</sup> “The First Peace Agreement Between The Misiriyya Humur And The Ngok Dinka, Concluded At Abyei, March 3, 1965”, Appendix 12 to A. D Saeed “The State And Socioeconomic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan” (January 1, 1982). ETD Collection for University of Connecticut. Paper AAI8213913, **Exhibit-FE 18/30**.

<sup>1456</sup> ABC Report, Part I, at p. 19, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>1457</sup> Annex 62 to GoS Memorial, (“Dinka shall return to their homes and farms at the Ragaba Zerga and other places and the Messeria shall frequent all Ragabas and water and pasture-places which they used to frequent before the incident.”).

<sup>1458</sup> ABC Report, Part II, Appendix 5, at p. 190, (setting out an excerpt from A.D Saeed “The State And Socioeconomic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan, at p. 235), **Exhibit-FE 15/1**.



m) Abyei Rural Council (1977)

1182. The GoS also recognized the geographic extent and permanent character of Ngok Dinka settlement in 1977 when it reclassified 47 existing Ngok Dinka villages into the Abyei Rural Council. The villages, some of which are identified on **Map 13** (Ngok Dinka Chiefdoms, 1905), are distributed throughout the territory identified by the ABC as the Abyei Area,<sup>1459</sup> including Abyei town, Langar [Arabic: Goleh], Dokura, Thigei, Alal, Tajalei, Mabek [Abu Azala], Nyadak Ayueng and Dakjur [Arabic: Dembaloya].

n) Sudanese Ministry of Agriculture Report (1978)

1183. The Government does not mention the 1978 report by a representative of the Sudanese Ministry of Agriculture, which summarized the Abyei region's habitation as follows: "*Ngok Dinka live in this area the year round*; Misseriya Humr during the dry season. Bahr El-Ghazal and Upper Nile Dinka come during the rainy season."<sup>1460</sup> The same author concluded that "Ngok Dinka are more the settlers compared to these other tribes," on the basis that they cultivated around their homes, while others only use the land seasonally.<sup>1461</sup> These observations, by the GoS's own representatives, are consistent with the Condominium descriptions discussed above.

o) The Historic Importance of Abyei Town

1184. As discussed in the SPLM/A Memorial, the area in the immediate proximity of current Abyei town has been the center of Ngok Dinka political, commercial and cultural life for nearly two centuries.<sup>1462</sup> Abyei town lies roughly three miles to the north of the Kiir/Bahr el Jange/Bahr el Arab, as depicted on **Map 7** (Abyei Area) and **Map 59** (Abyei: Satellite Image)

1185. The Government's Memorial attempts to dismiss the relevance of Abyei town to the location of the Ngok Dinka, arguing that "[t]he town of Abyei ... was established around 1914,"<sup>1463</sup> and that the first mapping instruction to identify the town on Anglo-Egyptian maps was given between 1912 and 1916.<sup>1464</sup> The Government also suggests dismissively that the population of Abyei was 2000 inhabitants in 1956.<sup>1465</sup>

1186. The Government's Memorial ignores essentially all of the historical evidence regarding the importance of the location of what is now Abyei town. In particular, the GoS ignores the evidence regarding the historic location of the home of the Ngok Dinka Paramount Chief and the seat of "central government" for the nine Ngok Dinka Chiefdoms, which was in the vicinity, or very close to, what is now called Abyei town.<sup>1466</sup> That evidence is outlined in the SPLM/A Memorial, and need not be repeated here.<sup>1467</sup>

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<sup>1459</sup> **Map 10**, (*Abyei Area Boundaries: Map 1*, Abyei Boundaries Commission, 2005).

<sup>1460</sup> A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 9-10 (1978), **Exhibit-FE 6/5** (emphasis added).

<sup>1461</sup> A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 10 (1978), **Exhibit-FE 6/5**.

<sup>1462</sup> SPLM/A Memorial, at paras. 84-110, 961-967.

<sup>1463</sup> GoS Memorial, at para. 6.

<sup>1464</sup> GoS Memorial, at para. 367.

<sup>1465</sup> GoS Memorial, at para. 6.

<sup>1466</sup> See SPLM/A Memorial, at paras. 86, 895-896; Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 6, ¶¶27, 30, 32; see **Figures 4 to 14** (historic Abyei town), **Appendix H to SPLM/A Memorial**.

<sup>1467</sup> SPLM/A Memorial, paras. 86, 895-896.

1187. The Government's apparent suggestion that Abyei town is unimportant, because it was only "established" in 1914, is misconceived. The fact that Abyei town was only formally recognized as such by Anglo-Egyptian administrators in 1914, and only designated on maps between 1912 and 1914, suggests nothing about the historic importance of the location to the Ngok Dinka. The basic point is that the reason that Anglo-Egyptian administrators established the town, where they did, was because of the historic importance of the location.

1188. The Government implicitly acknowledges as much. It concedes that "*Sultan Rob's village*" (or "*Sultan Rob's place*") was located in the vicinity of what is now Abyei town.<sup>1468</sup> Referring to "Rob's old village" and "Rob's new village," the Government's Memorial acknowledges, as it must, that the Anglo-Egyptian maps "show[ed] either or both the old and the new village, respectively just to the south and just to the north of the river [Kiir/Bahr el Arab]," in the vicinity of what is today Abyei town.<sup>1469</sup>

1189. Beyond this, the pre-1905 documentary record also demonstrates very clearly that Arop Biong ("Sultan Rob") lived and held court in the village of "*Burakol*," located to the north of the Kiir/Bahr el Arab, not far from what is today Abyei town, as did his son and successor in 1906, Kuol Arop.<sup>1470</sup> As the early descriptions by Mahon, Percival and others make clear, "*Sultan Rob's place*" was the heart of Ngok Dinka political, commercial and cultural life at the beginning of the 19<sup>th</sup> century. It was the place where the Ngok's Paramount Chief held court and was invested by the Condominium with honors (the "robe"); it was a "great trade centre for Bahr El Ghazal"; and it was the place from which Sultan Rob exercised authority over the Ngok.

1190. The reality is that the historic location of the seat or residence of the Ngok Dinka Paramount Chief was what led to the later formal recognition of Abyei town by Condominium authorities. The town did not emerge from nothing in the middle of the wilderness, but was the historic political, cultural and economic center of the Ngok Dinka people.

1191. It is also implausible in the extreme for the Government to allege, as it does, that "[p]rior to 1905, the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab,"<sup>1471</sup> while simultaneously acknowledging that the seat of the Ngok Dinka Paramount Chief was north of that river. It simply makes no sense to claim, as the Government does, that the Ngok Dinka Paramount Chief not only lived at the frontier of the Ngok territory with the Misseriya, but that he did so more or less alone, on the other side of the Kiir/Bahr el Arab from the rest of the Ngok Dinka people.

1192. In fact, the location of Arop Biong's ("Sultan Rob's") village to the north of the Kiir/Bahr el Arab is perfectly consistent with the Anglo-Egyptian accounts in the years immediately prior to 1905 of the Ngok Dinka living in the Bahr region, centered on the Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab. This puts the Ngok Dinka Paramount Chief in the heart of the Ngok territory, accessible to the nine Ngok Dinka Chiefdoms and not alone with potentially hostile Misseriya or others, on the other side of the Kiir/Bahr el Arab from all his people.

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<sup>1468</sup> GoS Memorial, at para. 367.

<sup>1469</sup> GoS Memorial, at para. 367.

<sup>1470</sup> See above at paras. 918, 932, 978-979, 999-1003, 1026.

<sup>1471</sup> GoS Memorial, at para. 332.

1193. This is also confirmed by the map evidence, which consistently places Abyei town in the center of Ngok Dinka territory to the north of the Kiir/Bahr el Arab.<sup>1472</sup> As discussed below, this can be seen in particular from **Map 50** (Achwang Sheet 65-K 1916), **Map 86** (Abyor Sheet 65-K 1918), **Map 96** (Abyei Sheet 65-K 1936), as well as the fold-out map insert herein.

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1194. In sum, the post-1905 documentary record clearly describes the Ngok Dinka as located widely throughout the Bahr region, centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, extending north to the southern boundary of the *goz*. A wide range of reports from diverse sources uniformly describe the Ngok Dinka as occupying prosperous villages with well-maintained homes, dotted throughout the region, and having substantial cultivated fields and large cattle herds. These descriptions of the locations and nature of the Ngok Dinka are uniform throughout the entire period following 1905 and continuing until the outbreak of civil war.

1195. The post-1905 observations are entirely consistent with the pre-1905 documentation, and with the ABC Report's conclusions, both of which locate the Ngok Dinka in exactly the same region. The post-1905 observations also flatly contradict the Government's claim that "the Western Dinkas [sic] (including the Ngok Dinka) were located to the south of the Bahr el Arab."<sup>1473</sup> Indeed, as with pre-1905 records, not a single post-1905 document supports the Government's current claim that the Ngok Dinka lived only south of the Kiir/Bahr el Arab.

1196. It is because the post-1905 documentary evidence so decisively refutes the Government's claims that it adopts the implausible and unsupported position that the Ngok Dinka immediately moved substantially to the north after 1905. In fact, as discussed above, there was substantial continuity in the locations and cultural practices of the Ngok and the Misseriya in the decades following 1905. The post-1905 evidence, which is precisely consistent with the pre-1905 records, is therefore of direct and important evidentiary value in ascertaining the locations of the Ngok Dinka and the Misseriya in 1905.

3. The Government's Claim That the Ngok Dinka Did Not Use and Occupy Territory North of the Kir/Bahr el Arab in 1905 Is Refuted by the Cartographic Evidence

1197. As discussed in the SPLM/A Memorial, the cartographic evidence provides additional decisive evidence that, in 1905, the Ngok Dinka occupied and used the territory of the Abyei region centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, extending to the northernmost border of the *goz*.<sup>1474</sup> In contrast, in those instances in which they are identified at all on the maps, the Misseriya or Humr are placed to the north of the *goz*, consistent with accounts of their "headquarters" in the Muglad and with the conclusions of the ABC Report.

1198. The following section addresses the map evidence. It discusses in chronological order each of the maps relied upon by the Government, as well as the other relevant cartographic

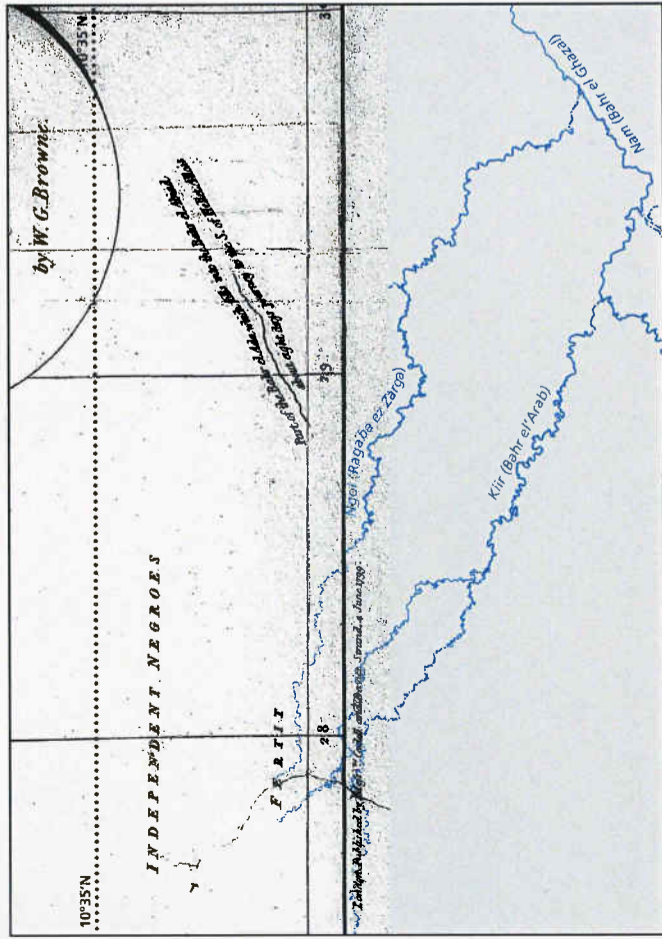
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<sup>1472</sup> See **Map 86** (Abyor Sheet 65-K 1918), **Map 96** (Abyei Sheet 65-K 1936) and **Map 50** (Achwang Sheet 65-K 1916).

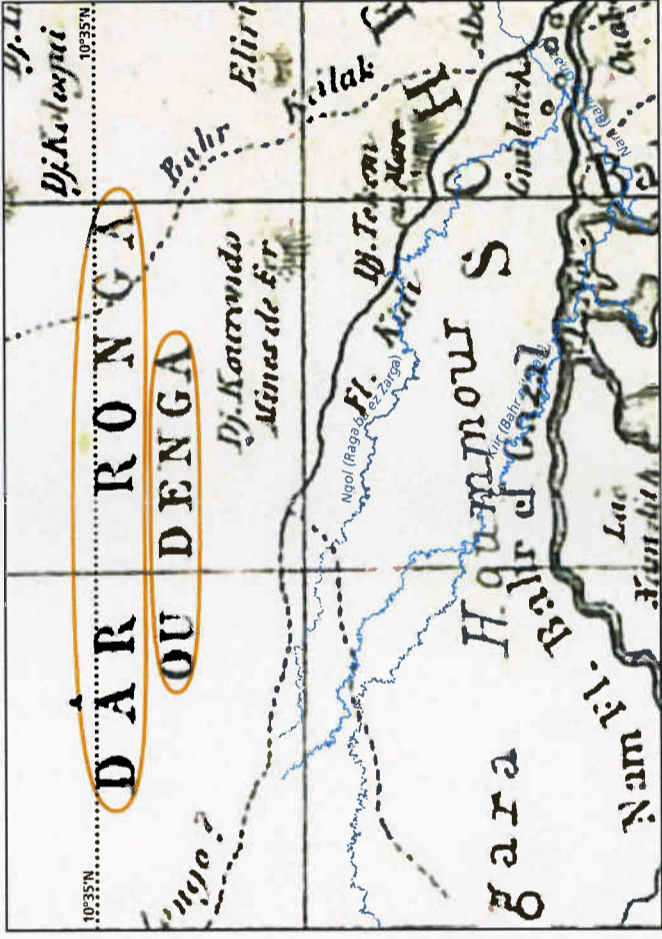
<sup>1473</sup> GoS Memorial, at para. 332.

<sup>1474</sup> SPLM/A Memorial, at paras. 978-1004.

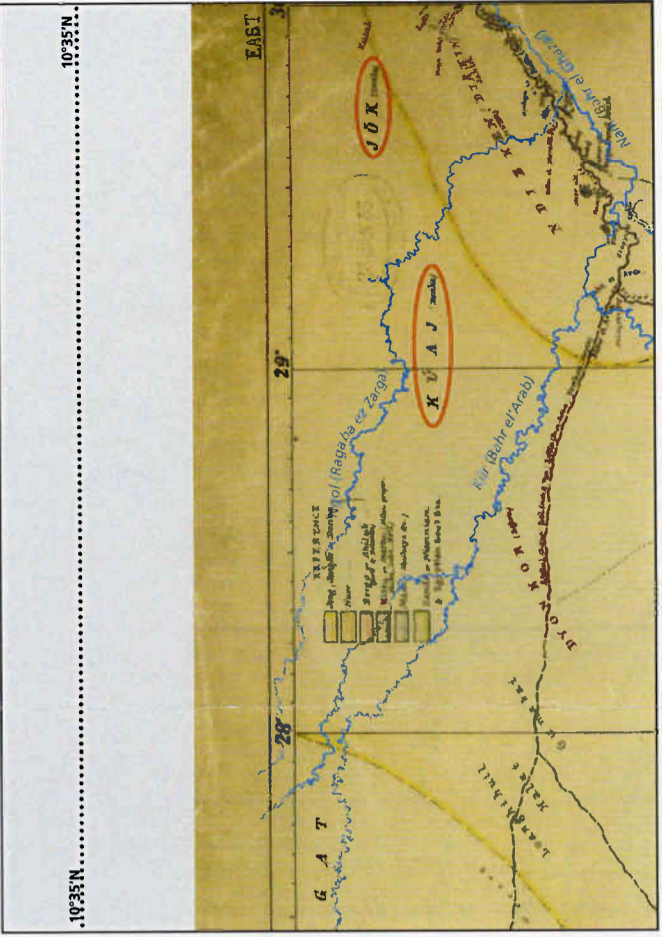




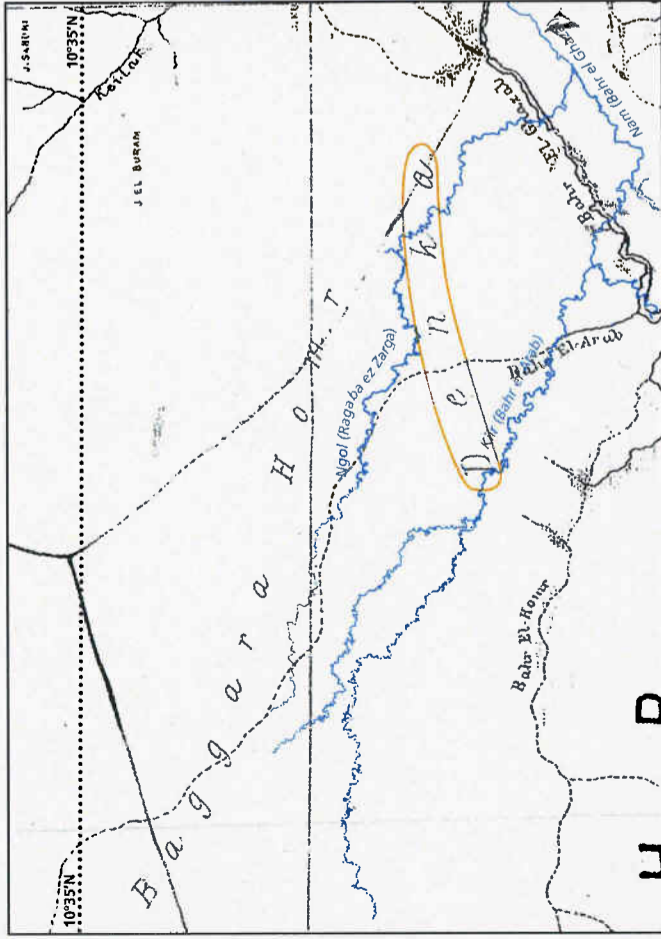
Map of Darfur, Brownie, 1799



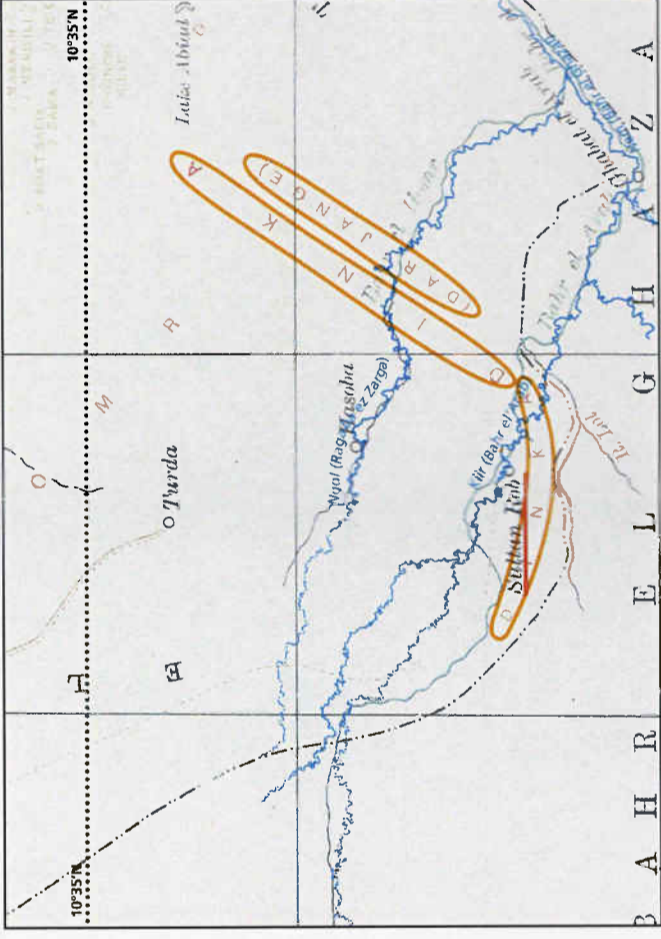
Carte du Cours du Fleuve Blanc, Speke and Grant, 1863



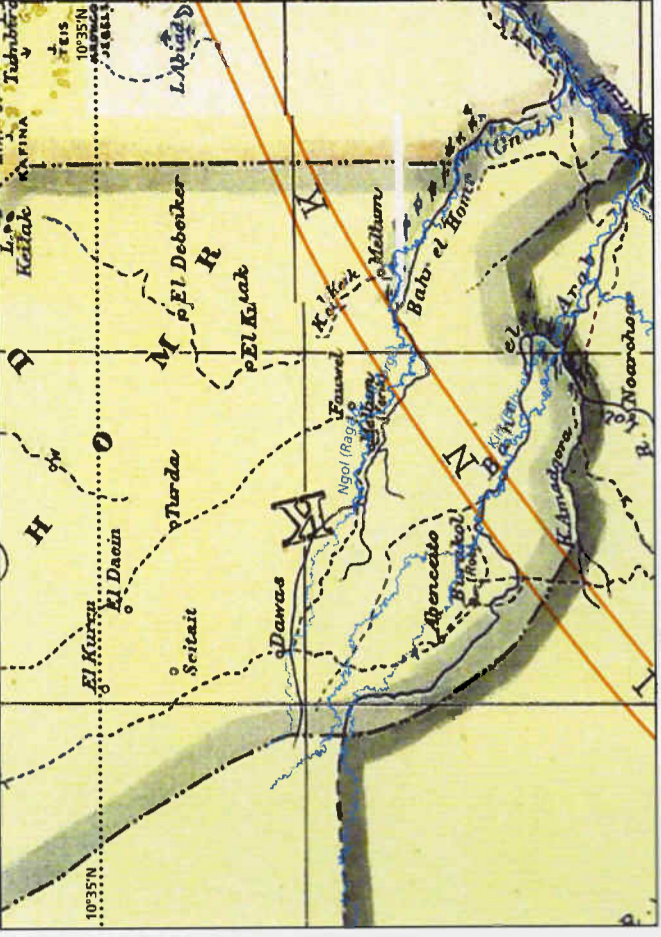
Eastern Equatorial Africa, Ravenstein, 1883



The Egyptian Sudan, Intelligence Branch War Office, 1883



The Anglo Egyptian Sudan Kordofan Province, Survey Office, 1913



The Anglo-Egyptian Sudan, War Office, 1914

evidence. The representation of so-called “provincial boundaries” on these and additional maps is discussed separately below<sup>1475</sup> and at **Appendix B**.

1199. The Government’s Memorial (and Macdonald’s Report) omit virtually any discussion of what the cartographic evidence shows with regard to the locations of the Ngok Dinka and the Misseriya. That is true notwithstanding the fact that a substantial number of the maps contain specific references to tribal lands, including the Dinka (variously called the “Denga,” the “Jeng,” the “Janghe,” the “Junge,” or “Mariekh”) and the Misseriya.

1200. The reason for the Government’s omission of any discussion of the cartographic evidence is clear: when the map evidence is examined, virtually every extant map of the region – totaling some 25 separate maps from a range of different dates and provenances – shows the Ngok Dinka inhabiting the territory of the Bahr region, extending north from the Kiir/Bahr el Arab, past the Ngol/Ragaba ez Zarga, to the *goz*, and the Misseriya as located in the Muglad region (or further north), above the *goz*. Conversely, with one obviously inaccurate exception (a 1907 map by Comyn), not a single map supports the Government’s claim that the Ngok lived only south of the Kiir/Bahr el Arab.

(i) Map “Mentioned by Browne” - 1799

1201. Macdonald refers to a map mentioned by Browne which labelled the Bahr el Arab as the “Bahr el Ada.”<sup>1476</sup> Neither the Government nor Macdonald provide a copy of the Browne map, which is at the SPLM/A Supplemental Map Atlas as **Map 72**. Although not provided or mentioned by the Government, the Browne map depicts the presence of “**INDEPENDENT NEGROES**” well north of 10° N latitude and well north of the river that the GoS now claims to be the Kiir/Bahr el Arab. This corroborates the oral traditions which Browne reported (as discussed elsewhere<sup>1477</sup>).

(ii) Carte du Cours du Fleuve - *Sources du Nile* - 1863

1202. Erhard Bonaparte prepared a map in 1863 based on the itineraries of Captain Speke and Captain Grant, British explorers of Africa, formerly officers in the Bengal Army (“1863 *Sources du Nile*”). Speke and Grant’s 1862 expedition to Sudan was Speke’s second exploration in search of the sources of the Nile, and it located the White Nile. The exploration, documented in Grant’s book “*A Walk Across Africa*,” included travel by river up the White Nile from Gondokoro.

1203. Although not mentioned by the Government, the 1863 *Sources du Nile* map identifies a number of tribal areas. A copy is at **Map 73** with an historic overlay at **Map 73a**. As seen from the overlay, North of the “Bahr el Arab,” and well above 10°N latitude, the tribal lands of “Dar Ronga or **Denga**” are identified. “**Denga**” is obviously a reference to “Dinka.”

(iii) Ravenstein Map of Eastern Equatorial Africa, 1883

1204. The earliest map submitted by the GoS is the 1883 Ravenstein map (**GoS Map 1**). Macdonald describes this map as representing “a distillation of all information gained by

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<sup>1475</sup> See below at paras. 1437-1465.

<sup>1476</sup> Macdonald Report, at para. 2.1.

<sup>1477</sup> See SPLM/A Memorial, at para. 905; see above at paras. 1302-1306.



Western explorers until that time,”<sup>1478</sup> and refers to the author, Ravenstein, as a “diligent researcher.”

1205. The Government does not refer to the fact that the Ravenstein map identifies tribal areas in Sudan and neighboring regions. The Dinka tribal area (according to the legend marked in yellow and referred to as “*Jeng, Janghe or Denka*”) is well north of the Kiir/Bahr el Arab and extends up to Keilak. Also inscribed on the Ravenstein map well to the north of the Kiir/Bahr el Arab are “*Kuaj (Denka)*” and “*Jok (Denka)*.” These are obvious references to Ngok Dinka (both “Jok” being the Paramount Chief of the Ngok who led their migration to the Abyei region,<sup>1479</sup> and Kuaj being references to people of the Ngok Dinka. No Misseriya or Humr territories are depicted up to the top of the map at 10° N latitude. This map is reproduced at **Map 77** with an historic overlay at **Map 77a**, SPLM/A Map Atlas.

(iv) Egyptian Sudan Map, 1883

1206. The British Intelligence Branch of the War Office prepared a map of Egyptian Sudan in 1883, included as **Map 31** in the SPLM/A Map Atlas. As noted in the SPLM/A Memorial, this map was prepared during the Mahydia and was based on limited military intelligence.<sup>1480</sup> Although undoubtedly the most authoritative map of Egyptian Sudan at the time, it is omitted from the GoS Map Atlas and not referred to in its Memorial.

1207. As indicated in the SPLM/A Memorial, the 1883 Egyptian Sudan Map identifies the area around the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga with the caption “*Denka*,” an obvious reference to the Ngok Dinka.<sup>1481</sup> The “Baggara Homr” are depicted, but well to the north of the “Denka,” above 10° N latitude.

(v) Lupton Bey Sketch Map, 1884

1208. The GoS relies on a Royal Geographic Society map of Eastern Equatorial Africa, upon which it has transposed a “sketch map” of Bahr el Ghazal by Lupton in 1884 (GoS **Map 2**).<sup>1482</sup> The Lupton 1883 Map shows two Ngok villages referred to in the Ngok evidence, namely, “*Mariak*” and “*Gojak*,” depicted to the north of the Kiir/Bahr el Arab. As noted above, “Marrak” is a descriptive used for the Ngok, referring to the main Ngok grain crop (*mahriek*).<sup>1483</sup>

(vi) Marchand Map - 1898

1209. The GoS rely on a map produced by Marchand in 1898 showing his trek through the south of Sudan (**GoS Map 4**).<sup>1484</sup> The Government does not, however, mention that the Marchand map labels the Abyei region, north of the Kiir/Bahr el Arab as “*Kouadj*.” As on the Ravenstein map (referring to the Ngok Dinka as “*Kuaj*,”) this reference is to the Ngok Dinka. The “Pays [country] des Baggaras” is identified to the north of the Ngok, well above 10° N latitude over the Abyei region. These can be seen clearly at the historic overlay for this map at SPLM/A **Map 78a**.

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<sup>1478</sup> Macdonald Report, at para. 2.2.

<sup>1479</sup> SPLM/A Memorial, at paras. 122 and 136

<sup>1480</sup> SPLM/A Memorial, at para. 979.

<sup>1481</sup> SPLM/A Memorial, at para. 980.

<sup>1482</sup> GoS Memorial, at para. 292; GoS Map 2.

<sup>1483</sup> See above at para. 911.

<sup>1484</sup> GoS Memorial, at para. 295.

1210. There is a second Marchand Map, entitled “Mission Marchand De 1896 A 1899,” which the Government omits from its discussion. A copy of this map is included in the SPLM/A Supplemental Map Atlas at **Map 79** (with an historic **overlay at Map 79a**). The second Marchand map even more clearly identifies the “*M A R A I S*,” another reference to the Ngok *mahriek* grain crop referred to above, again above the Kiir/Bahr el Arab,<sup>1485</sup>

(vii) Official Gleichen Map - 1905 Handbook

1211. The 1905 Gleichen *Handbook* contains a detailed map of “The Anglo-Egyptian Sudan, compiled in the Intelligence Office, Khartoum, May 1904” (the “1905 Gleichen Map”).<sup>1486</sup> This is the only official Sudan Government map contained in the 1905 Gleichen *Handbook*, reproduced at SPLM/A **Map 36**.

1212. Although not mentioned by the Government, the 1905 Gleichen Map contains descriptions of the location of the Ngok Dinka (“*Dar Jange*”), but not of the Misseriya, in the Abyei region. In particular, the “*Dar Jange*” are identified as straddling both the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga (incorrectly labeled “Bahr el Arab”). “*Sultan Rob*” is identified just to the north of the Kiir/Bahr el Arab, on the north bank of the river. The “Homr” and “Misseriya” are identified, but only above the Muglad region, well to the north of the *goz*.

(viii) Comyn Map - 1907

1213. The Government Memorial relies on a 1907 sketch map prepared by Lieutenant Comyn (**GoS Map 9**). The Comyn Map is described on its face as a “Sketch Map” and its provenance is unclear. Comyn appears to have used an existing base map and superimposed his own information; the resulting map is idiosyncratic in its details and highly inaccurate.

1214. The Comyn Map locates Sultan Rob’s village south of the Lol (miles to the south of its true location). No other map so locates Sultan Rob and no other report indicates that Sultan Rob was ever based south of the Lol, which is entirely implausible. Comyn purports to have crossed the heads of each of these rivers but, quite clearly, did not visit either Sultan Rob’s Old Village, or his new village near Abyei. In fact, Comyn appears to have confused the Kiir/Bahr el Arab and the Lol.

(ix) Lloyd Map - 1907

1215. The Geographical Journal published the Kordofan “Map of Dar Homr” in 1907 to depict the explorations of Captain Watkiss Lloyd of the Scottish Rifles (the “1907 Lloyd Map” included as **Map 38**).<sup>1487</sup> The map is not discussed in the GoS Memorial.<sup>1488</sup>

1216. As discussed in the SPLM/A Memorial, the 1907 Lloyd Map contains information about a route taken by Lloyd through the center of the Abyei region to Hasoba.<sup>1489</sup> Above Tebeldiya, in the northwest of the Abyei region, Lloyd marked two arrows which are labelled

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<sup>1485</sup> See above at paras. 1910.

<sup>1486</sup> **Map 36** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905)); **Map 36a** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905) – Detail.)

<sup>1487</sup> **Map 38** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907); **Map 39** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907 – Overlay).

<sup>1488</sup> SPLM/A Memorial, at para. 985-987.

<sup>1489</sup> **Map 28** (*Excursions of British Authorities*); **Map 39** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907 – Overlay).

“To *Dar Junge*,” one is located at the edge of the Muglad area (at approximately 10°50’ N) and points due south and the second, near the area of Tebeldiya, points southeast, directly into the heart of the Abyei region.<sup>1490</sup>

1217. The *goz*, located immediately above Tebeldiya, is accurately described by Lloyd as “Hard sandy soil Open forest.”<sup>1491</sup> Moreover, the 1907 Lloyd Map also labelled the region around Turda as having “*black soil*”; as discussed elsewhere, the Ngok Dinka lands of the Abyei region were characterized by fertile black soil (on which the Ngok’s staple crop of sorghum/*dura* was cultivated), in contrast to the reddish, drier soil of the Muglad area.<sup>1492</sup> Turda is to the east of the *goz*, which is not as wide in the west of the Abyei Area as elsewhere. **Map 68** (Bahr Region); MENAS Expert Report paragraphs 138-145.

(x) Northern Bahr el Ghazal Map - 1907

1218. Both the SPLM/A and GoS Memorials refer to a 1907 map of “Northern Bahr el Ghazal” which was compiled at the Survey Office of Khartoum (“1907 Northern Bahr el Ghazal Map”).<sup>1493</sup> The Government does not mention the fact that the 1907 Northern Bahr el Ghazal Map shows “*Sultan Rob’s New Village*” just to the north of the “Bahr el Homr” (Kiir/Bahr el Arab) and it labels the entire area between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga as “*Dar el Jange or Dinka*.” The map identifies “*Homr*” in the region of Lake Keilak and the “*Misseria*” further to the north, above Muglad.

(xi) 1910 Kordofan Lloyd Map

1219. As discussed in the SPLM/A Memorial, the Geographic Journal published a map of “*The Sudan Province of Kordofan*” in 1910 (the “1910 Kordofan Lloyd Map”), included as **Map 45** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910) and the Government as **GoS Map 11**.<sup>1494</sup> The map identifies the southern, central and eastern areas of the Abyei region which Lloyd explored as “*Dar Jange*,” referring to the Ngok Dinka.<sup>1495</sup> Mithiang is identified in the 1910 Kordofan Lloyd Map as “*Sultan Rob’s Old Village*,” located by Lloyd just to the north of the Kiir/Bahr el Arab.

1220. The 1910 Kordofan Lloyd Map places the “*Misseria*” to the north and east of the Muglad region, while the “*Dar Homr*” extends from the northwest of the Muglad in an arc through the *goz* to south of Lake Keilak. Several of the Misseriya sections are shown twice on the map (e.g., “Walad Kamil,” “Ageira”) in what appear to be both their dry season and wet season locations.

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<sup>1490</sup> **Map 38** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907); **Map 39** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907 – Overlay).

<sup>1491</sup> These characteristics of the *goz* are described in the SPLM/A Memorial (SPLM/A Memorial, at paras. 244-245) and the attached MENAS Expert Report (see MENAS Expert Report, at paras. 142-144).

<sup>1492</sup> See SPLM/A Memorial, at para. 97.

<sup>1493</sup> **SPLM/A Map 40** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907).

<sup>1494</sup> **Map 44** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910); **Map 44a** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Detail).

<sup>1495</sup> **Map 44** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910); **Map 44a** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Detail); **Map 45** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Overlay).



(xii) Anglo-Egyptian 1:250,000 Series – 1909  
to 1938 – General Observations

1221. The Anglo-Egyptian Sudan map prepared by the Intelligence Office at Khartoum in 1904, referred to above,<sup>1496</sup> was used as the underlying map for a series of 1/250,000 maps that were prepared by the Sudan Government between 1909 and 1938. Revised versions of these maps were issued successively in 1910, 1914, 1916, 1922, 1925, 1936 and 1951.

1222. An Index to the Sheets of the 1/250,000 Series is at **Map 80**. The Map Index represents in red overlay the differently named and numbered sheets comprising the entire grid of Sudan. As indicated on the face of the index, “[t]he shading denotes sheets published up to December 1909.” The sheets relating to the Abyei region are Sheets 65K, 65L, 65G and 65H. As can be seen from the absence of shading, none of these four sheets had been published as at December 1909.

1223. In 1909, the Head of the Sudan Survey, Hugh Pearson, noted:

“At the present time [1909] no single sheet [of mapping for the Sudan] can be considered final, and many are of very doubtful accuracy. Practically, however, maps were required for administrative purposes, and rightly or wrongly it was felt that a map, however inaccurate, was better than none at all. Compilations have therefore been hurried on, and criticism invited in the hopes that even in the absence of the ordinary survey checks, something fairly reliable may be eventually arrived at.”<sup>1497</sup>

1224. Similarly, a note on the face of the Index indicates that “Many of the positions assigned to places in Southern and Western Kordofan, Bahr el Ghazal and south of the Sobat, depend upon route sketches and *must not be regarded as accurate*.”<sup>1498</sup> As set out in detail above, the rough route sketches of the area comprising the four sheets of the Abyei area (Sheets 65K, 65L, 65G and 65H) were the source of any information for these maps almost until the end of the Condominium.

1225. Although there were significant inaccuracies in the geographical features depicted on the 1:250,000 Series, these maps nonetheless provide evidence of the location of the Ngok Dinka (and the Misseriya) which precisely corroborates the pre-1905 cartographic evidence and the various Anglo-Egyptian reports. The location of the Ngok Dinka on the 1:250,000 Series is exactly consistent with the location of the Ngok on earlier maps (discussed above) and in the reports by Mahon, Wilkinson, Percival, Lloyd and others from prior to 1905 (also discussed above).

1226. The GoS suggests in passing that the Sheet 65-L series of the 1:250,000 maps traces the “process of extension” of the Ngok Dinka village of “Sultan Rob” northwards after 1905.<sup>1499</sup> (As discussed above, the GoS also relies on a statement in 1921 concerning movement among the Bongo section along the Gurf in support of this “process of extension”; that argument is clearly misplaced for the reasons detailed above.<sup>1500</sup>)

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<sup>1496</sup> See above at paras. 1211-1212.

<sup>1497</sup> H. Pearson, Progress of Survey in the Anglo-Egyptian Sudan, The Geographical Journal, Vol. 35 No. 5 (May, 1910), p. 540, **Exhibit-FE 3/7**.

<sup>1498</sup> Index to the Sheets of the 1/250,000 Map Series, **Map 80** (emphasis added).

<sup>1499</sup> GoS Memorial, at para. 367.

<sup>1500</sup> See above at paras. 1081-1085.

1227. In fact, the location of Ngok Dinka villages in the Sheet 65-L series is a result of increased knowledge of the area by the Anglo-Egyptian administration. As Anglo-Egyptian officials gained information about the area and its inhabitants, the descriptions of the region on the Anglo-Egyptian maps naturally expanded as well. This had nothing to do with movement of peoples and everything to do with the increase in Anglo-Egyptian knowledge, as is evidenced by the increasing level of detail and geographic accuracy in successive versions of the same maps. What one sees, therefore, is not a creep of Ngok Dinka villages to the north on the successive versions of maps, but instead a simple process of gradually filling in details in places where they had not previously existed.

(xiii) Anglo-Egyptian 1:250,000 Series – 1910  
Hasoba Map (Sheet 65-L)

1228. The earliest available map in the Abyei region grid of the Anglo-Egyptian 1:250,000 Series (Sheets 65K, 65L, 65G and 65H) is the 1910 Hasoba map (Sheet 65-L) (the “1910 Hasoba Map”). The Survey Office at Khartoum compiled and printed the “Anglo-Egyptian Sudan, Africa, Hasoba, Sheet 65-L,” Survey Office Khartoum,” in March 1910.<sup>1501</sup> This map is at **Map 45** of the SPLM/A Map Atlas.

1229. This map depicts the area to the east of Abyei town (then called Burakol, marked to the far west of the map with the inscription “*From Burakol*”) and the southeast section of the Abyei region. As explained in detail above, the reference to “*Burakol*” is consistent with the trek reports of Percival and Huntley Walsh, which confirm that by the end of 1904 Paramount Chief Arop Biong was no longer at “Sultan Rob’s Old Village,” but was instead at “*Burakol*” or “*Rob’s New Village*,” near the location of present-day Abyei town.<sup>1502</sup>

1230. Although containing relatively little detail, the 1910 Hasoba Map contains evidence of presence of Ngok Dinka throughout the map area:

- a. “*Burakol*” is clearly marked as being off the western end of the map and north of the Kiir/Bahr el Arab;
- b. “*Sultan Rob’s Old Village*” is marked, apparently on the river course itself (suggesting the settlement existed on both sides of the river) located at a clearly marked “*Ferry*” crossing;
- c. the Ngok Dinka sub-tribe “*Mareng*” is clearly labelled to the north of “*Sultan Rob’s Old Village*” and the Kiir/Bahr el Arab;
- d. a number of Dinka cattle camps are identified throughout the Abyei Area, including several well north of the Kiir/Bahr el Arab toward the Ngol/Ragaba ez Zarga, one due north of “*Sultan Rob’s Old Village*” at El Nyat and another close to Hasoba; and

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<sup>1501</sup> **Map 46** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910; **Map 46a** *Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910 – Detail).

<sup>1502</sup> See above at paras. 999-1011.

e. several Ngok villages are marked and distinguishable from temporary Arab camps or feriks to the north, including El Ashraya, Bara, Abu Kharait, Um Seneini, Gulud and Tegelai – all well north of the Kiir/Bahr el Arab.<sup>1503</sup>

(xiv) 1913 Kordofan Map

1231. The Survey Office, Khartoum, produced in February 1913 a map titled “The Anglo-Egyptian Sudan, Kordofan Province” (the “1913 Kordofan Map”)(**Map 48**).<sup>1504</sup>

1232. Although not mentioned by the Government, the 1913 Kordofan Map places the “*Dinka*,” referred to parenthetically as “*Dar Jange*” (identified in red as a “Tribe” in the legend), almost entirely to the north of the Kiir/Bahr el Arab, extending further north well beyond the Ngol/Ragaba ez Zarga up to approximately 10° 20’N latitude, in the region of Miding/Heglig. The map identifies the “*Misseria*” and the “*Dar Misseria*” as located to the north and east of the Muglad, well above the *goz*.

1233. As noted by the Government, the 1913 Kordofan Map labels the Ngol/Ragaba ez Zarga as the “Bahr el Homr.” The Nyamora/Ragaba Umm Biairo appears to be depicted, with Sultan Rob’s village located south of it. However, that river is later along its course described as the “Bahr el Arab.” As shown in the historic overlay (**Map 49**), the 1913 Kordofan Map correctly locates Abyei town (described as “*Sultan Rob*”) in the “V”-shaped area between the Kiir/Bahr el Arab and Nyamora/Ragaba Umm Biairo.<sup>1505</sup>

(xv) Map of Anglo-Egyptian Sudan - 1914

1234. The GoS rely on a 1914 map produced by the Geographical Section of the War Office (**GoS Map 14**). The GoS Memorial does not mention that the map places “*Burakol (Rob)*” to the north of the Kiir/Bahr el Arab, or that the map includes a prominent label of “*Dinka*” that runs from beneath the Kiir/Bahr el Arab in an arch above both the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga, to roughly latitude 10° N. The Government also does not mention that a label entitled “*Dar Misseria*” is placed north and east of the Muglad region and the *goz*, while the “Homr” are placed to the north, stretching south-east from Muglad to roughly Lake Abiady.

(xvi) Anglo-Egyptian 1:250,000 Series – 1914  
Ghabat el Arab (Sheet 65-L)

1235. The 1914 Ghabat el Arab map (Sheet 65-L) in the Anglo-Egyptian 1:250,000 Series, succeeds the Hasoba Map described above and was published by the Survey Office, Khartoum, in May 1914 (“1914 Ghabat el Arab Map”).<sup>1506</sup> The map is included at **Map 81** of the SPLM/A Supplemental Map Atlas.

1236. Although limited in detail, the 1914 Ghabat el Arab Map contains a variety of evidence that the Ngok Dinka were located throughout the map area:

<sup>1503</sup> **Map 47** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910 – Overlay).

<sup>1504</sup> **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913); **GoS Map 12**.

<sup>1505</sup> **Map 49** (*Kordofan Province*, Survey Office Khartoum, 1913 – Overlay).

<sup>1506</sup> The 1914 Ghabat el Arab map contains the following attribution: “The traverse survey of the Bahr el Ghazal, by the Sudan Irrigation Service between the fixed positions of Lake No & Meshra el Rek, the wheel and compass sketches with Latitudes from Talodi via Bahr el Homr, Mellum, Mareng, and Mapier by Capt Conningham, and sketches with Latitudes, by Capt Lloyd, form the bases of this sheet. Other detail has been adjusted from sketches by Capt Percival, Wilkinson, Bayldon, Whittingham and Mr Willis. Additions and corrections from Irrigation Dept and Mr Lubbock.”

- a. “*Burakol*” is again clearly marked as being off the western end of the map and clearly north of the Kiir/Bahr el Arab;
- b. “*Sultan Rob’s Old Village*” is marked even more clearly as located on the course of the Kiir/Bahr el Arab itself (indicating that the settlement existed on both sides of the river) with “*FERRY*” marked again;
- c. two (unnamed) villages are marked at “*Sultan Rob’s Old Village*” to the immediate south of the river and at least six to the immediate north, confirming that the village/s extend to both sides of the river at the ferry crossing;
- d. the Ngok Dinka Chiefdom “*Mareng*” is again clearly labelled to the north of “*Sultan Rob’s Old Village*” and the Kiir/Bahr el Arab, and the Ngok Chiefdom of “*Achaak*” is added further to the north;
- e. the word “*DINKA*” is included as straddling the Kiir/Bahr el Arab;
- f. the name “*Abyia*” is written across the area where modern Abyei town is sited, where a number of unnamed villages are marked, either as a reference to the Abyior (Paramount Chief lineage) Chiefdom or a reference to what was to be recognized by Condominium administrators as Abyei town;
- g. additional towns, clearly distinguished from temporary Arab camps or feriks, are included further north at Um Geren, Bara and Nimar; and
- h. a smaller number of Dinka cattle camps are identified throughout the Abyei Area, including in the regions of El Neiat and on the Ngol at Id Tebusia.

(xvii) Anglo-Egyptian 1:250,000 Series – 1916  
Achwang (Sheet 65-K)

1237. The 1916 Achwang Map is the first available map of Sheet 65-K in the Anglo-Egyptian 1:250,000 Series. It was published by the Survey Office, Khartoum, in June 1916 (“1916 Achueng Map”). The map’s name (“*Achwang*”) is derived from the name of the Ngok Dinka Chiefdom sited largely to the southwest of the Abyei region.<sup>1507</sup> The map is included at **Map 50** in the SPLM/A Map Atlas.

1238. Although limited in detail, the 1916 Achwang Map contains further evidence of the presence of Ngok Dinka throughout the map area:

- a. “*Burakol*” is clearly located north of the Kiir/Bahr el Arab, near where Abyei Town is now located, marked “*Burakol (Sultan Kwol Wad Rob)*,” reflecting the succession from Arop Biong to his son, Kuol Arop;
- b. numerous unnamed Ngok Dinka villages are dotted around the Abyei town area, including “*Deng’s*,” just to the north of Burakol;

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<sup>1507</sup> The 1916 Achueng Map contains the following attribution: “The route to Nyamland in SE corner is a wheel and compass traverse with latitudes based on Wau, by Capt Conningham. The R Lol is a survey by Capt Thwaites, and the route in the NE corner from a sketch with latitudes by Capt Lloyd; and other detail by Capt Percival, Greenwood, Whittingham and Mr Hellum.”

- c. the Ngok Dinka Chiefdoms of “*Anyal*”, “*Achwang*”, “*Bongo*” and “*Manyar*” are all clearly marked, with all but “*Anyal*” being located entirely to the north of the Kiir/Bahr el Arab;
- d. several other Ngok Dinka villages are marked along the Nyamora/Um Biero, including “*Abenceito*” and “*Saheb*”; and
- e. the word “**D I N K A**” is written in bold well above the Kiir/Bahr el Arab.

(xviii) 1916 War Office Map of Darfur

1239. The GoS relies on a 1916 map of Darfur prepared by Geographical Section of the War Office (**GoS Map 16**). The Government omits to mention that the map again depicts “*Rob*” at “*Burakol*,” to the north of the Kiir/Bahr el Arab and labels the “**DINKA**” as extending from beneath the Kiir/Bahr el Arab, north beyond the Ngol/Ragaba ez Zarga (labelled the “Bahr el Homr (Gnol)”) to roughly 10° 20’ N latitude.

(xix) Anglo-Egyptian 1:250,000 Series – 1918 Nyamell (Sheet 65-K)

1240. The 1918 Nyamell map is likely a misnamed map in the Achwang (and later Abyei) series at Sheet 65-K, part of the Anglo-Egyptian 1:250,000 Series. The map was published by the Survey Office, Khartoum, in December 1918 (“1918 Nyamell Map”). The map is included at **Map 83** of the SPLM/A Supplemental Map Atlas.

1241. The 1918 Nyamell Map in large part mirrors the 1916 Achwang Map, but includes several additional villages including “*Buk*,” “*Gerinti*” “*Nil*,” “*Akutuk*,” and “*Mabiek*,” all Ngok settlements. It is, of course, implausible that these various villages would have sprung up in the space of a few years, since the previous maps in the 1909 Anglo-Egyptian 1:250,000 Series; instead, the cartographers were obviously elaborating on earlier maps with increased knowledge about the local topography and inhabitants.

(xx) 1920 Revision of Anglo-Egyptian Sudan Map

1242. The Government relies on a 1920 revision of a 1914 map of Anglo-Egyptian Sudan produced by the Geographical Section of the War Office (**GoS Map 17**). The Government does not mention that the map identifies Abyei as a town, lying in roughly its current location to the north of the Kiir/Bahr el Arab. The Government also does not mention that the map places the label “**DINKA**” squarely on and across the Bahr region between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, extending north to approximately 10° 20’ N latitude. Likewise, the Government does not mention that the “Misseria” and “Dar Homr” are located much further to the north, above the *goz*.

(xxi) Anglo-Egyptian 1:250,000 Series – 1911 Lake Keilak *corrected 1922* (Sheet 65-H)

1243. The Survey Office at Khartoum compiled and printed the “Anglo-Egyptian Sudan, Africa, Lake Keilak, Sheet 65-H,” Survey Office Khartoum,” in 1911, corrected Dec 1922

(the “1911 (corrected 1922) Lake Keilak Map”).<sup>1508</sup> This map is at **Map 85** of the SPLM/A Supplemental Map Atlas.<sup>1509</sup>

1244. The map depicts the area to the northeast of Abyei town, directly above Sheet 65-L (discussed above). The map contains a variety of evidence confirming the presence of Ngok Dinka throughout the map area:

- a. several Ngok Dinka “*dugdugs*” are marked around and south of Lake Abiad, including one named “*Ming*” and another named “*Aniak*”;
- b. the places “*Turda*” and “*Na’am Wells*” and “*Subu Wells*” are marked, confirming Ngok oral evidence that they used these sites, and in particular Nyama (or “*Na’am Wells*”) as sources of water and fishing sites (“*Turda*” being defined as “lake” in the map legend on later versions of this map sheet);
- c. at close to 11° N latitude, the boundary between the “*Misseriya*” to the north and the “*Homr*” to the south is marked, suggesting that the land below 11° N latitude was not known to have been used for seasonal grazing by the Misseriya;
- d. two Homr feriks are recorded, one far to the north at Lake Keilak and the other at Kawak.

1245. The map’s inclusion of a number of “*dugdugs*” warrants attention. The term “*dugdug*” is a Bagara word meaning “cattle camp” and was a clear reference to Ngok Dinka cattle camp areas, which may contain permanent shelters and fire pits used to build fires to keep insects away. The later 1936 version of the Ghabat El Arab Map (**Map 54**), discussed below, clearly describes in its legend (in the upper right hand corner) that a “*dugdug*” is a “*Dinka cattle camp*.”<sup>1510</sup>

1246. Numerous references are also made to Dinka dugdugs by Condominium officials in the contemporaneous documents, including Willis in the May 1909 Sudan Intelligence Report at Appendix C, where he referred to how he “heard the Dinkas had a little grain this year (they must have had because they made marisa), I saw no cultivation, and in the cattle *dugdugs* the folk had practically none...”<sup>1511</sup> Similarly, Mr. Tibbs makes it clear in his witness statement that “dugdug” was considered by the British administration to be a Dinka word for “*luak*,” the cattle byres built by the Ngok (and not by the Misseriya).<sup>1512</sup>

(xxii) Anglo-Egyptian 1:250,000 Series – 1918  
(corrected 1922) Abyor (Sheet 65-K)

1247. The Survey Office at Khartoum compiled and printed the “Anglo-Egyptian Sudan, Africa, Abyor, Sheet 65-K,” Survey Office Khartoum,” in 1918 and corrected it in December

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<sup>1508</sup> **Map 46** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910; **Map 46a** *Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910 – Detail).

<sup>1509</sup> The attribution states: “Recompiled 1911. The portion of W of Long 29.15’ is from sketches by Maj Wilkinson, Capts Lloyd & Whittingham. The remainder of the sheet is from sketches supplied by Capts Hadow, Wilson & Pearson, adjusted to Capt. Pearson’s astronomical observations. Latitude at Agag is by Capt Coningham. 1918 Corrections are by Capt Heinekey & Messrs Davies & Bence Pembroke. 1919 Ed NE portion of the sheet readjusted to 1/250,000 Surveys and other corrections and additions by Capt Marshall. 1920 Corrections by Messrs Davies and Dupuis.”

<sup>1510</sup> See below at paras. 1260.

<sup>1511</sup> Sudan Intelligence Report, No. 178, dated May 1909, at p. 17, **Exhibit-FE 18/2**.

<sup>1512</sup> Witness Statement of G. Michael Tibbs, p. 5, ¶22.

1922 (the “1922 Abyor Map”). This map is at **Map 86** of the SPLM/A Supplemental Map Atlas. The map is named “*Abyor*,” derived from the name of the Paramount Chief lineage.<sup>1513</sup>

1248. The map provides additional information, updating previously maps in the series:

- a. Burakol is now renamed “*Abyor (Sultan Kwol)*” and is placed in exactly the location of Abyei town;
- b. Kuol Arop’s resthouse at Abyei is clearly marked;
- c. a ford is marked at a crossing on the Kiir/Bahr el Arab immediately south of Abyei town;
- d. a number of additional Ngok Dinka settlements are recorded, including “*Kolakaj*”, “*Noong*” (which the oral evidence indicates was the second home of Paramount Chief Deng Majok in the 1940s to 1960s), “*Makeir*,” “*Koleiyit*,” “*Andab*,” “*Ideira*,” “*Waiyangwam*,” “*Abeimangwi*,” “*Maleigurbil*,” “*Koladur*,” “*Wunabil*” and “*Aigel*”; and
- e. the sole record of Arab presence is the seasonal grazing route of the Aulad Kamil.

(xxiii) Anglo-Egyptian 1:250,000 Series – 1919  
Fishnik *corrected* 1922 (Sheet 65-G)

1249. The Survey Office at Khartoum compiled and printed the “Anglo-Egyptian Sudan, Africa, Fishnik, Sheet 65-G,” Survey Office Khartoum,” in 1919, corrected April 1922 (the “1919 (corrected 1922) Fishnik Map”). This map is at **Map 87** of the SPLM/A Supplemental Map Atlas.

1250. Above 10°35 N latitude, the seasonal grazing area of the Arab tribe “Ageira” is marked. Other than that there is no reference to the presence of any Misseriya (or Homr) in this area called “Dar Homr”, below 10°35 N latitude. The map identifies several additional Ngok settlement places, including at “*Dawas*” and “*Tebeldia*.” Even by the time this map was prepared – in April 1922 – the Ngol/Ragaba ez Zarga is marked as being “*unsurveyed*.” It is therefore unsurprising that many Ngok Dinka settlements in the area remain unrecorded.

(xxiv) Anglo-Egyptian 1:250,000 Series – 1922  
Ghabat el Arab (Sheet 65-L)

1251. The 1922 Ghabat el Arab map (Sheet 65-L) was published by the Survey Office, Khartoum, in March 1922 (“1922 Ghabat el Arab Map”). The map contains some additional detail, beyond that in the 1914 version of this sheet, including additional Ngok Dinka villages on the northern banks of the Kiir/Bahr el Arab and two further ferry crossings over the Kiir/Bahr el Arab marked to the west of “*Sult Rob’s old vill.*”

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<sup>1513</sup> See SPLM/A Memorial, at paras. 122 and 176.

(xxv) Anglo-Egyptian 1:250,000 Series – 1925  
Ghabat el Arab (Sheet 65-L)

1252. The 1925 Ghabat el Arab map (Sheet 65-L) was published by the Survey Office, Khartoum, in December 1925 (“1925 Ghabat el Arab Map” included at **GoS Map 21**).<sup>1514</sup> The 1925 Ghabat el Arab Map contains the following additional information as to Ngok presence in the southwest part of the Abyei region:

- a. a village marked “*Sultan Arob’s Old Village*” is clearly on the north of the Kiir/Bahr el Arab;
- b. various ferry crossings and /or fords are marked along the Kiir/Bahr el Arab and to the immediate west of Abyei is the description that “[t]he Bahr el Arab here narrow, winding and choked with weeds;” and
- c. numerous other Ngok settlements and dugdugs are marked throughout the area, particularly to the north of the Kiir/Bahr el Arab, including at El Mahafir, Um Seggan, El Khardud and Um Geren.

(xxvi) Anglo Egyptian 1:250,000 Series –  
1925 Lake Keilak Map (Sheet 65-H)

1253. The 1925 Lake Keilak map (Sheet 65-H) was published by the Survey Office, Khartoum, in October 1925 (“1925 Lake Keilak Map”). The map is included at **Map 90** in the SPLM/A Supplemental Map Atlas. No new source of information is referenced in relation to the area falling into the Abyei region to the southwest.

1254. Nevertheless, there is a new recording of cultivation near “*Subu Well*,” located toward the north of the Abyei area, just below latitude 10°15 N. As the nomadic Misseriya did not cultivate to any meaningful extent<sup>1515</sup> and as this map predated the British cotton growing program in southwest Kordofan, this could only be a Ngok cultivation site.

(xxvii) Anglo-Egyptian 1:250,000 Series – 1929  
Ghabat el Arab (Sheet 65-L)

1255. The 1929 Ghabat el Arab map (Sheet 65-L) was published by the Survey Office, Khartoum, in November 1929 (“1929 Ghabat el Arab Map”). A copy of the map is reproduced at **Map 92** in the SPLM/A Supplemental Map Atlas.<sup>1516</sup>

1256. This latest iteration of the Ghabat el Arab map contains confirmed latitude fixings which show that “*Sultan Arob’s old villages*” (plural) were all located north of the Kiir/Bahr el Arab. The 1929 Ghabat el Arab map also records a number of Ngok Dinka “*dugdugs*” and settlements located north of the Ngol/Ragaba ez Zarga, specifically at El Kheil, El Harr, Umm Suneina, Kweik es Sobhi, Kweik esh Shaib and Umm Qurein. Only a small number of temporary Arab feriks are marked, including that of “Nazir Nimr Ali Julla” at “Angwol.”

<sup>1514</sup> As with the 1925 Twij Dinka Map, the 1925 Ghabat Al Arab Map includes additional information compiled from “Major Titherington’s surveys and route sketches adjusted to Mr Woolcott’s fixed positions in Bahr el Ghazal.”

<sup>1515</sup> See SPLM/A Memorial, at paras. 234-237.

<sup>1516</sup> As with the 1929 Ghabat Al Arab Map confirms that “[t]he topography of this sheet is based on Coningham and Lloyd’s latitude fixings of Fagai, Hasoba and Sultan Arob, Raqaba ez Zarga etc. and is supplied by Capts. Whittingham, Percival, Wilkinson, Stubbs and Roberts and Messrs Davies, Dupuis, Tabor and Blackley, and Maj Titherington.”



(This map also contains an additional (and new) legend describing a “wot” as the “Site of cattle camp. There is always water there and it is slightly raised ground generally fairly dry.”)

(xxviii) Anglo Egyptian 1:250,000 Series – 1931  
Dar Homr Map (Sheet 65-G)

1257. The 1931 Dar Homr map (Sheet 65-G) was published by the Survey Office, Khartoum, in June 1931 (“1931 Dar Homr Map”). A copy of this map is reproduced at **Map 93** in the SPLM/A Supplemental Map Atlas.<sup>1517</sup>

1258. The Misseriya are recorded to the far north; the label “**H U M R**” is placed above 10°32 N latitude, roughly on a level with Tebeldia. No temporary Arab feriks are recorded below that line.

(xxix) Anglo-Egyptian 1:250,000 Series – 1931  
Abyei Map (Sheet 65-K)

1259. The Survey Office at Khartoum compiled and printed the “Anglo-Egyptian Sudan, Africa, Abyei, Sheet 65-K,” Survey Office Khartoum,” in August 1931 (the “1931 Abyei Map”). The 1931 Abyei map is the first time that sheet 65-K in the Anglo-Egyptian 1:250,000 Series is labelled “**Abyei.**” A copy of the map is reproduced at **Map 94** in the SPLM/A Supplemental Map Atlas.

1260. Abyei town is described as “**Abyei (Chf. Kwol Arob)**”, and “**En Na’am**” – an acknowledged Ngok settlement – is described as a “dugdug,” confirming that the British recorded permanent Dinka cattle enclosures (*luaks*) as dugdugs, as opposed to temporary cattle camps. Various of the previously recorded Ngok settlements are marked with a “w”, indicated that these were “wots,” or cattle camps, as described at paragraph 1245 above. These were Ngok cattle camps, rather than Misseriya feriks; in contrast, an Arab ferik near Bilail Beida is marked as such (“(Nazir’s Fariq 1928)”).

(xxx) Anglo-Egyptian 1:250,000 Series – 1936  
Abyei Map (Sheet 65-K)

1261. The Survey Office at Khartoum compiled and printed the “Anglo-Egyptian Sudan, Abyei, Sheet 65-K,” Survey Office Khartoum,” in March 1936 (the “1936 Abyei Map” included as **Map 52**).<sup>1518</sup> The 1936 Abyei Map again records a large number of Ngok Dinka settlements throughout the map area. It also records the sites of “Nazir’s Fariq” in 1932 (in the northeastern corner) and in 1933 (further south at Lukji). No other Homr and/or Misseriya presence is recorded.

1262. A number of bridges and fords are labelled at crossings at the various rivers throughout the western regions of the Bahr, including at Abyei, Gungawi Bridge, and Andal Bridge. For the first time, the Sheet 65-K map records the tomb of the paramount Chief Alor Monydhang at Mijok Alor (marked close to “Saheib” on the map). The map also names a

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<sup>1517</sup> In a notation on the map, Commander Whitehouse is said to have provided additional “fixings of Dawas and Muglad”, to which the information earlier provided has been adjusted.

<sup>1518</sup> **Map 52** (*Abyei: Sheet 65-K*, Survey Office Khartoum, 1936); **Map 52a** (*Abyei: Sheet 65-K*, Survey Office Khartoum, 1936 – Detail).

number of Ngok Dinka villages along the west of the Kiir/Bahr el Arab, including “*Kolading*” and “*Majok*.”

(xxx) Anglo Egyptian 1:250,000 Series – 1936  
Ghabat El Arab Map

1263. The Survey Office at Khartoum prepared the “Anglo-Egyptian Sudan, Ghabat El Arab, Sheet 65-L,” Survey Office Khartoum,” in June 1936 (the “1936 Ghabat El Arab Map” included as **Map 54**).<sup>1519</sup> On the 1936 Ghabat El Arab Map, there is more detail around the rivers than on previous maps, but large tracts of country (sometimes described as uninhabited) remain unsurveyed.

1264. According to the legend, cattle enclosures are marked on this map with the letter “m”; as discussed elsewhere, the Ngok Dinka kept their cattle in permanent cattle byres (*luaks* or *dugdugs*) at their settlements, but the Misseriya did not.<sup>1520</sup> Throughout the area between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, a multitude of cattle enclosures are marked. Similarly, the legend in the body of the map (in the upper right hand corner) on the 1936 Ghabat El Arab Map explains that a “*dugdug*” is a “*Dinka cattle camp*.”<sup>1521</sup> Large numbers of “*dugdugs*” are marked throughout the entire Abyei region, including between the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga and above the Ngol/Ragaba ez Zarga.

(xxxii) Native Administrations of Kordofan  
Province Map – 1941

1265. The GoS makes some effort in its Memorial to explain away a Sudan Government map from 1941 which shows the “Native Administrations of Kordofan Province” (included as **GoS Map 27**). The GoS acknowledges that this map is not the area that the parties agreed to adopt as the “Abyei Area” for the purposes of the CPA: “if the Parties had wished the Abyei LGA to count as the relevant area, they would have said so in terms – avoiding the need for historic inquiry.”<sup>1522</sup>

1266. In fact, as can clearly be seen from the ABC Experts’ findings and the evidence submitted by the SPLM/A, the Local Government Administration area of Abyei is less than half of the total land area occupied and used by the Ngok Dinka in 1905. The reason that the GoS is concerned about the content of the Local Government Administration map is because it starkly contradicts its position that the Ngok Dinka were located below the Kiir/Bahr el Arab. This is plainly not the view of the Sudan Government for native administrative purposes in 1949 (even influenced as it would have been by a heavy Northern Arab lobby, arguing that none of the southern Sudanese should be entitled to any native administration at all).

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<sup>1519</sup> **Map 54** (*Ghabat El Arab: Sheet 65-L*, Survey Office Khartoum, 1936); **Map 54a** (*Ghabat El Arab: Sheet 65-L*, Survey Office Khartoum, 1936 – Detail).

<sup>1520</sup> See SPLM/A Memorial, at paras. 206-216, 249-254. See also Cunnison, “*Humr and their Land*,” 35(2) SNR 50, 55 (1954) (The “building of Dinka-type byres do[es] not suit the desire of the Arabs for flexibility of movement .... Nomadism is the only way of life to which they are attuned, and they are masters of it.”), **Exhibit-FE 4/5**.

<sup>1521</sup> This is also contained in the Witness Statement of G. Michael Tibbs, p. 5, ¶22.

<sup>1522</sup> GoS Memorial, at para. 213(d).

(xxxiii) Lienhardt Map - 1961

1267. The final paragraphs of the Government's Memorial refer to a map produced by Lienhardt, supposedly to demonstrate that "the Ngok occupy only a small sector of south-eastern Kordofan."<sup>1523</sup> Lienhardt produced the map cited by the Government in connection with his 1952 doctoral thesis titled "*The Dinka of the Southern Sudan*."<sup>1524</sup> The Government's reliance on Lienhardt and his map is entirely misconceived.

1268. Lienhardt was neither a geographer nor a cartographer.<sup>1525</sup> He spent his career studying social anthropology and sociology.<sup>1526</sup> Moreover, his studies had nothing to do with the Ngok Dinka, and concerned other tribal groups.

1269. Lienhardt spent "most of [his] time among the Rek group, but extended [his] knowledge of the tribes of that group, and further visited the Western Tuic Dinka of the Bahr-el-Ghazal Province" and subsequently "the Rek" again, "the Agar, and the Bor, Tuic and Nyarreweng Dinka of the west bank of the Nile."<sup>1527</sup> No mention is made by Lienhardt in any of his works of the Ngok Dinka.

1270. Lienhardt did not, in fact, ever visit the Ngok Dinka. He did so deliberately, explaining his view that it was better to have a deep understanding of a few areas than a superficial understanding of many.<sup>1528</sup> Lienhardt stated that made "no attempt to see every part of Dinkaland" and for groups such as the Ngok, whom he did not visit, he relied on opportunities where he "met and talked with Dinka." That is not a serious basis to reach conclusions about where the Ngok Dinka lived in 1905, nor to draw an authoritative map.

1271. Following Lienhardt's death, Francis Deng and Zachariah Bol Deng, both sons of Paramount Chief Deng Majok of the Ngok Dinka, paid tribute to him. Zachariah Bol Deng describes meeting Lienhardt "in the early 1960s when [he] was working as a junior doctor in south London."<sup>1529</sup> Francis Deng explained that "Lienhardt did his fieldwork among the Rek Dinka in Bahr-el-Ghazal, *quite distant from our area of the Ngok Dinka*" and so he had "not met him or heard of him until 1962 when [Francis Deng] was a graduate student in London."<sup>1530</sup> Lienhardt did not even meet his two closest and knowledgeable Ngok contacts until 10 years after he had produced the tribal map in his thesis.

1272. In summary, at the time of drawing his sketch map, Lienhardt had no personal or even directly relevant secondary experience of the Ngok Dinka or their territory. Nor did Lienhardt purport to discuss the Ngok Dinka in his research or writing. Consequently, his tribal map, cited by the Government, cannot seriously be considered to be a credible or reliable source.

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<sup>1523</sup> GoS Memorial, at para. 395.

<sup>1524</sup> Lienhardt, *The Dinka of the Sudan*, Exeter College, Oxford, D. Phil. Thesis, presented in May 1952, at p. iii, **Exhibit-FE 18/19**.

<sup>1525</sup> As the Government acknowledges, Lienhardt conducted his "field work [in Sudan] on Dinka religion." GoS Memorial, at para. 395.

<sup>1526</sup> Al-Shahi, "Ronald Godfrey Lienhardt, 1921-1993 Biographical Notes and Bibliography" in 28 Journal of the Anthropological Society of Oxford v. 1, 8-9 (1997), **Exhibit-FE 19/1**.

<sup>1527</sup> Lienhardt, *The Dinka of the Sudan*, Exeter College, Oxford, D. Phil. Thesis, presented in May 1952, at p. 1, **Exhibit-FE 18/19**.

<sup>1528</sup> Lienhardt, *The Dinka of the Sudan*, Exeter College, Oxford, D. Phil. Thesis, presented in May 1952, at p. 2, **Exhibit-FE 18/19**.

<sup>1529</sup> Deng, "Thienyeng" 28 Journal of the Anthropological Society of Oxford v. 1, 119 (1997), **Exhibit-FE 19/1**.

<sup>1530</sup> Deng, "Debt to Godfrey Lienhardt" in 28 Journal of the Anthropological Society of Oxford v. 1, 109 (1997), **Exhibit-FE 19/1**.

1273. In sum, the cartographic evidence demonstrates beyond any shadow of a doubt that the Ngok Dinka were not confined to territory beneath the Kiir/Bahr el Arab in 1905, as the Government now pretends. On the contrary, more than 25 different maps produced between 1860 and 1930 consistently show the Ngok Dinka territory as extending throughout the Bahr region, centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga; conversely, all of these maps place the Misseriya to the north of the *goz*, in the Muglad and Babanusa regions. In contrast, only a single aberrant and obviously confused map (Comyn in 1907) provides even arguable support for the Government's position. Like the documentary record, the cartographic evidence could not be clearer.

4. The Government Ignores A Highly Probative Body of Witness Testimony, Oral Traditions and Environmental Evidence Which Flatly Contradict Its Claim that the Ngok Dinka Did Not Occupy Territory North of the Kiir/Bahr el Arab

1274. The Government's Memorial does not merely misinterpret and distort the documentary and cartographic evidence. In addition, the Government ignores other relevant categories of evidence, which bear importantly on the respective locations of the Ngok Dinka and Misseriya in 1905. In particular, the Government's Memorial does not attach or address any witness evidence of fact (aside, arguably, from the witness statement of Cunnison, who lived with one section of the Misseriya in the 1950s). The Government also does not (save in passing) consider either the oral traditions of the Ngok Dinka or the Misseriya or the relevant environmental and cultural evidence.

1275. It is striking that the Government attempts to present a case that ignores the inhabitants of the Abyei Area. Assuming that it is not motivated by ambush-style litigation tactics, the Government's approach to the evidentiary record which is relevant to determining the locations of the Ngok Dinka and the Misseriya is remarkable. It is both inordinately defensive and produces an artificial and unrealistic view of the factual circumstances of both the Ngok Dinka and, ironically, the Misseriya.

1276. Preliminarily, this is a case where the documentary record is not so complete or detailed that one can conclude that witness and other forms of evidence are necessarily irrelevant. Rather, as discussed in detail above, the documentary record from the time in question (1905) is subject to non-trivial limitations, making other forms of evidence particularly useful and appropriate.<sup>1531</sup>

1277. Given these limitations, and as Professor Daly concludes, it is both legitimate and important to consider evidentiary materials other than the pre-1905 Condominium records.<sup>1532</sup> Although other sources of evidence have limitations, they are useful and essential to supplement a documentary record. Indeed, given these limitations, it is essential that witness evidence and other forms of non-documentary evidence be considered.

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<sup>1531</sup> See above at paras. 1062-1067.

<sup>1532</sup> Daly Supplemental Expert Report, at pp. 3-4.

- a) The Government Ignores Witness Testimony Demonstrating That in 1905 the Ngok Dinka Used and Occupied the Territory Extending North of the Current Bahr el Ghazal/Kordofan Boundary to Latitude 10°35'N

1278. The Government's Memorial attaches no factual evidence from witnesses (save, arguably, for Professor Cunnison's recollections of his experiences in the 1950s). This is a remarkable omission, given the limitations of the documentary record.

- (1) The Importance of Witness Evidence in the Current Circumstances

1279. It bears emphasis that the relevant time period – the first decade of the 20<sup>th</sup> century – is properly the subject of credible witness testimony. To be sure, the witnesses do not include individuals who personally experienced the events of 1905. Nonetheless, the witnesses are able to – and do – describe basic aspects of daily life and community affairs from the first decade of the 20<sup>th</sup> century as reported to them by their parents, relatives and tribal elders.<sup>1533</sup>

1280. Moreover, and more generally, the locations of the Ngok Dinka and the Misseriya in the years following 1905 are probative of these peoples' location in 1905, with the earliest years following 1905 being most probative. That conclusion was specifically adopted by the ABC Experts<sup>1534</sup> – whose expertise in Sudanese history has not seriously been challenged by the Government. The same conclusion is confirmed by Professor Daly, who concludes:

[t]he collected SPLM Witness Statements regarding Ngok land use and settlement make a powerful impression, which a critical reading of the documentary record does nothing to diminish. The GoS Memorial, by contrast, provides neither supporting witness testimony by Sudanese, nor documentary evidence, contradicting the

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<sup>1533</sup> This is explained in the witness testimonies. For example, the Witness Statement of Weiu Dau Nguth (Mareng elder), p. 2, ¶5 (“I learned the areas of the Mareng chiefdom from my father, and his father told him. We did not have documents, so the oral history that is passed down from father to son is very important. For the Ngok, when you are young you learn the settlements of your chiefdom place by place in this way...”); Witness Statement of Malual Alei Deng (Mareng elder), p. 2, ¶5 (“What I know of our traditional lands I learned from my elders, especially my father, who learned it from my grandfather. My grandfather, Deng Luol, used to be a translator for the Ngok Dinka Paramount Chief Arop Biong... When my grandfather was young my grandfather was abducted and grew up with the Arabs. This was either prior to or during the Mahdiyya. He even took a wife up there and had three children. My grandfather then returned to the Abyei area and became a translator for Arop Biong whenever the Paramount Chief wanted to engage with the Arabs, send a Ngok Dinka delegation to talk to them, or receive them in our lands. My father would tell me stories of my grandfather's time with Arop Biong. I recall that he said my grandfather played a role in talks between Arop Biong and the Misseriya leader, Azoza. My father told me that in the time of Azoza the Misseriya were not grazing in our lands, but my grandfather did translate for discussions between Azoza and Arop Biong regarding matters of security. I was told that during this period there was raiding of lands. Azoza and Arop Biong met to resolve this. Azoza told my grandfather that his few cattle (used mostly for milk and transport) had no place to go during the dry season for food and he feared going into Ngok Dinka land with them. Arop Biong gave Azoza permission to come onto Ngok lands.”); Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyeil), p. 3, ¶17 (“My elders have told me that it was in the mid-1950s that Misseriya first began travelling to the Anyiel lands. They were just traders then. Before this time I have heard stories of the Rizeigat coming, but not Misseriya. My great-grandmother composed a song about how my own grandfather, who was a boy at the time, was captured by the Rizeigat at a place south of River Kiir. The Ngok Dinka then fought the Rizeigat. My grandfather was released after 2 or 3 days.”); Witness Statement of Kuol Lual Deng Akonon (Mareng elder), p. 2, ¶8 (“Initially, the Mareng lived at Panjang under Chief Kuol Bagat, and the chief is buried there. Under Chief Lual Kuol, the Mareng moved to Ajith Lual. Lual Kuol died and is buried at Ajith Lual. The place was named after him. Ajith means chicken. When our people move to a new place we often slaughter an animal like a goat. On the way from Panjang to Ajith Lual, the Nuer robbed them of their cattle in the Ngol area. When Lual Kuol and his people arrived at Ajith, all they had was a chicken. So they slaughtered it. This is how it got its name.”).

<sup>1534</sup> ABC Report, Part I, at pp. 18-19, **Appendix B to SPLM/A Memorial**.

proposition of continuous Ngok habitation after 1905 of the area occupied by the Nine Ngok Chiefdoms at the time of the transfer.<sup>1535</sup>

1281. As discussed above, the general proposition that the traditional homelands of the Ngok and the Misseriya would not be substantially changed in the four or five decades following 1905 is also corroborated by the policy of the Condominium in southern Sudan during this period. In particular, the Anglo-English administrators adopted a policy (discussed in the SPLM/A Memorial) of leaving most matters of governance to local authorities, at the same time that the Condominium authorities generally ensured security and transportation, industrial or other changes.<sup>1536</sup> As noted in 1931 by the District Commission, Western Kordofan, to the Governor of Kordofan “*I understood it is the policy to exclude the Dinka from Arab influence.*”<sup>1537</sup>

1282. In these circumstances, the factual testimony of witnesses becomes all the more important. Although 1905 is beyond most direct living memories, the events of 1920, 1930 and subsequent dates are plainly not. And, given the continuity of their settlements and lifestyles, the locations of the Ngok and the Misseriya during these later periods bears importantly on the locations of the Ngok and the Misseriya in 1905.

1283. It was for these reasons that the Government and the SPLM/A went to very substantial lengths during the ABC proceedings to arrange for witness testimony. As discussed in the SPLM/A Memorial, more than 125 witnesses were heard by the ABC Experts, including in the Abyei Area.<sup>1538</sup> Additionally, as discussed above, the parties’ agreements guarantee that the “Commission members should have free access to members of the public other than those in the official delegations at the locations to be visited.”<sup>1539</sup>

1284. These provisions, which entailed considerable expense, effort and delay, were adopted precisely because both the Government and the SPLM/A considered the witness testimony to contribute important information to the factual record. That is also the reason that both the Government and the SPLM/A proceeded to implement these provisions.

1285. Indeed, during the ABC proceedings themselves, the Government cited the witness testimony as bearing importantly on the locations of the Ngok Dinka and Misseriya. In the GoS’ Final Presentation to the ABC on 16 June 2005, the Government’s presentation slides clearly treated the Misseriya and Ngok witness testimony as an integral part of the presentation to the ABC. On a slide titled “Relevant Testimonies,” the GoS included a what it termed “*Relevant Messeriya Testimonies*” and “*Relevant Ngok Dinka Testimonies.*”<sup>1540</sup>

1286. When presenting these slides, Ambassador Dirdeiry confirmed that the GoS regarded at least some of the verbal testimonies from the Abyei field visits as a “*very important and relevant part of the story.*”<sup>1541</sup> For example:

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<sup>1535</sup> Daly Supplemental Expert Report, at p. 4.

<sup>1536</sup> SPLM/A Memorial, at paras 259-365; *see above* at paras 929-930. Witness Statement of G. Michael Tibbs, pp. 2-3, ¶¶10-14, 21, 26.

<sup>1537</sup> Letter dated 9 August 1931, **Exhibit-FE 18/10**.

<sup>1538</sup> SPLM/A Memorial, at paras. 730(c), 864, 1018

<sup>1539</sup> ABC RoP, Art. 7, **Appendix F to SPLM/A Memorial**. *See also* Witness Statement of Minister Deng Alor Kuol, at p. 15, ¶89.

<sup>1540</sup> GoS Final Presentation to the ABC, dated 16 June 2005, at p. 13, **Exhibit-FE-14/18**.

<sup>1541</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 1, at p. 2, **Exhibit-FE 19/15**.

a. “Mr. Chairman, while we were in Abyei, we had in fact been there *according to verbal testimonies*, told that there were so many tombs in the area. But in Abyei Town unanimously we had been told that there were only three tombs. The two tombs which we had visited and the third tomb of Deng Abot of which we did not visit. *This is telling us Mr. Chairman of very important and relevant part of the story.*”<sup>1542</sup>

b. “Those testimonies were presented Mr. Chairman on oath by people who are very much knowledgeable about what they have said, yes, it may be some of them were not or most of them were not relevant to what you are doing, *but I think there are a very few which were relevant should be definitely considered.*”<sup>1543</sup>

c. “*The relevant Ngok Dinka testimonies – first the fact that Abyei Town was not mentioned within the Ngok settlements during the Mahdiyya is also very important.* The question posed by you, your Excellency, to the Ngok Dinka was that where your people were settling during the Mahdiyya and they mention so many places, but they never mentioned Abyei. This is *very much relevant.* They never mentioned Abyei. Within the places of their permanent settlements and this is indicating also confirming what we have said earlier on and also telling us that Abyei town was established very late. *The second testimony which was also relevant according to our assessment was that they are not sure whether Abyei Town was ever part of Bahr el Ghazal or not....* This I think is something that you can draw from also some useful conclusions Mr. Chairman.”<sup>1544</sup>

1287. In these circumstances, the Government’s failure to address the witness testimony before the ABC, or to offer additional witness testimony, omits a significant aspect of the factual record. That aspect of the record was before the ABC and bears importantly on the issues in dispute.

- (2) The Witness Testimony Demonstrates that in 1905 the Ngok Dinka Used and Occupied the Territory Extending North of the Current Bahr el Ghazal/Kordofan Boundary to Latitude 10°35’N

1288. The witness evidence is addressed in detail in the SPLM/A Memorial and in the accompanying 26 witness statements by members of the nine Ngok Dinka Chiefdoms. Owing to the manner in which the Government has presented its case, there is presently no witness evidence in the record that contradicts the 26 Ngok Dinka witness statements – notwithstanding the fact that it is the Government that is purportedly seeking to overturn the ABC Report.

1289. For the avoidance of doubt, the SPLM/A reserves its procedural rights in the event that the Government chooses to introduce, for the first time, witness evidence with its Reply Memorial. The Government had the obligation to submit such evidence in support of its case together with its Memorial, particularly given its position of challenging the ABC Report.

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<sup>1542</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 1, at p. 2, **Exhibit-FE 19/15.**

<sup>1543</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 1, at p. 3, **Exhibit-FE 19/15.**

<sup>1544</sup> Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 1, at p. 3, **Exhibit-FE 19/15.**

Insofar as the Government has elected for tactical reasons, and in order to preclude the SPLM/A from submitting rebuttal witness evidence, the SPLM/A reserves its procedural rights.

1290. It is notable that, having heard the Ngok Dinka and Misseriya witnesses, the ABC Experts concluded that the Ngok Dinka evidence was “*detailed and extensive*” and that “representatives of each of the nine chiefdoms were able immediately *to give detailed accounts of their territory, both permanent villages and seasonal grazing areas, when asked*.”<sup>1545</sup> The quality of the Ngok Dinka witness evidence contrasted with what the ABC described as the “*sparse details given by Misseriya witnesses*.”<sup>1546</sup>

1291. Whether or not the Government submits witness evidence together with its Reply Memorial, it is difficult to avoid the conclusion that the Government chose not to present Misseriya witnesses because their testimony would (again) be transparently inadequate. That is the most credible explanation for the Government’s omission of a central aspect of the factual record in this case.

1292. The 26 Ngok Dinka witnesses who have given evidence in this proceeding include:

- a. the current Paramount Chief of the nine Ngok Dinka Chiefdoms, Kuol Deng Kuol Arop and the nine chiefs from each of the nine Ngok Dinka Chiefdoms (specifically, Kuol Alor Makuac Biong (Abyior), Nyol Pagout Deng Ayei (Bongo), Mijak Kuol Lual Deng (Mareng), Chol Por Chol (Achaak), Bagat Makuac (Manyuar), Ajak Malual Beliu (Achueng), Akonon Ajuong Deng Tiel (Anyiel), Arop Kuol Kwon (Diil), Belbel Chol Akuei Deng (Alei));
- b. 14 elders from the Ngok Dinka Chiefdoms (specifically, Alor Kuol Arop (Abyior elder), Deng Chier Agoth (Abyior elder), Mijak Biong Jieny (Bongo Sub-Chief and elder), Chor Deng Akouon (Mareng elder), Wieu Dau Nguth (Mareng elder), Kuol Lual Deng Akonon (Mareng elder), Malual Alei Deng (Mareng elder), Mijak Kuot Kur (Achaak elder), Ring Makuac Dhel Yak (Achaak Executive Chief and elder), Adol Kuot Malual (Manyuar elder), Jok Deng Kek (Achueng elder), Malok Mien Ayiek (Anyiel elder), Mijok Bol Atem (Diil elder), Peter Nyuat Agok Bol (Alei elder));
- c. a Ngok Dinka agriculturalist (Arop Deng Kuol Arop); and
- d. a Ngok Dinka woman (Nyankiir Chol Piok Bar).

1293. As discussed at length in the SPLM/A Memorial, the detail and consistency of the Ngok Dinka witness evidence, which recounts oral traditions regarding people, places and events for a period of more than a century, gives it particular weight and authenticity. Indeed, because of the limitations of the documentary record (discussed above),<sup>1547</sup> the testimony and oral traditions of the Ngok not only corroborate, but provide a more detailed and comprehensive description of the Ngok Dinka during the early 20<sup>th</sup> century (including their occupation and use of less accessible parts of the Abyei region) than is otherwise available.

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<sup>1545</sup> ABC Report, Part I, at p. 42, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>1546</sup> ABC Report, Part I, at p. 42, **Appendix B to SPLM/A Memorial**.

<sup>1547</sup> See above at paras. 919-932; SPLM/A Memorial, at paras. 908-912.



1294. As detailed in the SPLM/A Memorial, the witness testimony of the 26 Ngok Dinka Chiefs, elders and others is highly detailed and consistently places the nine Ngok Dinka Chiefdoms both south and north from Abyei town, inhabiting permanent villages throughout the area centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, and extending west to the current Kordofan/Darfur border with Darfur, north of Abyei town up to an approximate latitude of 10°35'N, north of Turda and toward Lake Keilak and east to approximately Miding [Arabic: Heglig] and Mardhok.

1295. Among other things, the evidence of Ngok witnesses from the Abyior, Alei, Achaak, Bongo, Mareng, and Manyar Chiefdoms all unequivocally confirm that their chiefdoms had permanent villages above the Ngol/Ragaba ez Zarga in 1905.<sup>1548</sup> Specifically:

a. The Chief of Abyior records “*The Abyior lands... extend up as far as Wun Deng Awak [Arabic: Umm Sakina] in the northwest and Rumthil [Arabic: Antilla] in the north*”<sup>1549</sup> and an elder states: “*I would go with cattle to Akot Tok, Mijong Alor, Thigei, Rumthil and up to the town called Dhony Dhoul (near Tebeliya), where I remember seeing Ngok settlements. Alor Kuol Chor, the father of Honorable Deng Alor, had a tukul there. This was the same for my father and grandfather. Also, before Tebeliya was a place where we would gather kol cum [Arabic: setep].*”<sup>1550</sup>

b. The Alei were settled in the north of the Abyei area, well above the Ngol/Ragaba ez Zarga. An elder of the Alei recalls “*the Alei moved to Thur (which the Arabs have now renamed Turda) and also to Nyama. The Alei made this move during the time of Paramount Chief Arop Biong and when Chol Lual was Paramount Chief of the Alei. In Nyama we had a good life as there was plenty of water, good crops and fishing. Nyama was so named because there was an abundance of fish, so the people could eat only the tastiest part, the gills (nyam), and leave the rest of the fish head behind.*”<sup>1551</sup>

c. The permanent villages of the Achaak were above the Ngol/Ragaba ez Zarga, thus an elder states “*When the British came the Achaak were at Nyama, Ruba, Kol Lang... Ajaj, Pawol, Mardhok and Miding. This was during the time of Arop Biong... We were permanently forced from these places in 1963.*”<sup>1552</sup> The Achaak also locate Achaak villages further north at Michoor,<sup>1553</sup> Niag<sup>1554</sup> and Nyadak Ayueng.<sup>1555</sup>

d. Bongo were also located above the Ngol/Ragaba ez Zarga: “*Permanent settlements of the Bongo in the upper Ngol [north of the Ngol/Ragaba ez Zarga] included Payai, Bakura, Pac-ayir and Wun Lual Deng (named after the tribe of the*

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<sup>1548</sup> SPLM/A Memorial, at paras 1022-1033. This is depicted on **Map 14** (Abyior Chiefdom, 1905), **Map 17** (Alei Chiefdom, 1905), **Map 15** (Achaak Chiefdom, 1905), **Map 19** (Bongo Chiefdom, 1905), **Map 22** (Mareng Chiefdom, 1905), **Map 20** (Dill Chiefdom, 1905), and **Map 21** (Manyar Chiefdom, 1905),

<sup>1549</sup> **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶12; Witness Statement of Deng Chier Agoth (Abyior elder), at p. 4, ¶¶9, 21.

<sup>1550</sup> **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Deng Chier Agoth (Abyior elder), at pp. 2-3, ¶9.

<sup>1551</sup> **Map 17** (Alei Chiefdom, 1905). Witness Statement of Peter Nyuat Agok Bol (Alei elder and sub-chief), at p. 2, ¶8 (emphasis added).

<sup>1552</sup> **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 3, ¶¶10-11 (emphasis added).

<sup>1553</sup> Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶14.

<sup>1554</sup> Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶11.

<sup>1555</sup> Witness Statement of Mijak Kuot Kur (Achaak elder) at p. 3, ¶11.

**Lual area**). These areas are east of Dakjur and not far from Ajaj, where there would be mingling between Bongo, Alei and Achaak. There were not border lines between us. These were all permanent settlement places of the Bongo during my father's and grandfather's time."<sup>1556</sup>

e. The Mareng also had settlements north of the Ngol/Ragaba ez Zarga River at Nyama<sup>1557</sup> and near to Nyama at Ruba,<sup>1558</sup> Thur<sup>1559</sup> and Kaba.<sup>1560</sup>

f. Manyuar were located at Thuba, south of Nyama but well above the Ngol/Ragaba ez Zarga: "I was born in the early 1940s... **My grandfather was born in Thuba and lived there until he was a man.** I have been told that my grandfather was initiated in Thuba."<sup>1561</sup>

1296. Ngok Dinka from the Abyior, Alei, Achaak, Bongo, Mareng, and Manyuar Chiefdoms also locate their relatives' birthplaces in villages north of the Ngol/Ragaba ez Zarga,<sup>1562</sup> and locate their relatives' burial sites in the same region.<sup>1563</sup> In particular:

a. Abyior elder Deng Chier Agoth's grandfather was born near to Meiram [Dinka: Kol Arouth] in the late 1800s.<sup>1564</sup>

b. The father and grandfather of the current Chief of the Achaak were born in Miding [Arabic: Heglig]: "**It is the traditional seat of our family.**"<sup>1565</sup> The Executive Chief and elder of the Achaak, Ring Makuac Dhel Yak, was born in the traditional Achaak settlement of Dakjur in the 1940s, and his grandfather and great-grandfather

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<sup>1556</sup> **Map 19** (Bongo Chiefdom, 1905). See Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶10 (emphasis added).

<sup>1557</sup> **Map 22** (Mareng Chiefdom, 1905). See Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶6; Witness Statement of Malual Alei Deng (Mareng elder), at p. 2, ¶¶3, 7, 8; Witness Statement of Alor Kuol Arop (Abyior elder), at p. 2, ¶10 ("We would graze to Nyama (which was a permanent Ngok settlement of the Mareng, Manyuar, Achaak and Bongo)... The Abyior of my father's age and my grandfather's age would also use this grazing route and meet the same settlements of the Ngok Dinka."); Witness Statement of Chor Deng Akouon (Mareng elder), at p. 2, ¶¶5, 6 (commenting on Ngok settlements in the 1940s-1960s. "I had about eight *luaks* (cattle byres) near Nyama in the Ngol area" and "Nyama ... These were sites with Ngok Dinka settlements, where we would let the Misseriya graze their cattle in the dry season."); Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2, ¶¶7-8 ("We [Manyuar] considered Nyama for Alei and also Mareng... Nyama was an important settlement for the Ngok. We lived in these places during the time of the Ngok Paramount Chiefs Biong Alor and Arop Biong. My grandfather was alive during the time of both Paramount Chiefs. During the Mahdiyya we were pushed south from our places around Thuba by the Misseriya, who were supported by the Mahdi.") and at ¶9 ("My father was born in Mijak toward the end of the Mahdiyya. I know that the British came when my father was still young and not yet married. The Manyuar moved north around this time back to their villages... My father's generation all returned to our traditional lands to the north of Abyei town and up to Thuba. We all lived in our lands during my lifetime until we were displaced in the 1960s.").

<sup>1558</sup> **Map 21** (Manyuar Chiefdom, 1905). See Witness Statement of Malual Alei Deng (Mareng elder), at p. 2, ¶8.

<sup>1559</sup> **Map 21** (Manyuar Chiefdom, 1905). See Witness Statement of Malual Alei Deng (Mareng elder), at p. 2, ¶8.

<sup>1560</sup> Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶6; Witness Statement of Malual Alei Deng (Mareng elder), at p. 2, ¶8; Witness Statement of Chor Deng Akouon (Mareng elder), at p. 2, ¶¶5 and 9.

<sup>1561</sup> **Map 21** (Manyuar Chiefdom, 1905). See Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2, ¶¶4-5 (emphasis added).

<sup>1562</sup> SPLM/A Memorial, at paras 1035-1046.

<sup>1563</sup> SPLM/A Memorial, at paras 1047-1057.

<sup>1564</sup> **Map 14** (Abyior Chiefdom, 1905). See Witness Statement of Deng Chier Agoth (Abyior elder), at p. 2, ¶3.

<sup>1565</sup> **Map 15** (Achaak Chiefdom, 1905). See Witness Statement of Chol Por Chol (Chief of Achaak), at p. 2, ¶4 (emphasis added). Chief Chol Por Chol was born after the displacement of his family from its traditional seat, and at p. 2, ¶7 ("It is our will that this process will allow us to return to our homelands, the places of my father and grandfathers.").

were born in Miding [Arabic: Heglig] “*My grandfather and great-grandfather were born in Miding [Arabic: Heglig].*”<sup>1566</sup>

c. The current Bongo Chief was born in Mabek [Arabic: Abu Azala], north of the Ngol/Ragaba ez Zarga River. His father (also a Chief of the Bongo) and grandfather were born in Bakura, near to Puoth (all above the Ngol/Ragaba ez Zarga): “*My grandfather was born in Bakura sometime in the late 1800s.*”<sup>1567</sup>

d. An Alei elder recalls the birth of his father at Thur [Arabic: Turda]:

“My father was born in the Alei settlement of Thur [Arabic: Turda].... In Thur [Arabic: Turda] and Nyama there was conflict between the Alei and the Misseriya. The Alei chiefdom was a big wut (chiefdom), but during the time of the Mahdiyya the Misseriya obtained firearms and we could not defeat them. So we moved further southwards from Thur [Arabic: Turda] and Nyama and *settled in the Ngol in places like Pawol (or Fawal, west of Miding) and Dakjur.* When the British came and defeated the Mahdi, the Alei were then able to return to our homes in Nyama and Thur. This was also during the time of Arop Biong and my father must have been born around this time because he was born in Thur.”<sup>1568</sup>

The same elder’s grandfather was born between El Odayya and Muglad.<sup>1569</sup> The recent line of the Alei Chiefs were born in the Ngol/Ragaba ez Zarga area near Dakjur and Pandeng [Arabic: Bedheny].<sup>1570</sup>

e. Manyuar also locate birthplaces north of the Ngol/Ragaba ez Zarga, thus the grandfather of a current Manyuar elder was born in Thuba: “*My grandfather was born in Thuba and lived there until he was a man. I have been told that my grandfather was initiated in Thuba.*”<sup>1571</sup>

f. The grandfather of a Mareng elder was born at Kaba,<sup>1572</sup> which is above the Ngol/Ragaba ez Zarga.

1297. The evidence from the chiefs and elders of the Alei, Achaak, Bongo, Mareng and Manyuar also records that their Chiefdoms all had age-sets initiated in locations above the Ngol/Ragaba ez Zarga prior to 1905.<sup>1573</sup> Thus:

a. As noted above, the grandfather of a current Manyuar elder was initiated in Thuba,<sup>1574</sup> north of the Ngol/Ragaba ez Zarga.

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<sup>1566</sup> **Map 15** (Achaak Chiefdom, 1905). See Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶¶3-4.

<sup>1567</sup> **Map 19** (Bongo Chiefdom, 1905). See Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 2, ¶¶3-5.

<sup>1568</sup> **Map 17** (Alei Chiefdom, 1905). See Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2-3, ¶¶4, 9 and 10 (emphasis added).

<sup>1569</sup> Witness Statement of Peter Nyuat Agok Bol (Alei elder), at p. 2, ¶4.

<sup>1570</sup> **Map 17** (Alei Chiefdom, 1905). See Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶¶4-6.

<sup>1571</sup> **Map 21** (Manyuar Chiefdom, 1905). See Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2,

<sup>1572</sup> Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶3.

<sup>1573</sup> SPLM/A Memorial, at paras. 1058-1063.

<sup>1574</sup> See above at para 1297.

b. The Executive Chief of the Achaak corroborates the locations of Achaak age-set initiation sites north of the Ngol/Ragaba ez Zarga: “***My father and I were both marked at Dakjur [Arabic: Dembaloya]. My grandfather was marked in Panyang.*** Panyang is a one-day walk west of Pariang and these are both Achaak villages.”<sup>1575</sup>

c. Members of the Bongo Chiefdom were marked near the traditional seat of the Chief at Mabek [Arabic: Abu Azala] and in the Ngol area north of the Ngol/Ragaba ez Zarga: “***My father was initiated in Ameth Agouch just a few hours near to Mabek.*** I do not recall where my grandfather was marked but I believe that it was in Bakura or Payai which is southwest of Miding.”<sup>1576</sup>

d. The evidence of Alei age-sets is not comprehensive, but nonetheless confirms initiations on the Ngol/Ragaba ez Zarga at Dakjur<sup>1577</sup> (although given the Alei’s traditional villages around Nyama and Turda it is almost certain they would also have initiated in the vicinity of those places<sup>1578</sup>).

e. The father and grandfather of a current Mareng elder were initiated in Kaba: “I was initiated at Nyama, my age set is named Ngok. My father was initiated at Kaba, and his age set is named Anyantor. My grandfather was initiated at Kaba, his age set is named Miyen.”<sup>1579</sup>

1298. The Ngok witnesses also describe the wet season grazing patterns of the cattle camps from all of the nine Ngok Dinka Chiefdoms, which confirm use by the Ngok of extensive areas above the Ngol/Ragaba ez Zarga.<sup>1580</sup> This is illustrated by **Map 13** (Ngok Dinka Chiefdoms, 1905) and **Map 25** (Abyei Area: Grazing Patterns in the Wet Season).<sup>1581</sup>

1299. Further, the Ngok wet season grazing areas in 1905 extended to and beyond latitude 10°35’N.<sup>1582</sup> During the wet season, the Ngok cattle herders traveled with their cattle ***away*** from the Kiir/Bahr el Ghazal and Ngol/Ragaba ez Zarga river systems, to avoid the mud, flies and mosquitoes.<sup>1583</sup> The cattle were taken either toward and into the *goz*, running north from

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<sup>1575</sup> **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶5 (emphasis added).

<sup>1576</sup> **Map 19** (Bongo Chiefdom, 1905). Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 2, ¶5; Witness Statement of Mijak Biong Jieny (Bongo sub-chief), at p. 2, ¶3 (emphasis added).

<sup>1577</sup> **Map 17** (Alei Chiefdom, 1905). Witness Statement of Peter Nyuat Agok Bol (Alei elder), at p. 2, ¶3.

<sup>1578</sup> See above at paras 1295(b).

<sup>1579</sup> Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶4.

<sup>1580</sup> SPLM/A Memorial, at paras. 1064-1081.

<sup>1581</sup> See also below above at para 1322-1333.

<sup>1582</sup> See below at para 1322-1333.

<sup>1583</sup> See SPLM/A Memorial, at paras. 196-205. See also S. Ali El Tayab, Agricultural and Natural Resources, at p. 3, **Exhibit-FE 6/5**.

a latitude around Dhony Dhoul/Tebeldiya/Nyama toward Muglad,<sup>1584</sup> or toward the north-east, to Miding [Arabic: Heglig] and toward Keilak.<sup>1585</sup> For example, the Alei would proceed north from Nyama to Kol Lang [Arabic: Abu Likri] and Keilak.<sup>1586</sup> Kol Lang, *Kol* means pool of water and *Lang* trees, is also known by the Arabic name Abu Likri, where there are pools of water (see **Map 38** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907); **Map 40** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907); **Map 41** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907 – Overlay)). The Bongo also recount use of Kol Lang, north of Nyama.<sup>1587</sup> This movement is purposefully choreographed to the geography and climate of the Bahr region, as highlighted by the MENAS Expert Report,<sup>1588</sup> and the seasonal satellite images: **Map 68** (Bahr Region); **Map 69** (Abyei Area: Wet Season Vegetation); **Map 70** (Abyei Area: Dry Season Vegetation).

1300. The area described by the Ngok Dinka witnesses as having been occupied and used by them and their ancestors is for the most part what the ABC Experts found, after an extensive and expert analysis. Thus, the ABC Experts concluded that in the early 20<sup>th</sup> Century the Ngok Dinka used all of the territory extending north from the current Bahr el Ghazal/Kordofan boundary to latitude 10°35'N.<sup>1589</sup> In reaching these conclusions, the ABC

<sup>1584</sup> **Map 13** (Ngok Dinka Chiefdoms, 1905) depicts the traditional Ngok wet season cattle grazing pastures as the light shaded areas to the north of the Abyei Area. See also **Map 25** (Abyei Area: Grazing Patterns in the Wet Season). See also the Ngok witness evidence: Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶39 (“The pattern of seasonal grazing for the Ngok was for the young men of the cattle camps to take the cattle to the north in the rainy season, to escape the worst of the mud and flies”). Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 3, ¶10 (“While we grazed in Dhony Dhoul we all knew it to be a permanent settlement of the Abyior”); Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶11 (“We would take cattle to Dhony Dhoul, where there were Abyior settlements, further north to Angareib and then onwards, though we would not reach Deinga [Arabic: Muglad]... My father, grandfather and those before him would follow this route.”) and **Map 16** (Acheung Chiefdom, 1905). Witness Statement of Deng Chier Agoth (Abyior elder), at p. 2, ¶9 (“[B]efore Tebeldiya was a place where we would gather *kol cum* [Arabic: setep]. A *cum* is a type of fruit tree with small sweet yellow fruit... *Kei* is a similar fruit that grows in the water (*kol*) and we could find it in the same area. We would eat these fruits when we were grazing in the area with our cattle during the rainy season.”) and **Map 14** (Abyior Chiefdom, 1905); Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶11 and **Map 17** (Alei Chiefdom, 1905); Witness Statement of Chor Deng Akouon (Mareng elder), at p. 3, ¶11 and **Map 22** (Mareng Chiefdom, 1905); Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶15 and **Map 14** (Abyior Chiefdom, 1905); Witness Statement of Alor Kuol Arop (Abyior elder), at p. 3, ¶16 and **Map 14** (Abyior Chiefdom, 1905); Witness Statement of Adol Kuot Malual (Manyaur elder), at p. 3, ¶12 and **Map 21** (Manyaur Chiefdom, 1905); Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶7 and **Map 18** (Anyiel Chiefdom, 1905);

<sup>1585</sup> **Map 13** (Ngok Dinka Chiefdoms, 1905) depicts the traditional Ngok wet season cattle grazing pastures as the light shaded areas to the north of the Abyei Area. See also **Map 25** (Abyei Area: Grazing Patterns in the Wet Season). See also the Ngok witness evidence: Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶39 (“[In the wet season the] more eastern chiefdoms would take their cattle towards Keilak.”) Witness Statement of Chor Deng Akouon (Mareng elder), at p. 3, ¶11 and **Map 22** (Mareng Chiefdom, 1905); Alei would go from Nyama to Kol Lang [Arabic: Abu Likri] to Keilak, Witness Statement of Peter Nyuat Agok Bol (Alei elder), at p. 2, ¶8 **Map 17** (Alei Chiefdom, 1905). Witness Statement of Mijok Bol Atem (Diil elder), at p. 3, ¶11 (“The Diil had a very close relationship with the Achaak from very long ago and my father, grandfather and great-grandfather would take their cattle and graze with the Achaak in the north during the rainy season... The easternmost route took us to Yak Agany, Puoth, Miding [Arabic: Heglig], Michoor, Pawut, Kwok... and Keilak.”) and **Map 20** (Diil Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶14 (“[W]e also took cattle to a high place named Niag, and there were also Achaak settlements in this area.”) and **Map 15** (Achaak Chiefdom, 1905).

<sup>1586</sup> Witness Statement of Peter Nyuat Agok Bol (Alei elder), at p. 2, ¶8 (“We did not have to go far [from Nyama] for grazing because there was enough water there most of the time. But in the rainy season, it would become too wet and we might take cattle grazing to higher ground at Kol Lanf [Arabic: Abu Likri] and further on from there to Lake Keilak.”). See also **Map 17** (Alei Chiefdom, 1905) which depicts the traditional Alei wet season cattle grazing pastures as the light shaded areas to the north and northeast of Nyama, towards Lake Keilak.

<sup>1587</sup> **Map 19** Bongo Chiefdom, 1905. Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3 ¶11.

<sup>1588</sup> MENAS Expert Report, paras 154-163.

<sup>1589</sup> ABC Report, Part I, at pp. 43-45, **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Dinka Presence).

Experts accepted that Ngok used land and resources at Nyama (located at 10°20'N),<sup>1590</sup> and heard submissions that the Ngok were located at (among other places) Dhony Dhoul (approximately 10°35'N),<sup>1591</sup> Miding,<sup>1592</sup> Mardhok,<sup>1593</sup> Anyak,<sup>1594</sup> Thur (approximately 10°20'N),<sup>1595</sup> Ruba,<sup>1596</sup> Kol Aruth/Kol Chom,<sup>1597</sup> Mijok Alor,<sup>1598</sup> Maper Amaal<sup>1599</sup> and Kwak (approximately 10°20'N).<sup>1600</sup> The ABC also heard oral testimonies from Ngok Chiefs and elders that the Ngok had northern settlements including Michoor (approximately 10°20'N),<sup>1601</sup> Niag, (approximately 10°20'N), and Wun Deng Awak.<sup>1602</sup> (approximately 10°25' N)

1301. The testimony of the Ngok Dinka witnesses, and the findings of the ABC Experts, are consistent with the documentary record (both pre-1905 and post-1905) and cartographic evidence. The area which all of these sources describe as being occupied by Ngok Dinka villages in 1905 extends well above the Kiir/Bahr el Arab (indeed, including only a narrow slice of territory to the south of the Kiir/Bahr el Arab), continuing north past the Ngol/Ragaba ez Zarga and extending to the southern boundary of the *goz*; at the same time, the Ngok also used the territory extending further north, to the northern edge of the *goz*.

b) The Government Ignores the Ngok Dinka and Misseriya Oral Traditions

1302. The Government also almost completely ignores the oral traditions of both the Ngok Dinka and the Misseriya. The role of oral traditions in historical analysis is well-established and, particularly where no complete or detailed documentary record exists, oral traditions are fully entitled to be accorded evidentiary weight.

1303. As discussed in the SPLM/A Memorial, a considerable body of Ngok oral tradition describes the Ngok Dinka migration to the Bahr region centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab and, by the end of the 19<sup>th</sup> century, the Ngok occupation of that region.<sup>1603</sup> Those traditions are detailed and consistent in their references to place names and names of Ngok Paramount Chiefs. The Ngok traditions are reported by a number of different sources (Henderson, Howell, Santandrea, Deng and Sabah), all written before the current dispute arose and all providing a largely consistent description of Ngok Dinka occupation of

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<sup>1590</sup> ABC Report, Part I, at pp. 34, 35, 42 **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Dinka Presence).

<sup>1591</sup> ABC Report, Part I, at pp. 42, 44 **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Dinka Presence).

<sup>1592</sup> ABC Report, Part I, at p. 44, **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Dinka Presence).

<sup>1593</sup> ABC Report, Part I, at p. 44, **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Dinka Presence).

<sup>1594</sup> ABC Report, Part I, at p. 44, **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Dinka Presence).

<sup>1595</sup> ABC Report, Part I, at p. 44, **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Dinka Presence).

<sup>1596</sup> ABC Report, Part I, at pp. 42, 44 **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Dinka Presence).

<sup>1597</sup> ABC Report, Part I, at p. 44, **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Dinka Presence).

<sup>1598</sup> ABC Report, Part I, at p. 42, **Appendix B to SPLM/A Memorial** (referred to incorrectly as “Majeng Alor”).

<sup>1599</sup> ABC Report, Part I, at p. 42, **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Presence).

<sup>1600</sup> ABC Report, Part I, at p. 44, **Appendix B to SPLM/A Memorial; Map 62** (Abyei Area: Ngok Presence).

<sup>1601</sup> ABC Report, Part II, at p. 124 and 133, **Exhibit-FE 15/1**.

<sup>1602</sup> ABC Report, Part II, at pp. 122, 123, 124, 131, 132, 149, **Exhibit-FE 15/1; Map 62** (Abyei Area: Ngok Presence).

<sup>1603</sup> SPLM/A Memorial, at paras. 119-127.

the region;<sup>1604</sup> the same traditions are recorded by the contemporary Ngok witnesses referred to above.<sup>1605</sup> While less extensive, Misseriya oral tradition corroborates the Ngok Dinka descriptions, enhancing its credibility.<sup>1606</sup>

1304. The Government makes a half-hearted mention of oral tradition in two sentences at paragraph 333 of its Memorial: “Traditionally, the majority of Dinkas lived near the White Nile up to about 12’N, around the mouth of the Bahr el Ghazal, along the right bank of that river and on the banks of the lower Sobat. Some groups, however, gradually migrated westwards along the Bahr el Ghazal and Bahr el Arab.”<sup>1607</sup> The Government cites no sources to support its statement.

1305. The GoS Memorial subsequently quotes, without discussing, a passage from Henderson regarding the migration of the Ngok Dinka.<sup>1608</sup> The Government does not mention that Henderson’s account describes the Ngok Dinka, under Paramount Chief Kuol Dongbek (or Kwoldit) driving away indigenous tribes living along the Ngol/Ragaba ez Zarga and claiming the land from “Tebussayya” to “Hugnet Abu Urf” as their home, west along the “Gnol,” “one generation before the Baggara came south to Turda.”<sup>1609</sup> This account corroborates the subsequent witness and documentary evidence regarding the Ngok Dinka settlement in the region of Miding [Arabic: Heglig], Ajaj, Pawol [Arabic: Fauwel], Dakjur and Mabek [Arabic: Abu Azala].

1306. In sum, the oral traditions reported from a number of independent and reliable sources attest to the Ngok Dinka migrating into and residing in the Bahr region, particularly centered around the Ngol/Ragaba ez Zarga. That is exactly consistent with both the witness testimony (discussed above<sup>1610</sup>) and the documentary record (discussed below<sup>1611</sup>).

c) The Government Ignores or Distorts the Environmental and Cultural Evidence

1307. The Government also ignores or distorts the evidence of the environment, climate, soil and other conditions of the Abyei Area, as well as the social organization, agriculture, cattle herding practices, houses and settlements of both the Ngok Dinka and the Misseriya. That omission is significant, because the complementary relationships between the Ngok and the Misseriya and their respective environments corroborates their respective locations – with the nomadic Misseriya based in the arid region north of the *goz* and the Ngok inhabiting the wetter Bahr region south of the *goz*.

(1) The Government Ignores the Overwhelming Bulk of the Environmental and Cultural Evidence

1308. The GoS Memorial ignores the overwhelming bulk of the environmental and cultural evidence. For the Government, both the Ngok Dinka and the Misseriya, and their

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<sup>1604</sup> SPLM/A Memorial, at paras. 119-127, 883-887.

<sup>1605</sup> SPLM/A Memorial, at paras. 888-889.

<sup>1606</sup> SPLM/A Memorial, at paras. 890-892.

<sup>1607</sup> GoS Memorial, at para. 333.

<sup>1608</sup> GoS Memorial, at para. 334.

<sup>1609</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 49, 58 (1939), **Exhibit-FE 3/15**. The “Gnol” (referring to the Ngol/Ragaba ez-Zarga) is identified on **Map 13** (Ngok Dinka Chiefdoms, 1905), as is Turda, located to the north of the river.

<sup>1610</sup> SPLM/A Memorial, paras. 1015-1084; *See also above* at paras. 1288-1301.

<sup>1611</sup> *See above* at paras. 891-1196.

environment, effectively do not exist and have no relevance to the GoS's case. The aspects of the environmental and cultural evidence which the Government ignores include:

- a. the Ngok Dinka agro-pastoral way of life was well-adapted to the fertile soil and extreme climatic conditions of the Bahr region and the *goz*;<sup>1612</sup>
- b. the Ngok sorghum is well-suited to the Bahr region, and parts of the *goz*, because it is “drought resistant”<sup>1613</sup> – a distinct advantage given the region's climatic conditions;<sup>1614</sup>
- c. the Ngok Dinka cattle were well-suited physically to the conditions and diseases of the region, particularly during the rainy season;<sup>1615</sup>
- d. the Ngok Dinka animal husbandry practices (e.g., constructing substantial cattle byres (*luaks* or dugdugs)) were adapted to protecting their livestock from the region's climate;<sup>1616</sup>
- e. the soil in the area of Muglad is a non-cracking red clay intersected by numerous sand ridges (described as the “Baggara Repeating Pattern”),<sup>1617</sup> ill-suited for agriculture;<sup>1618</sup>
- f. the Misseriya engaged in little agriculture (thus having no reason to avail themselves of the fertile soil of the Bahr region),<sup>1619</sup> with their only crop being millet, which was best grown in the sandier, drier soil near Muglad, rather than in the damper conditions of the Bahr region;<sup>1620</sup>
- g. the Misseriya's nomadic lifestyle included living in temporary shelters, without protection from rainy conditions for either themselves or their cattle, which “do not have the faculty for moving in the mud that Dinka cattle possess”;<sup>1621</sup> and

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<sup>1612</sup> See SPLM/A Memorial, at paras. 176-185.

<sup>1613</sup> See S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 92 (2004), **Exhibit-FE 12/18**.

<sup>1614</sup> See SPLM/A Memorial, at paras. 100-105; D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 97 (1997) (“the Sorghum plant can survive periods of drought and heat that are fatal to other crops such as maize.”), **Exhibit-FE 8/14**. See also MENAS Expert Report, at paras. 126-163 (in particular para. 152) confirming that both the soils of the Bahr region and parts of the *goz* (except in the dry season) are well vegetated including with pastures and amenable to crops. Furthermore, the cartographic evidence confirms the existence of perennial wells in the *goz*, which would support Ngok settlements even in dry season (when the cattle were further south): **Map 93** (Dar El Humr: Sheet 65 K, Survey Office, 1936 (rev. 1951 by Army Map Service).

<sup>1615</sup> See SPLM/A Memorial, at paras. 196-205.

<sup>1616</sup> See SPLM/A Memorial, at paras. 196-205.

<sup>1617</sup> See I. Cunnison, *Baggara Arabs—Power and the Lineage in a Sudanese Nomad Tribe* 16 n. 6 (1966), **Exhibit-FE 4/16**.

<sup>1618</sup> See SPLM/A Memorial, at paras. 242, 1011; I. Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 10 (1960) (“nature of the [Misseriya's] land itself ... favours cattle rather than grain.”), **Exhibit-FE 4/8**.

<sup>1619</sup> See SPLM/A Memorial, at para. 234. See also Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 9 (1960), **Exhibit-FE 4/8**; I. Cunnison, “Some Social Aspects of Nomadism in a Baggara Tribe” in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan*, Proceedings of the Tenth Annual Conference 11th-12th January 1962, at p. 109, **Exhibit-FE 4/11**.

<sup>1620</sup> See SPLM/A Memorial, at paras. 233-237; I. Cunnison, *Baggara Arabs—Power and the Lineage in a Sudanese Nomad Tribe* 16, 23 (1966) (bulrush millet, which is grown by the Misseriya “almost to the exclusion of other crops, does best on sand”), **Exhibit-FE 4/16**.

<sup>1621</sup> See I. Cunnison, “*Humr and their Land*,” 35(2) SNR 50, 54 (1954), **Exhibit-FE 4/5**.



h. the nomadic Misseriya herders and their lifestyle were best (and only) suited to the dry, sandy regions to the north of the *goz*.<sup>1622</sup>

1309. The character of the Bahr region, as opposed to the *goz*, and the even more arid conditions at Muglad and beyond, is highlighted by Cunnison's detailed account discussed above. The Bahr area described by Cunnison reconciles with the area of the nine Ngok Dinka Chiefdoms in 1905 and until their displacement during the Sudanese civil war,<sup>1623</sup> and he describes the same in his own words: "the south [directly referring to the area immediately to the south of the *goz*] ... *is the traditional land of Dinka*..."<sup>1624</sup>

1310. As so described by Cunnison, the Bahr area includes territory up to and north of 10°35'N. This is discussed in detail above, and not repeated here.<sup>1625</sup> As discussed above, this territory perfectly describes the territory of the nine Ngok Dinka Chiefdoms.<sup>1626</sup>

1311. This is also consistent with the description by Lloyd of the northeastern areas of the Ngok territory, south of Lake Keilak and to the east of Nyama and Turda: "[i]n the north the soil is reddish sand, interspersed with tracts of sand and clay mixed... This gradually increases further south until the red sand disappears, and black soil commences. *South of lat. 10°30' black soil predominates*."<sup>1627</sup> Similarly, *The Handbook of Anglo-Egyptian Sudan* (1922) describes the "black cotton soil" as beginning near Aba Zabad.<sup>1628</sup> The *Handbook* then describes the Khor Abn Habl which "loses itself in the swamps near Turda."<sup>1629</sup> The Ngok witness testimony also confirms the perennial sources of water near Turda, and Nyama, which can be clearly seen from the satellite imagery: **Map 64** (Abyei Area: Wet Season-Mosaic); **Map 65** (Abyei Area: Wet Season – Detail); **Map 66** (Abyei Area: Dry Season - Mosaic); **Map 67** (Abyei Area: Dry Season - Detail).<sup>1630</sup>

1312. The foregoing conclusions are explained in greater detail in the MENAS Expert Report. That Report also concludes that the Bahr area includes areas up to and north of 10°35'N, and that all of this area together with the *goz* support the Ngok agro-pastoral lifestyle.

1313. MENAS explains with respect to the fertile soils characteristic of the Bahr region:

"According to Lebon the area south of (what must be approximately) latitude 10° N and north of 6 ° N is classified generally as the 'Seasonally Wet Clay Grassland of the Southern Clay Plain.' Lebon notes that during the rainy season this area is flooded, whilst during the dry season, the stagnant water evaporates. The vegetation consists

<sup>1622</sup> See SPLM/A Memorial, at paras. 233-237.

<sup>1623</sup> **Map 13** (Nine Ngok Dinka Chiefdoms, 1905).

<sup>1624</sup> Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 10 (1960), **Exhibit-FE 4/8** (emphasis added).

<sup>1625</sup> See above at paras. 1110-1170.

<sup>1626</sup> See above at paras. 1294.

<sup>1627</sup> Lloyd, *Some Notes on Dar Homr*, The Geographical Journal, 29 (January to June), 1907, at p. 649, **Exhibit-FE 3/4** (emphasis added). This area, and its soil composition, is highlighted on **Map 68** (Bahr Region).

<sup>1628</sup> *The Handbook of Anglo-Egyptian Sudan* 36 (1922), **Exhibit-FE 18/7**. **Map 44** The Sudan Province of Kordofan, Watkiss Lloyd, (1910) locates Aba Zabad at approximately 12°20' N i.e. well north of the Ngok territories.

<sup>1629</sup> *The Handbook of Anglo-Egyptian Sudan* 37 (1922), **Exhibit-FE 18/7**.

<sup>1630</sup> Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 3, ¶13 ("[in the dry season] older members of the community would go to Nyama where there was water.") See also **Map 65** (Abyei Area: Wet Season Detail); **Map 67** (Abyei Area: Dry Season – Detail) and **Map 68** (Bahr Region) which confirm the perennial water source at Turda. **Map 93** (Dar El Humr: Sheet 65 G, Survey office Khartoum, 1931) also locates naturally forming wells near Turda and Nyama, Naam and Subu.

exclusively of tall perennial grasses, growing in tussocks, to a height of about 1.8m. From the end of the year until May, the Clay plain is a blackened and waterless. In May, the first rains come and there is rapid transformation to swamp, surmounted by densely verdant vegetation. In our view this presents as an accurate description of the soils and vegetation of the Bahr region as depicted on the annotated satellite image at **Map 68** (Bahr Region). As can be seen, the “grassland” clay plain of the Bahr region actually extends beyond 10°N, past 10°35’ N, above Turda and toward Lake Keilak.<sup>1631</sup>

These contrasts of the soil composition in Sudan are also set out in the text of Barbour, who graphically depicts the main soil categories in Sudan. His depiction of the Bahr region is of “alluvial and lacustrine” soils (i.e. very fertile clayey silts) which again, reflects the depiction of the annotated satellite image at **Map 68** (Bahr Region) with the grassland clay plain of the Bahr region extending beyond 10°N, past 10°35’ N.”<sup>1632</sup>

1314. As to the vegetation in “grassland clay plain of the Bahr region” MENAS highlights Lebon’s description (above) of the Bahr as consisting “exclusively of tall perennial grasses, growing in tussocks, to a height of about 1.8m” in the wet season.<sup>1633</sup> MENAS also refers to Tayab’s description of the “clay plain of the Abyei Bahr region is covered in many areas by thick forest, bushes and vegetation. The vegetation is mostly tropical woodland savanna including various grasses, acacia trees, gum trees and rubber trees,”<sup>1634</sup> before concluding that:

“The satellite imagery makes it clear that the Bahr region has significant levels of vegetation, pastures and land for growing crops in all but the height of the dry season (we understand this is when the Ngok take their cows south to graze in the pastures of the *tooc*). **Map 69** (Abyei Area: Wet Season Vegetation) and **Map 70** (Abyei Area: Dry Season Vegetation) are Channel 4-3-2 images, which show the levels of vegetation in the Bahr region and *goz* as areas of red, clearly confirming this to be the case.<sup>1635</sup>

1315. As to the *goz* in the northwest of the Abyei Area, MENAS states that “[t]he area referred to as the *goz* can be described as a vast tract of sandy terrain which extends from the Chad border to the Nile. As stated in Barbour these sandy soils support the characteristic low rainfall woodland savanna. On average, 800 mm of rain falls in summer, when temperatures are high and evaporation intense. There are periods when the rains in a number of years are below average. High evaporation, rapidly draining sandy soils and unreliable summer rains make the *goz* a tract with useful but limited potential for livestock rearing and crop

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<sup>1631</sup> MENAS Expert Report, para. 140 citing J.H.G Lebon, *Land Use in Sudan*, The World Land Use Survey, No. 4, 1965, at p. 37, **Exhibit-FE 18/25** and K. M. Barbour, *The Republic of the Sudan: a regional geography*, 1961, fig. 29, at p. 53, **Exhibit-FE 18/24**.

<sup>1632</sup> MENAS Expert Report, paras 141 citing K. M. Barbour, *The Republic of the Sudan: a regional geography*, 1961, fig. 29, at p. 53, fig. 39 at p. 57, and pp. 52-61, **Exhibit-FE 18/24; Map 68** (Bahr Region).

<sup>1633</sup> MENAS Expert Report, paras 140 citing J.H.G Lebon, *Land Use in Sudan*, The World Land Use Survey, No. 4, 1965, at p. 37, **Exhibit-FE 18/25**

<sup>1634</sup> MENAS Expert Report, paras 147 citing A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province*, 1978, at pp. 2, 4-5, **Exhibit-FE 6/5**.

<sup>1635</sup> MENAS Expert Report, para. 148. The seasonal variation in vegetation levels is also indicated in the Channel 4-3-2 images: **Map 69** (Abyei Area: Wet Season Vegetation); **Map 70** (Abyei Area: Dry Season Vegetation).

production. Figure 24 from Barbour's text provides a very useful depiction of the *goz*.<sup>1636</sup> MENAS concludes that:

"The satellite imagery complements Barbour's graphical depiction. As can be seen from **Map 68** (Bahr Region) the annotated image very clearly shows the area of the *goz* in the Abyei Area, where it is only a narrow strip in the northwest of the area."<sup>1637</sup>

1316. As alluded to above, MENAS concludes that the narrow strip of *goz* in the Abyei Area is well vegetated in the wet season, the relevant extracts from the MENAS Expert Report provide:

"The *goz*' sandy soils support low rainfall woodland savanna vegetation. This vegetation is a mix of low trees, shrubs and seasonal herbs. Barbour describes the land use of the *goz* as "unimproved grazing with forest or swamp."<sup>1638</sup>

"The wet season image indicates that the *goz* has vegetation in the wet season – in quite significant amounts. There are certainly pastures for grazing and the area would support the growth of crops."<sup>1639</sup>

"It is clear that the *goz* around Tebeldiya, and to the north and south of Tebeldiya has this quality of vegetation and has good pastures which would be suitable for cattle and maintain crops in the wet season. Accordingly, whilst the *goz* is clearly of a different character to the Bahr region that does not mean that humans and cattle could not survive in the area."<sup>1640</sup>

"The dry season images show lack of vegetation in the *goz* (and even in the Bahr). This does not necessarily provide that there was no permanent settlement in those areas of the *goz*, but that any occupants would need to have a perennial (or very near perennial) water source (such as a naturally forming well or pool of water). The satellite imagery does not permit us to identify whether or not there are currently any such permanent (or temporary dry season) wells, pools or other water sources in the *goz*. Of course, in modern times mechanical wells have made it possible to extract water from the table below the *goz*, providing a perennial water supply."<sup>1641</sup>

1317. Thus, based on the historical, geographic and satellite imagery record the MENAS Expert Report draws a number of important conclusions as to the Ngok's land use:

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<sup>1636</sup> MENAS Expert Report, para 142 citing K. M. Barbour, *The Republic of the Sudan: a regional geography*, 1961, fig. 24, at p. 53, **Exhibit-FE 18/24**.

<sup>1637</sup> MENAS Expert Report, para 143, referring also to **Map 67** (Abyei Areas: Dry Season – Detail) and the 4-3-2 Channel images which highlight the vegetation in the area: **Map 69** (Abyei Area: Wet Season Vegetation); **Map 70** (Abyei Area: Dry Season Vegetation).

<sup>1638</sup> MENAS Expert Report, para 150, citing J. H. G. Lebon, *Land use in Sudan*, 1965. Lebon provides a detailed description of the vegetation types on page 23, and K. M. Barbour, *The Republic of the Sudan: a regional geography*, 1961, fig. 39, at p. 99, **Exhibit-FE 18/24**.

<sup>1639</sup> MENAS Expert Report, para 151, also noting that in sandy areas natural vegetation is not so readily apparent from satellite imagery. This is because the moisture is not so fully retained in the soil profile, and much goes down to the water table. The fact these satellite images present such a consistent depiction of vegetation in the *goz* highlights that it existed to quite an extent.

<sup>1640</sup> MENAS Expert Report, para 152.

<sup>1641</sup> MENAS Expert Report, para 153.

“The physical characteristics of the Bahr region, and probably some southern areas within the *goz* (such as around Tebeldiya)... are well suited to [the Ngok Dinka’s] agro-pastoral lifestyle.”<sup>1642</sup>

“The Bahr region itself, characterized by thick forest, bush, vegetation and crops, is an abundant resource and would clearly support and promote a permanently settled community, with an agro-pastoral lifestyle and culture, such as we understand the Ngok’s to be.”<sup>1643</sup>

“The historic seasonal grazing pattern described by the Ngok is consistent with the geography of the region. The sandy soils of the *goz* and the Bahr alkaline clay plain soils in the northeast of the Bahr region toward Lake Keilak (each are depicted on **Map 68** (Bahr Region)), because of their soil compositions and distance from the Bahr river system, are naturally drier during the rains. Because of this they would provide the Ngok cattle with a natural refuge from the mud and fly prevalent around the rivers and wet season swamps further south of the Kiir/Bahr el Arab. Given this, it would appear to make no sense for the Ngok to move south into the damper areas during the wet season.”

“We understand that the traditional dry season grazing areas of the Ngok are south of the Kiir/Bahr el Arab and in the areas of *tooc* in the northern parts of Bahr el Ghazal province. Lebon discusses the area known as the *tooc*, where the Ngok graze their cattle in the dry season, describing it as a “*perennially moist riverain grassland*.”<sup>1644</sup>

“When the dry season satellite imagery is seen, it is not surprising that the Ngok cattle travelled south in the dry season towards more abundant pastures and water sources of the *tooc*. Equally, the wet season satellite imagery highlights why the Ngok cattle would move to the north of the Bahr region and into the *goz*, and the semi-arid soils toward Lake Keilak in the wet season, as the areas around the rivers of the Bahr Region obviously flood and the area itself becomes very waterlogged.”<sup>1645</sup>

1318. The MENAS Expert Report therefore corroborates, with precision, the wide variety of evidence that describes occupation and use by the Ngok of the whole of the Abyei Area, centered around the Bahr region which extends past 10°35’N, but also including the *goz*, which equally formed a vital part of the Ngok’s connection with the Abyei Area.

1319. Importantly, the findings of the MENAS Report confirm the pastoral qualities of the *goz*, though MENAS was not able to conclude from the contemporary satellite evidence that there was sufficient water in the *goz* to support permanent inhabitation. However, it is apparent from the cartographic evidence that in the early 20<sup>th</sup> Century the *goz* (or at least certainly its lower reaches south of Tebeldiya) did have permanent water sources capable of supporting permanent inhabitation. We also know that Sudan has had a number of well documented periods of drought over the past Century, thus suggesting that at the turn of the 20<sup>th</sup> Century there existed more water in the southern areas of the *goz* during the dry season.<sup>1646</sup> This existence of water is confirmed by Lloyd’s 1907 map (**Map 38** (Map of Dar

<sup>1642</sup> MENAS Expert Report, para 154.

<sup>1643</sup> MENAS Expert Report, para 155.

<sup>1644</sup> MENAS Expert Report, para 157 citing J.H.G. Lebon, Land Use in Sudan, The World Land Use Survey, No. 4, Geographical Publications Limited, 1965, at p. 38

<sup>1645</sup> MENAS Expert Report, para 159. **Map 69** (Abyei Area: Wet Season Vegetation)

<sup>1646</sup> MENAS Expert Report, para. 104.

Homr, Lloyd, 1907)), which depicts “water” at El Kumi, Turda, “Naama” (which must be reference to Nyama) and Subu, and ponds or lakes near Turda at Kakran. The 1:250,000 map series, sheet 65-G (Dar Homr) also depicts seasonal wells and numerous symbols representing, according to legend, the existence of Dahal (pools), Rahad (stagnant pools), Buta (large pool) and Kelgai (small Rahad), at **Maps 93 and 95**. Thus corroborating Ngok Dinka occupation of settlements such as Wun Deng Awak,<sup>1647</sup> Dhony Dhoul,<sup>1648</sup> Maper Amaal,<sup>1649</sup> and others, within the *goz*.<sup>1650</sup>

1320. The Government ignores all these, and other, environmental and cultural factors. That is a significant omission, because the environmental and cultural evidence gives rise to a powerful inference that the Ngok Dinka lived in the Abyei Area, while the Misseriya were instead located principally to the north of the *goz*, save for temporary dry season grazing in the Bahr. Moreover, the character of this evidence is such that it would not shift or change over the course of a few decades, further confirming the historical continuity of the locations of the Ngok Dinka and the Misseriya.

(2) The Government Distorts and Confuses What Little Environmental and Cultural Evidence It Addresses

1321. The Government only makes five comments regarding the environmental and cultural evidence. Each of these comments is demonstrably wrong. The Government’s five

<sup>1647</sup> **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶38 (“Abyior... extends north to Wun Deng Awak.”); Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶12 (“The Abyior lands... extend up as far as Wun Deng Awak [Arabic: Umm Sakina] in the northwest”); Witness Statement of Alor Kuol Arop (Abyior elder), at pp. 2-3, ¶¶10-11; Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶13 (“A known permanent village of the Abyior was Wun Deng Awak.”).

<sup>1648</sup> **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶15 (“In the rainy season, the young Abyior men would drive the cattle up as far as a settlement called Dhony Dhoul, near Tebelidiya.”); Witness Statement of Deng Chier Agoth (Abyior elder), at pp. 2-3, ¶9 (“I would go with cattle to Akot Tok, Mijong Alor, Thigei, Rumthil and up to the town called Dhony Dhoul (near Tebelidiya), where I remember seeing Ngok settlements. Alor Kuol Chor, the father of Honorable Deng Alor, had a *tukul* there. This was the same for my father and grandfather. Also, before Tebelidiya was a place where we would gather *kol cum* [Arabic: setep].”), at ¶10 (“Tebeldiya itself was nothing more than a rest house for the government representatives... The Paramount Chief Deng Majok had told me that the rest house at Tebelidiya marked the border between the Ngok and the Misseriya. A post was actually put up between two tebelidiya trees by the British to mark the border between the Ngok and the Misseriya.”); Witness Statement of Alor Kuol Arop (Abyior elder), at p. 3, ¶16 (“The place called Dhony Dhoul was used by my grandfather, and even my father, where they come and spend a night as a resting place. There were Ngok settled at Dhony Dhoul.”); Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶11 (“We would take cattle to Dhony Dhoul, where there were Abyior settlements...”). See below at paras. 1082-1084: the Ngok were required to clear the path for the road through their lands. The Ngok were responsible for the road from Abyei town to Tebelidiya, the border with the Misseriya; Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶¶14-15 (“The Ngok lands went as far North as Tebelidiya. There was no settlement there [in Tebelidiya] that I know of. Traditionally we considered it the border between the Ngok and the Misseriya. The British put a post here as a border between our lands. At this location there used to be a resting house built by Mr Tibbs, the British District Commissioner. You can no longer see this house but there is a marker there that can be seen. However, we met with Misseriya there before the rest house was built. In Sudan at that time there was no map known to us. We did not need a map to know where one another’s lands started and finished. For example, if the Turks or the British wanted a road built, they would need someone to cut down trees and make a path. They would say to us, “this is your land, you cut, we need the road from here to here.” We would cut the trees for as far as the road was in our lands. Then the next peoples would pick up the work where our lands finished and their lands began. For the road from Abyei town to the north, we Ngok used to cut up to Setieb (Setep) and beyond to Tebelidiya. The Misseriya would take over responsibility for the road from Tebelidiya (although they were not happy about because they had no homes in that area so disputed that they should be required to cut the road there.”); Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 3, ¶12.

<sup>1649</sup> **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13 (“Names of other settlements that existed in the Abyior Chiefdom at the turn of the 20<sup>th</sup> century included... Maper Amaal”).

<sup>1650</sup> **Map 62** (Abyei Area: Ngok Dinka Presence).

comments concern (a) the seasonal grazing patterns of the Ngok Dinka, (b) the relationship between the terms “Dinka” and “Ngok Dinka,” (c) the extent to which the Kiir/Bahr el Arab was a “physical barrier,” as claimed by the Government, (d) the number of Ngok Dinka villages, and (e) the population of the Ngok Dinka. When the Government’s errors on each of these issues is corrected, they each further corroborate the fact that the Ngok Dinka indisputably inhabited permanent settlements throughout the entire Bahr region.

(a) Direction of Seasonal Grazing Patterns

1322. First, the Government’s Memorial claims that “in the wet season [Sultan Rob and the Ngok Dinka] went *south* to the River Lol, not *north*.”<sup>1651</sup> Again, this claim is demonstrably wrong.

1323. The Government provides no support or citation for its claim that the Ngok went *south* during the wet season, not *north*. That is because this suggestion has never previously been made and is contradicted, in specific terms, by every single one of a wide range of diverse authorities, including the Government’s own witness (Professor Cunnison). We summarize only some of the evidence disproving the Government’s outlandish claim below.

1324. Former District Commissioner Reginald Davies, writing about his observations in the 1920s, noted:

“When the Homr went south to it [the shallow basin of the Bahr el Arab river] in the dry season, the Dinka withdrew still farther south into the Bahr el Ghazal Province; **but when the rains came** and the Arabs took their cattle north to the area of El Muglad, the Dinka, whose small breed of cattle had acquired immunity to fly-borne disease, **moved up and occupied the river region...**”<sup>1652</sup>

1325. Former District Commissioner P.P. Howell, writing about his observations in the 1940s said:

“Permanent villages, and cultivations are set along the higher ground north of the Bahr el Arab, **while dry season grazing grounds are for the most part in the open grassland (toich) south of the river... The majority of the younger generation spend their time during the dry months of the year in the cattle camps to the south,** returning from time to time to assist in the repair or rebuilding of their houses or in clearing the ground for the cultivation season.”<sup>1653</sup>

Howell goes on to describe the season of “ruil [ruel] (July to October)” as “the **period of heavy rains and permanent habitation in the villages of all the tribe**” when the herdsman return *north*.<sup>1654</sup>

1326. The Government’s own witness, Professor Cunnison, has observed:

“The southern part of the country, the Bahr... is the area in which the Humr spend the **latter half of the dry season**. It is characterized by dark, deeply cracking clays and

<sup>1651</sup> GoS Memorial, at para. 359 (emphasis added).

<sup>1652</sup> R. Davies, *The Camel’s Back* 130 (1957), **Exhibit-FE 18/21** (emphasis added).

<sup>1653</sup> Howell, “*Notes on the Ngork Dinka of West Kordofan*,” 32/2 SNR 239, 243-244 (1951), **Exhibit-FE 4/3** (emphasis added).

<sup>1654</sup> Howell, “*Notes on the Ngork Dinka of West Kordofan*,” 32/2 SNR 239, 244 (1951), **Exhibit-FE 4/3** (emphasis added).

numerous winding watercourses all connected eventually with the Bahr el Arab, a tributary of the White Nile ..... [M]uch of the *Bahr has permanent Dinka settlements, although during most of the time that the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab.*<sup>1655</sup>

and further:

“The country, centred on Abyei, of the Ngok Dinka is traditional grazing ground of the Humr in the dry season... Ngok Dinka are free to migrate north with the Humr, but only a handful of cattlemen do so in company with the Humr camps. *During the dry season Ngok Dinka move into Bahr el Ghazal province...*<sup>1656</sup>

1327. The Harvard Development Project Team, writing about their experiences in Abyei in the 1970s observed as follows:

“Ngok migrations, like their neighbours, *move generally from Northwest, in the wet season, to Southeast in the dry season.*<sup>1657</sup>

And:

“*Early in the dry season, the [Ngok Dinka] cattle camps congregate in the immediate vicinity of Abyei ....* By about the first of February, however, *the pastures in the settled area no longer support the large herds, and the camps cross over to the empty area south of the Kir River.* Camps split up during the migration only to regroup in large numbers later in the season when all cattle must converge on the same limited water supply at the edge of the Sudd swamp. *By the height of the dry season, the Ngok Dinka herds are far to the southeast, pushing on the borders of Nuer territory ....* As soon as it begins to rain a bit, the herders can turn back towards Abyei.... As the land grows wetter, the herds can move up into the sandier areas on Abyei’s northern perimeter.”<sup>1658</sup>

and further:

“During the *dry season almost half of all Ngok cattle [of the Abyei region] are kept in those homesteads* [in the Abyei region] which are near permanent water sources such as the Kir river.... and the other half *are in the camps near the swamps (toich).* During the rains a number of camp cattle *return to the homesteads for a short period of time but most remain in the wet season camps (gok) [to the north].*<sup>1659</sup>

1328. A representative from the Sudan Ministry of Agriculture and Natural Resources wrote a report based on his visits to the “Abyei District” in 1977 and 1978 which noted that:

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<sup>1655</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 18-19 (1966), **Exhibit-FE 4/16** (emphasis added).

<sup>1656</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 25 n.24 (1966), **Exhibit-FE 4/16** (emphasis added).

<sup>1657</sup> M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 1 (1983), **Exhibit-FE 7/1** (emphasis added).

<sup>1658</sup> D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 92, 96 (1997), **Exhibit-FE 8/14** (emphasis added).

<sup>1659</sup> M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 13 (1983), **Exhibit-FE 7/1** (emphasis added).

“[d]uring the rainy season the Bahr El-Ghazal and Upper Nile Dinka (Toich) come to Abyei District where there is high-land for their cattle rather than the swamps that are in their areas during this season” and that “[d]uring the rainy [sic] season the [Ngok] Dinka keep their cattle in a big barn called a Lowak [luak] [in the Abyei District].”<sup>1660</sup>

1329. The Ngok Dinka witness testimony is to the same effect:

a. All of the 20 Ngok Dinka chiefs (including the Paramount Chief) and elders who give evidence of the Ngok’s wet season grazing patterns state with absolute certainty, detail and consistency that in the wet season the Ngok Dinka cattle camps (only the camps, not all of the Ngok population) took their cattle north of the Bahr river system, and in all cases well north of the Kiir/Bahr el Arab River, to graze.<sup>1661</sup> This was to avoid the effects on their cattle of the seasonal fly and mud.<sup>1662</sup> The cattle camps would generally travel either in a north-western direction to the *goz* or north-east toward Lake Keilak.<sup>1663</sup>

b. This pattern was not followed by just those Ngok Dinka Chiefdoms who resided exclusively above the Kiir/Bahr el Arab River (Bongo,<sup>1664</sup> Achaak<sup>1665</sup> and Alei<sup>1666</sup>), but also for those that had settlements above and below the Kiir/Bahr el Arab River.<sup>1667</sup> The Kiir/Bahr el Arab was not a physical barrier to movement of Ngok cattle camps.<sup>1668</sup>

1330. The historic seasonal grazing pattern of all the tribes in the region is consistent with the topography of the region. The areas of the *goz* and the northern lands in the corridor between the Ngok and Lake Keilak are, because of their sandy soil and distance from the Bahr River system, naturally dryer during the rains and provide a natural refuge for the Ngok cattle from the mud and fly prevalent in the wet season (the fly and mud being the reason for the movement of the cattle camps).<sup>1669</sup> This can be seen from the satellite images at **Map 68** (Bahr Region); **Map 65** (Abyei Area: Wet Season – Detail); **Map 64** (Abyei Area: Wet Season – Mosaic); **Map 66** (Abyei Area: Dry Season – Mosaic); **Map 67** (Abyei Area: Dry Season – Detail). Given this, it would make no sense for the Ngok to move south into the damper areas during the wet season.

1331. This conclusion is confirmed in the MENAS Expert Report, who after reviewing the historical, geographical and satellite evidence conclude that:

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<sup>1660</sup> A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 6, 8 (1978), **Exhibit-FE 6/5** (emphasis added).

<sup>1661</sup> SPLM/A Memorial, at paras. 1064-1081. This was also the conclusion reached by the ABC: ABC Report, Part I, at p. 43, **Appendix B to SPLM/A Memorial**.

<sup>1662</sup> SPLM/A Memorial, at para. 1067.

<sup>1663</sup> SPLM/A Memorial, at paras. 1067-1073.

<sup>1664</sup> **Map 19** (Bongo Chiefdom, 1905). SPLM/A Memorial, at para. 1026.

<sup>1665</sup> **Map 15** (Achaak Chiefdom, 1905). SPLM/A Memorial, at para. 1032.

<sup>1666</sup> **Map 15** (Achaak Chiefdom, 1905). SPLM/A Memorial, at para. 1030-1031.

<sup>1667</sup> SPLM/A Memorial, at para. 1064-1081.

<sup>1668</sup> M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 9 (1983) (“Majority of herds crossing Kir River toward south east” listed in “February” on “Migration Routes of Ngok Camps, Dec. 1979 – Nov 1980”), **Exhibit-FE 7/1**.

<sup>1669</sup> MENAS Expert Report, para. 156; Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), p. 8,

¶39.



“it would make no sense for the Ngok to move south [of the Kiir/Bahr el Arab] into the damper areas during the wet season.”<sup>1670</sup>

1332. The Government’s error with regard to the direction of the Ngok Dinka seasonal cattle grazing patterns is both emblematic and probative.<sup>1671</sup> The Government’s error is emblematic, because it demonstrates in striking terms how far removed the Government’s case is from the people and cultures – both the Ngok Dinka and the Misseriya – of the Abyei Area.

1333. Even more importantly, the Government’s error is probative because it artificially distorts the location of the Ngok Dinka by trying – falsely – to turn the Ngok’s southern dry season grazing areas into their northernmost limits. The places on the Kiir/Bahr el Arab to which the Ngok had come south in the dry season are thus wrongly described as the places to which they had gone north. In effect, the Government’s entire discussion of the Ngok’s territory and land use is falsely shifted some 50-75 miles or more to the south on the basis of this fundamental and very obvious error.

(b) Dinka, Western Dinka and Ngok Dinka

1334. Second, the GoS Memorial refers to the “Western Dinka” (in paragraphs 336 and following) and describes “Ngok Dinkas” as “*a subsection of the Western Dinkas*.”<sup>1672</sup> This is simply wrong, even on the Government’s own authorities. There is no evidence of any source from any period that defines Western Dinka to include the nine Chiefdoms of the Ngok Dinka.

1335. The Government refers to an article on the Western Dinka by Stubbs and Morison. Captain J.M. Stubbs was a District Commissioner in the Aweil District of Southern Sudan (south-west of the Abyei Region and home to the Rek Dinka).<sup>1673</sup> In the article, Western Dinka are described as “a branch of the Raik [Rek] who in turn originate from the Agar Dinkas.”<sup>1674</sup> There is no mention of the Ngok Dinka as being part of the Western Dinka.

1336. The Government also relies on Godfrey Lienhardt, who is cited as a “leading authority on the Dinka.”<sup>1675</sup> As noted above, however, Lienhardt did not study, or even visit, the Ngok Dinka, and instead devoted himself entirely to the very distinct and separate Western Dinka.

1337. As discussed above, in his doctoral thesis, Lienhardt confirms that the Ngok Dinka are not part of the “Western” Dinka, which he defines to include Luac, Rek, Abiem, Paliet, Malual, Palioupiny and Tuic; rather the Ngok are described as part of the “North-Western” Dinka together with the Rueng.<sup>1676</sup> That is confirmed by one of Lienhardt’s best-known articles on the Western Dinka, which defines the Western Dinka as “the western Luac, estimated at some 14,000 people, the Rek (156,000), Abiem (13,800), Paliet (4370), Malwal

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<sup>1670</sup> MENAS Expert Report, at para. 156.

<sup>1671</sup> The GoS Memorial is confused on the issue of the Ngok Dinkas’ seasonal grazing, remarking elsewhere that “the Dinka went south in the dry season.” See GoS Memorial, at para. 367.

<sup>1672</sup> GoS Memorial, at para. 336.

<sup>1673</sup> Lienhardt, “*The Western Dinka*” in *Tribes Without Rulers* 99 (1958), **Exhibit-FE 18/23**.

<sup>1674</sup> GoS Memorial, paras. 335-336 (quoting Stubbs & Morison, “*Land and Agriculture of the Western Dinka*,” 21 SNR 251 (1938), **Exhibit-FE 3/14**).

<sup>1675</sup> GoS Memorial, at para. 395.

<sup>1676</sup> Lienhardt, *The Dinka of the Sudan*, Exeter College, Oxford, D. Phil. Thesis, presented in May 1952, at p. 1, **Exhibit-FE 18/19**.

(37,640) and the Palioupiny.”<sup>1677</sup> Again, there is no mention of the Ngok Dinka (not surprisingly, because they are not regarded as being “Western Dinka”). Lienhardt’s definition accords with that of Stubbs and Morison as the groups he mentions were part of the Rek Dinka and still inhabit the same general location.<sup>1678</sup>

1338. Similarly, in contemporary writing, the “Western Dinka” are defined as the “Reik [Rek]” Dinka.<sup>1679</sup> One commentator who has taken an extremely expansive view of the term “Western Dinka” (defined as “Bahr el-Ghazal [Dinka]” including “all of the Dinka west of the Nile” in “the Bahr el Ghazal” province). She names ten separate Dinka tribes as comprising the Western Dinka – *but does not include the Ngok Dinka*.<sup>1680</sup>

1339. Professor Daly concludes “[t]hat the Ngok live to the west of some other Dinka is unarguable. But the term ‘Western Dinka’ is a modern European construct, apparently of late 19<sup>th</sup> century origin, of no value as an analytical tool in reference to the Ngok. We would also point out (as the GOS Memorial did not) that *Prof. Lienhardt’s work never encompassed the Ngok and is wholly irrelevant to the issue at hand*.”<sup>1681</sup>

1340. In fact, the Government’s Memorial appears to have confused the Ngok Dinka with another (but very obscure) people, called the Ngok section of the Rek Dinka, who live “in the town of Gogrial” in southwestern Sudan.<sup>1682</sup> These people have no connection whatsoever to the nine Chiefdoms of the Ngok Dinka or to the Abyei Area. It is a measure of the Government’s fundamental lack of familiarity with the Abyei region and its people that its Memorial would commit this error (akin to saying that the English are the people living in New England).

1341. The Government’s Memorial refers to Lupton Bey’s 1883 notes to describe the “country of the Bongo” as “between latitudes 6° and 8° on the south-western depression of the Ghazal basin.”<sup>1683</sup> GoS relies upon this reference as evidence as to “where [the Ngok Dinka] lived prior to 1905.”<sup>1684</sup> In fact, the Bongo described by Lupton Bey are not Dinka at all, let alone Ngok. They are “the non-Nilotic Bongo peoples to [the] south and west [of the Dinka].”<sup>1685</sup>

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<sup>1677</sup> Lienhardt, “*The Western Dinka*” in *Tribes Without Rulers* 102 (1958), **Exhibit-FE 18/23**. See F. Deng, *Tradition and Modernization* 4 (1971), **Exhibit-FE 5/2** (“Writing on the Western Dinka of Bahr-el-Ghazal Province, Godfrey Lienhardt calls what I call tribes ‘tribal groups.’ He considers tribes to be components of a tribal group. Lienhardt, ‘Western Dinka’ 97, 102. Owing to the differences *between the Ngok political system and that of the Dinka groups on which Dr Lienhardt based his terminology [i.e. the Western Dinka], this nomenclature is not applied to the Ngok...*”)

<sup>1678</sup> Beswick, *Sudan’s Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 83 (2004), **Exhibit-FE 12/18**.

<sup>1679</sup> Jok, “*Militarism, Gender and Reproductive Suffering: The Case of Abortion in Western Dinka*” in *Africa* 194 (1999), **Exhibit-FE 19/4**.

<sup>1680</sup> Beswick, *Sudan’s Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 83 (2004) (“Western Dinka’ ...comprise ten major sections, the Ciec, Alaib, Apak-Atwot, Agar, Pakam, Gok, Western Luac [Luac], Rek, Malwal [Malual], and Western Twic.”). These tribes are depicted on **Map 12** (Southern Sudan: Tribes), **Exhibit-FE 12/18**.

<sup>1681</sup> Daly Supplemental Report, at p. 45 (citing e.g., G. Schweinfurth, *The Heart of Africa* 148 (1874), **Exhibit-FE 17/2** (emphasis added)).

<sup>1682</sup> Beswick, *Sudan’s Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 83 (2004), **Exhibit-FE 12/18**.

<sup>1683</sup> GoS Memorial, at para. 342.

<sup>1684</sup> GoS Memorial, at para. 341.

<sup>1685</sup> S. Beswick, *Sudan’s Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 78 (2004), **Exhibit-FE 19/8**.

1342. The oral evidence put forward by Ngok Dinka elders and chiefs from the Bongo chiefdom could not be clearer in describing the Bongo's homeland as far to the north of the Abyei Area. One elder describes his part of the Bongo chiefdom as "in the Ngol area"<sup>1686</sup> which is close to N°10, over fifty miles away from the Bongo of the Bahr el Ghazal. The Bongo Chief describes that when his "great grandfather was alive Bongo would be settled in the north at Nyama ... with Manyar, Kol Lang (which is north of Nyama) and at Ruba..."<sup>1687</sup> He expressly states that "[t]raditionally, most of the areas of the Alei, Bongo and Achaak were in the north and northeast of the Abyei area. *None had settlements south of the River Kiir.*" This is in stark contradiction to the picture that GoS attempts to paint of Bongo settlement because they were describing the wrong people.

1343. The Government's Memorial goes on to refer in most instances throughout its discussion of the Ngok Dinka to the "Dinka" and to sources referring to the "Dinka."<sup>1688</sup> In many cases, generic references to the "Dinka" are inaccurate and confusing. The "Dinka" included many sub-tribes other than the Ngok Dinka, as Lienhardt notes the "largest divisions of the Dinka people are some 25 named tribal groups"<sup>1689</sup> and references to one are by no means references to the other.<sup>1690</sup> Again, this confusion is emblematic of the Government's failure to engage with the basic historical and geographic facts concerning the nine Ngok Dinka Chiefdoms and their territory.

(c) Bahr el Arab as A "Physical Barrier"

1344. The GoS Memorial claims that the Kiir/Bahr el Arab was a "physical barrier" between the areas on either side of the watercourse. The sole authority cited by the Government for the proposition that the Kiir/Bahr el Arab was a "physical barrier" is Junker (a Russian traveler in the 1880s).<sup>1691</sup>

1345. The Government fails to note that (as discussed above) Junker did not travel to the region at issue here.<sup>1692</sup> Nor does it note that the passage it quotes from Junker – the claim that the Kiir/Bahr el Arab was a "physical barrier"<sup>1693</sup> – was presented as second-hand, or perhaps third- or fourth-hand information from unidentified informants: "The Bahr-el-Arab is fordable in the dry season at 25 1/2' east, but not, *it is said*, lower down."<sup>1694</sup>

1346. The Government cites no other authority that repeats Junker's view that the Kiir/Bahr el Arab was a physical barrier (no doubt, as discussed below, because the view is indefensible). Moreover, Junker is a desperately weak source for such a sweeping proposition – a 1880 traveler who never made it to the region in question. In any event, the reliance on such a source is particularly odd, given that there are large numbers of other, highly-informed authorities on the question whether or not the Kiir/Bahr el Arab is some sort of physical barrier.

<sup>1686</sup> Witness Statement of Mijak Biong Jieny (Bongo sub-chief), at p. 2, ¶7.

<sup>1687</sup> Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶11.

<sup>1688</sup> See, e.g., GoS Memorial, paras. 332, 333, 335, 342, 343, 344-345, 346, 351, 352.

<sup>1689</sup> Lienhardt, "The Western Dinka" in *Tribes Without Rulers* 102 (1958), **Exhibit-FE 18/23**.

<sup>1690</sup> Daly Supplemental Expert Report, at pp. 3, 26.

<sup>1691</sup> GoS Memorial, at para. 291.

<sup>1692</sup> See above at paras. 901-902.

<sup>1693</sup> GoS Memorial, at paras. 290, 291.

<sup>1694</sup> GoS Memorial, at para. 291 (quoting Junker, as cited in J. Wills, "Between the Nile and the Congo: Dr. Junker and the (Welle) Makua", (1887) 9 Proceedings of the Royal Geographical Society 285, p. 294, **Exhibit-FE 17/6**).

1347. In particular, Condominium officials and other observers travelled to and around the Kiir/Bahr el Arab throughout the 20<sup>th</sup> century, enabling them to address the question whether the river was some sort of physical barrier. Equally, the Ngok Dinka reside and have resided around the river for decades, allowing them to do the same. And finally, modern expertise can also address the question whether or not the Bahr el Arab is a barrier – or a river highway – without need for recourse to a 19<sup>th</sup> century Russian traveler who did not come within 100 miles of the waterway.

1348. In fact, as detailed below, the evidentiary record shows overwhelmingly that the Kiir/Bahr el Arab was very readily capable of being both forded by humans and cattle during all of the dry season and parts of the rainy season and crossed by small river craft at all times. Moreover, the documentary record also makes it completely clear that the Ngok Dinka routinely crossed the Kiir/Bahr el Arab during their seasonal grazing migrations and otherwise. This can be seen, among other things, from the Anglo-Egyptian cartography which, as discussed above, identified multiple fords crossing the Kiir/Bahr el Arab.<sup>1695</sup>

1349. The historical documentation also disproves decisively the Government’s suggestion that the Kiir/Bahr el Arab was a physical barrier. The Kiir/Bahr el Arab has been variously described:

a. Wilkinson described the Kiir/Bahr el Arab at Sultan Rob’s “old village” as “80 yards broad now, 3.2.02, 12 to 15 feet deep, current 1 ½ miles per hour. Banks low but firm... In the rains the banks are flooded and the river widens to 200 to 400 yards.” There is no reason at all to believe that a river of this size, with a slow current, would not be readily crossed by the local residents.

b. An extract from a report on 1906 explorations by Huntley-Walsh of the Kiir/Bahr el Arab (relied on by the Macdonald Report<sup>1696</sup>) clearly recognizes that the Kiir/Bahr el Arab is navigable, at the very least for most of its course:

“The Bahr El Arab, or Kir River, Lieutenant Huntly Walsh concluded from his own personal examination to be navigable in the flood for over 100 miles above the mouth of Lolle. From information gathered from various sources, other than personal examination, he thinks it may be further concluded that the navigable parts include also the upper part of the Bahr el Arab as far as Hofrat El Nahas.”<sup>1697</sup>

c. The Government also cites the “renowned civil engineer,” Sir W.E. Garstin, who described the Kiir/Bahr el Arab in the nature of a “*stream*”<sup>1698</sup> in his 1908 work.

d. The 1922 edition of *A Handbook of Anglo-Egyptian Sudan* describes the Kiir/Bahr el Arab as a “fine river”<sup>1699</sup> with a width of “**70 to 120 yds., and a depth (November) of 3 to 6 ft.**” The term “fine river” appears to be standard nomenclature of the time, for Comyn also described the Kiir/Bahr el Arab as a “fine river”<sup>1700</sup> and he explained that “when talking of a ‘fine’ river, the term might be misunderstood. I

<sup>1695</sup> See 1:250,000 Map series sheets 65-K and 65-L at **Maps 86, 92, 94 and 97.**

<sup>1696</sup> Macdonald Report, at para. 3.24.

<sup>1697</sup> Sudan Intelligence Report, No. 160, dated November 1907, Appendix B, at p. 5, **Exhibit-FE 17/29.**

<sup>1698</sup> GoS Memorial, at para. 320 (citing Garstin, *Fifty years of Nile Exploration and Some of its Result*, The Geographical Journal, 33 (1909), at pp. 142, **Exhibit-FE 18/1.**)

<sup>1699</sup> *A Handbook of Anglo-Egyptian Sudan* 92-93 (1922), **Exhibit-FE 18/7.**

<sup>1700</sup> Comyn, *The Western Sources of the Nile*, The Geographical Journal, 30 (1907), at pp. 524, 528, **Exhibit-FE 17/27.**

mean thereby a stream in which, in the dry season one finds a large pool of water every few hundred yards, and which, in the wet season, brings down a large, deep flow of water.”<sup>1701</sup>

e. The Kiir/Bahr el Arab is described as “*impermanent*” by the former Professor of Geography and Dean of Arts, Khartoum University, J. H. G. Lebon.<sup>1702</sup>

f. Henderson noted in the mid-1930s the ease with which the Dinka would traverse the river at Abyei, noting that he received “a locally-made hammock in 1935 as a wedding present, delivered to me at Abyei in a sack by a Dinka who suddenly appeared on the opposite bank and forded the river carrying it on his head.”<sup>1703</sup>

g. The contemporaneous maps at **Map 89** and **94** contain the description of the Kiir/Bahr el Arab near Abyei town as follows: “The Bahr el Arab here narrow, winding and choked with weeds. In rains much of water spreads into Khors.”

1350. These descriptions do not connote in any way the physical impossibility of passage at any of the different points on the Kiir/Bahr el Arab they describe. In fact, these descriptions flatly contradict such a suggestion.:

1351. The MENAS Expert Report thoroughly reviews the historic record and a range of sophisticated contemporary satellite imaging in its analysis of the Kiir/Bahr el Arab:

“The Kiir/Bahr el Arab is a seasonal river. In the high wet season during July/August it will flood, and its banks and the areas around them will be under substantial amounts of water. For a short period of time in the very high season, the river may well prevent passage by humans. However, for the remainder of the year and particularly in the driest months from November to May the Kiir/Bahr el Arab is a comparatively gentle river and one that is not particularly deep. Indeed it becomes very low, only a few feet during stretches of its course, during the dry season and is quite discontinuous in its reaches to the west of the Abyei Area.”<sup>1704</sup>

1352. The historical record indicates a river which would be entirely susceptible to crossings by swimming, boat and canoe at any point (80 yards with little or no current) or by foot (where the Kiir/Bahr el Arab resembled a “stream” or was “impermanent”). There are also a substantial number of references to the Ngok’s use of canoes as a method of transportation on and across the Kiir/Bahr el Arab and other rivers. For example, Wilkinson states that the “natives” at Sultan Rob’s “say that canoes can go in open water to the Bahr el Ghazal,”<sup>1705</sup> while Saunders recorded the existence of a type of “native canoe.”<sup>1706</sup> As noted by MENAS “[i]n our experience it is common for indigenous peoples who live on a watercourse to use

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<sup>1701</sup> Comyn, *The Western Sources of the Nile*, The Geographical Journal, 30 (1907), at pp. 524, 530, **Exhibit-FE 17/27**.

<sup>1702</sup> Lebon, *Land Use in Sudan*, The World Land Use Survey, No. 4, Geographical Publications Limited, at p. 18 (1965), **Exhibit-FE 18/25**.

<sup>1703</sup> K.D.D. Henderson, *Set Under Authority* at p. 98, **Exhibit-FE 18/32**.

<sup>1704</sup> MENAS Expert Report, paras. 96.

<sup>1705</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 151-157 (1905), **Exhibit-FE 2/15**.

<sup>1706</sup> Sudan Intelligence Report, No. 74, dated 9 October 1900, Appendix A, at p. 4, **Exhibit-FE 17/8**. Whilst not depicting Ngok Dinka an image of Dinka at Lake Ambady in a dug out canoe is in Comyn *Service and Sport in Sudan* (1911), at p. 51, **Exhibit-FE 18/3**.

simple methods of river transportation such as canoes or swimming. Both of these are described by the Ngok Dinka Wieu Dau Nguth.<sup>1707</sup>

1353. The Government notes references to the Kiir/Bahr el Arab being blocked by *sudd*, vaguely inferring (though not stating) that this is why the river might be in the nature of an impenetrable barrier. While the *sudd* may have been impassable for Condominium officials traveling by “steamer,”<sup>1708</sup> at certain limited parts of the river (namely its mouth at the Bahr el Ghazal, where the Ngok were not located), even this does not account for the Ngok Dinka’s ability to cross it by foot or by canoe – which as discussed above they plainly could.

1354. The evidence of a Ngok Dinka witnesses also confirms unequivocally that they have personally crossed the Kiir/Bahr el Arab, and describes their traditional practices in doing so.<sup>1709</sup> As stated by one Ngok elder:

“the river virtually never separates the area and the Ngok Dinka people on the north bank from the area and Ngok Dinka people on the south bank. Throughout the year the River Kiir can be crossed in many places by both people and cattle. Of course, during high floods, cattle must use special crossing points to cross the river Kiir because the waters are too high, but during the dry season and beginning of the rainy season it is common to see young men and women taking cows across the river. The cows are good swimmers.

Each Ngok Dinka Chiefdom had sections of the river where its people would cross when needed. The Mareng had a number of points, including Wunkom, Rum Akoch, Jamina, Wejwej, and Terawan. Especially during the wet season, you have to be careful of crocodiles and hippopotamus.

The river has changed in recent times, but in the time of my youth and that of my father’s and grandfather’s we crossed the river in many places by either canoe or swimming across. I myself have crossed the river many times in my lifetime to visit family across the river and to take the cattle to the seasonal camps. There are sometimes in the wet seasons when the river floods and prevents easy crossings, but then you just use a canoe that the Ngok Dinka build and leave for others at the side of the river. You might also find fewer places to cross by swimming. Growing up I witnessed that the Misseriya do not know how to swim well and they do not know how to use the canoes that we made out of hard wood trees in our area.

All of the rivers in the area (the Kiir/Ragaba ez Zarga, the Nyamora/Ragaba Um Bieiro and the Ngol/Ragaba ez Zarga) can be passed in the way I describe above but the River Ngol and River Nyamora tend to have dryer spots during the dry season

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<sup>1707</sup> MENAS Expert Report, at para. 109.

<sup>1708</sup> For example, refer to Saunders’ trip: Sudan Intelligence Report, No. 74, dated 9 October 1900, Appendix A, at p. 4, **Exhibit-FE 17/8**. Though it is obvious from Saunders’ report that he had only traveled to the mouth of the Kiir/Bahr el Arab and did not travel up the river, thus his inability to progress was clearly local to the area he was in (and likely the time of year) as can be seen when contrasted with Huntley-Walsh’s report that the Kiir/Bahr el Arab is “navigable in the flood for over 100 miles above the mouth of” the River Lol and possibly all the way to Hofrat el Nahas. See Sudan Intelligence Report, No. 160, dated November 1907, Appendix B, at p. 5, **Exhibit-FE 17/29**.

<sup>1709</sup> Second Witness Statement Wieu Dau Nguth (Manyuar elder), at pp. 2-3, ¶¶10-13. Second Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), p. 3, ¶¶13, 14.

making crossings during that period possible without a boat in some areas. All of these river systems have changed since the time of my grandfather.”<sup>1710</sup>

1355. The Ngok witness evidence highlights both fording the river at places known to be shallow and with lower banks, and the use of canoes in other areas. The Kiir/Bahr el Arab was obviously navigable and able to be crossed by the Ngok and their cattle. Indeed, such passage was a necessary and an unexceptional part of their lifestyle.

1356. There are other specific documented accounts of Ngok traveling north of the Kiir/Bahr el Arab. For example, in 1908 Paramount Chief Kuol Arop travelled from his home around Burakol to visit Kordofan Governor Lloyd at Nahud (Kuol having passed through Kadugli.)<sup>1711</sup> Earlier still Bayldon records that Ngok would travel north of their territories, crossing the Ngol/Ragaba ez Zarga to El Obeid.<sup>1712</sup>

1357. The MENAS Expert Report confirms that the geographical character of Kiir/Bahr el Arab would not prevent the Ngok and their cattle from crossing it. According to MENAS:

“To summarise, it is clear from satellite imagery that the river bed of the Kiir/Bahr el Arab varies in its course through the Abyei Area from continuous flows to areas of discontinuity along its length during the dry season. There is no reason at all to think that a river of this breadth, particularly a relatively slow-moving river, would not be readily forded by local inhabitants, in this case the Ngok Dinka. The Kiir/Bahr el Arab is a seasonal river. In the high wet season during July/August it will flood, and its banks and the areas around them will be under water. During this time the river would in some years prevent passage by humans. However, outside of those limited times and particularly in the driest months from November to May, the Kiir/Bahr el Arab is a comparatively gentle river and one that is not particularly deep. Indeed it becomes very low, only a few feet during stretches of its course, during the dry season and its western reaches are discontinuous.”<sup>1713</sup>

1358. Thus, the MENAS Expert Report states:

“The Kiir/Bahr el Arab is not of such a spectacular nature to act as a “barrier.” It is and was able to be crossed by both the Ngok and their cattle and the first hand evidence is that passage was possible year around. In no way could the character of the Kiir/Bahr el Arab be said to inhibit the movement of the Ngok Dinka north or south.”<sup>1714</sup>

1359. Professor Daly reaches a similar conclusion in his Report:

“the Bahr al-Arab has never been a ‘physical barrier’ for the Ngok Dinka, who easily forded it, with or without cattle, at will.”<sup>1715</sup>

1360. In sum, to suggest that an indigenous people inhabiting a region characterized by its sprawling watercourses are unable to traverse an unspectacular waterway, with the result that it forms an impassable physical barrier to their movement, is impossible to credit. Rather, the

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<sup>1710</sup> Second Witness Statement Wieu Dau Nguth (Manyuar elder), at pp. 2-3, ¶¶10-13.

<sup>1711</sup> Sudan Intelligence Report No. 171, October 1908, Appendix E, p. 87 **Exhibit-FE 17/31**.

<sup>1712</sup> Sudan Intelligence Report No. 128, March 1905, Appendix C, at p. 11, **Exhibit-FE 17/15**.

<sup>1713</sup> MENAS Expert Report, at para. 111.

<sup>1714</sup> MENAS Expert Report, at para. 110.

<sup>1715</sup> Daly Supplemental Expert Report, at p. 25.

evidence shows very clearly that the Kiir/Bahr el Arab was one of the innumerable waterways of the Bahr region that the Ngok used in the course of their daily lives to facilitate, not to obstruct, movement throughout their homeland.

(d) “Small Group of Dinka Villages”

1361. Third, the GoS’s Memorial claims that “[t]he Ngok inhabited a relatively small group of Dinka villages.”<sup>1716</sup> The Government cites no support for this sweeping evidentiary claim (and its discussion then proceeds to a discussion of brief 1909 “Notes” about “western Kordofan Dinkas”).<sup>1717</sup>

1362. Preliminarily, it bears comment that the Government acknowledges that, in contrast to the nomadic Misseriya, the Ngok Dinka lived in permanent settlements and “*villages*.” That is correct, and was a key observation of many reports about the region and its peoples. These reports are discussed in detail in the SPLM/A Memorial.<sup>1718</sup>

1363. The Government’s attempt to reduce the Ngok to a “small group” of villages is both unsupported and misconceived. In fact, the historical documentation, witness testimony and the Ngok Dinka Abyei Community Mapping Project Report all demonstrate clearly that the Ngok Dinka inhabited a substantial number of permanent settlements or villages throughout the Abyei Area. While not an exhaustive list of Ngok villages at 1905, these sources specifically identify and locate some more than 250 permanent settlements. These include (by no means an exhaustive list): Kol Arouth [Arabic: Grinti], Wun Deng Awak, Dhony Dhuol, Maper Amaal, Thigei, Rumthil, Majok Alor, Koladet, Alal, Kech, Riet, Maker Abyior, Langar, Mabek, Noong, Dokura, Ruba, Nyama, Thur, Thuba, Nyama, Dupo, Gol-Gol, Wunchuei, Mitrok, Burakol, Tajalei, Amuk, Pandeng, Pachol, Pariang, Michoor, Nyadak Ayuung, Niag, Ajaj, Pakur, Miding, Mardhok, Anyak, Rum Ameer, Mabok, Leu [Lou/Lau], Mithiang Diil, Agok, Mabek, Morol, Agany Achueng, Akur, Aait, Abouch Achaak, Abunabo, Abyei, Adem-Dem, Aghany, Akuoich Achaak, Alal Chier, Alal Kueng Achueng, Alich, Ameth Aguok, Ameyok, Amiet, Apaboung Achaak, Aruk-Dul, Athoba, Athoijang, Awol Achueng, Awouachot, Ayailieth, Baar Aboich Diil, Baar Achaak, Bagai, Bandura, Bany-Aguot, Bar-Agok, Bogeck, Chol Thaat, Dadaker, Dakjur, Dhiau-Ajith, Dob Matein, Dong-Nyala, Dongup Alei, Dub Gier, Duchar, Dum Wuot Achaak, Dunguji, Galaar, Gem Chul, Geny-Chuk, Giarich, Gok-Mou, Gom Goi, Gop-Acuil, Yuen, Guelbek Alei, Guilbek Manyuar, Hany, Jalak, Jamena, Jorweng, Kaar-Alei, Kaba Achaak, Kariang, Kol Akoic Diil, Kol Ngol Nyang, Kol-Agut, Kol-Ayok, Kol-Cum, Kol-Kuin, Kollang Achueng, Kol-Ngor, Kolom-Aliab, Kol-Thiou, Kool Rank, Kueradum, Kuthaku, Loor-Ayen, Mabek Ngol, Maber Manyuar, Mabior, Mading Achueng, Magak, Makeir Awet, Maker Agoot, Makuac, Ngol, Makuac-Bar-Agok, Malam, Malek-Goubil, Mareng Diil, Marial-Achaak, Math-Thouny, Mawal Alei, Mayen Baar Achaak, Midrok, Mijer, Mijok Alor, Minyang Lor, Miodhol, Miokol, Miyen Koor, Miyom, Miyom-Akuei, Mlual Ador Achueng, Moykol Abior, Naynay Biong, Ngabageir, Nhom Ngok, Nyinaweir, Nyinebouny, Nyokriang, Paatal, Panjang, Patal Achueng, Pathalang, Paweny, Pawol, Pelnuer, Pookloor, Pouth Achaak, Puripiu, Raantilaan, Rum Ajiec, Rum Lou, Rumegok, Rummaki, Rum-Mareng, Taaramaat, Thim-Thoi, Thurkugi, Todac, Wac-Anguom, Wangchuk, Wayang, Wayang Diil, Wejwej,

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<sup>1716</sup> GoS Memorial, at para. 337.

<sup>1717</sup> GoS Memorial, at para. 337.

<sup>1718</sup> See SPLM/A Memorial, at paras. 212-213.



Wun Goc, Wun-Ahoat, Wun-Beim, Wundup, Wunkiir, Wun-Ruok, Yakagany Achaak, Yar Achoot and Zeen which are identified on the **Map 62** (Abyei Area: Ngok Presence).<sup>1719</sup>

1364. Similarly, as discussed in the SPLM/A's Memorial and above, the pre-1905 documentary record plainly evidences the existence of substantial numbers of Ngok Dinka villages scattered throughout the Bahr region.<sup>1720</sup> This is confirmed by the first-hand observations of a number of Condominium authorities, who reported on traveling to and through prosperous and sizeable villages throughout the region.<sup>1721</sup>

1365. In contrast, no documentary or other evidence cited in the GoS Memorial supports its claim as to "a relatively small group" of villages. The only source cited by the Government is a report from Inspector C.A. Willis in a Sudan Intelligence Report.<sup>1722</sup> The Government's reliance on Willis' Note is surprising, because nothing in it supports the Government's claim that there was only a "small group" of Ngok Dinka villages. Willis does not use that term and nothing in his Note makes any judgment, directly or indirectly, about the number of Ngok or Ngok villages.

1366. It is also notable that the Government relies indiscriminately on Willis. That is ironic because Willis' research practices were the subject of a scathing "official post-mortem of his department" which found that Willis "*lacked the trained staff to evaluate information, check local conditions, or even investigate the motives of his informants.*"<sup>1723</sup> In respect of evidence, it has been demonstrated that Willis "was highly selective in choosing what he would accept, and that *this selection was not based on the experience or knowledge of his*

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<sup>1719</sup> See SPLM/A Memorial, at paras. 1022-1033; Poole Expert Report, **Annex F** (List of Mapped Sites within the Study Area); and Poole Expert Report **Annex H** (Ngok Dinka Abyei Community Mapping Project Study Area Map).

<sup>1720</sup> See SPLM/A Memorial, at paras. 908-944; *see above* at paras. 917-1066.

<sup>1721</sup> See SPLM/A Memorial, at paras. 913-934; *see above* at paras. 943-952, 953-972, 973-974, 975-982, 983-1011, 1014-1022, 1023-1028 and 1035-1053.

<sup>1722</sup> Sudan Intelligence Reports, No. 178, dated May 1909, Appendix C, 16-18, **Exhibit-FE 18/2**. The report identifies "various sub-tribes," which the Government suggests were the ten "'sub-tribes' or sections" of the Ngok Dinka. GoS Memorial, at para. 337. The Government asserts that one section must have "disappeared," leaving the remaining nine Ngok Dinka Chiefdoms, but offers no evidence to support that assertion other than reference to an article by Howell which simply lists a different set of sub-tribes. GoS Memorial, at para. 337. In fact, the "units of Ngork Dinka" described by P. Howell in the article cited in the Government's Memorial do not accord with Inspector Willis' list. The sections identified by Howell include: Manuar, Anyel, Mareang, Diil, Abyor, Acweng, Acak, Alei, Bongo. Howell, "*Notes on the Ngork Dinka of West Kordofan,*" 32(2) SNR 254 (1951), **Exhibit-FE 4/3**. The names of the sub-tribes listed by Inspector Willis have no source and do not accord with the nine chiefdoms of the Ngok Dinka listed in the Howell article. Inspector Willis also separates the Ngok as being under the leadership of two chiefs, which is contrary to the known view that the Ngok are under the leadership of a single Paramount Chief, who at that time would have been Kwal Arop, son of "the late Sultan Rob." The Government's reference to "Sultan Lar [Alor]" is confusing and unsupported by the historical evidence. The Genealogy of Ngok Paramount Chiefs has been set out by Howell based on an oral history from Nyok, son of Paramount Chief Kwal Arop, from his father P. Howell, *Genealogy of Ngork Chiefs*, U.N. Doc 768/1/9 (1945), **Exhibit-FE 3/16**. Howell describes the Paramount Chief of the Ngok Dinka using the Dinka expression *bany de ring*, explaining that this role constitutes "head of the tribe" and that all Paramount Chiefs have hailed from "the main Pajok lineage." Howell, "*Notes on the Ngork Dinka of West Kordofan,*" 32(2) SNR 242 (1951), **Exhibit-FE 4/3**.

Willis may have been referring to Alor Adjing of the Manyuar and secondary Dhendior lineage who was a contender for the leadership of the Ngok Dinka "prior to the nineteenth century" but in "the Egyptian colonial period", the "Egyptian administration recognized instead Arob [Arop] Biong of the Abyor [Abyior] clan as the major representative of all of the Ngok peoples in the region." S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 52 (2004), **Exhibit-FE 12/18**. Alternatively, the reference to Lar may be confusion with the group of Rueng Dinka called "Alor" with whom the Ngok share a "close association and relationship" and of whom "it might be argued" "they are all Ngork," although this is not consistently recognized. "The main sections of Alor are MAJWAN, THEINYIR, AMAL, MANPENG, NGONGCIL and ABANG." Howell, "*Notes on the Ngork Dinka of West Kordofan,*" 32(2) SNR 242, 250 (1951), **Exhibit-FE 4/3**.

<sup>1723</sup> Johnson, *Willis and the "Cult of Deng": A Falsification of the Ethnographic Record in History in Africa* 133 (1985), **Exhibit-FE 18/31**.

*informants.*<sup>1724</sup> Citing Willis as its sole authority does not support, but rather confirms the inadequacy of, the Government's claim.

1367. In sum, the Government's passing claim that there was a "small group" of Ngok villages is completely unsupported (including by the Willis Note cited by the GoS Memorial). The real facts are those indicated by the pre-1905 Condominium documents and witness testimony, which clearly evidence substantial numbers of Ngok villages throughout the Bahr region.

(e) Size of Ngok Dinka Population

1368. Finally, the GoS Memorial asserts that the "Ngok Dinka were a relatively small group," estimating that in 1905 they "might" have "numbered less than 5,000 in total." In fact, the evidence does not require (or permit) such speculation and instead makes clear that there were substantially more than 5,000 Ngok Dinka in 1905.

1369. There is no single authoritative published estimate of the Ngok Dinka population circa 1905. The Government's Memorial states that "there are no statistics from 1905."<sup>1725</sup> Instead the GoS relies on population data from the Governor of Kordofan in 1934 and the District Commissioner in the "early 1950s"<sup>1726</sup> that appear to little more than wild guesses. In fact, the first and only moderately reliable population measure in Sudan was not undertaken until 1955.<sup>1727</sup>

1370. Although not from 1905, much more contemporaneous population estimates exist for the Dinka and even for the province of Kordofan shortly after the 1905 transfer. They include the following:

- a. an estimate of "quatre ou cinq millions [four or five million]" Dinka by explorer Jean-Baptiste Marchand in October 1898, of which the Ngok Dinka is one of the largest tribes. Marchand referred to the Dinka as "la tribu dirigeante" or "the leading tribe";<sup>1728</sup>
- b. an estimate of "about 2 million" Dinka "according to Cameron Bey [a Condominium official]" in January 1906, of which the Ngok Dinka is one of the largest tribes;<sup>1729</sup>
- c. an estimate of "roughly" "a half million" in Kordofan province, from a report in the Sudan Intelligence Report of October 1908 of which the Ngok would form around ten percent using present proportions.<sup>1730</sup>

1371. The above figures have no inherently more or less credibility than the figures cited by GoS, except that they were published much closer to 1905. In each case, the estimate is

<sup>1724</sup> Johnson, *Willis and the "Cult of Deng: A Falsification of the Ethnographic Record in History in Africa* 140 (1985), **Exhibit-FE 18/31**.

<sup>1725</sup> GoS Memorial, at para. 339.

<sup>1726</sup> GoS Memorial, at para. 339.

<sup>1727</sup> M. Daly, *Darfur's Sorrow* 9 (2007).

<sup>1728</sup> Bulletin du Comité de l'Afrique Française "De L'Oubangui au Nil : Les missions Liotard et Marchand, Octobre 1898, at p. 329, **Exhibit-FE 17/20**.

<sup>1729</sup> As noted in a letter dated 30 January 1906 from Albert Cook to Mr Baylis, a representative of the Church Missionary Society resident in Bor, Sudan, Church Missionary Society Archives, **Exhibit-FE 17/20**.

<sup>1730</sup> Sudan Intelligence Report No. 171, October 1908, Appendix D, at p. 52, **Exhibit-FE 17/31**. Estimate of ten per cent is based on present proportion of Ngok Dinka in Kordofan as compared to overall population in Kordofan.

much higher than those proposed by GoS and yet it is not submitted that the above figures should be preferred. Rather, these figures have been submitted to show the range of data produced. It is also submitted that almost every population estimate in Sudan, whether by tribe or by region, produced by state or individual, contemporaneous or otherwise, is inherently unreliable because it has no scientific basis. As referred to above, the “first scientific census of the Sudan gave an official figure in December 1955, on the eve of its independence of 1,329,000. There has been no national census since then.”<sup>1731</sup>

1372. To be sure, this lack of accurate data is not restricted to the Ngok or the first half of the 20<sup>th</sup> century. Daly, in writing about a similar difficulty in measuring the population of Darfur concluded (writing in 2007) that “now or for almost any time in the past” population estimates “are subject to dispute.”<sup>1732</sup> Daly explains this result on the basis of “[t]he vast area; transient patterns of some of its people...; suspicion of census takers and the use to which their findings may be put.” He further describes how “these common problems have been both admitted and exploited by successive regimes to misrepresent the British population or one or another of its components.”<sup>1733</sup>

1373. The 1955 population census of the Sudan employed a probability sampling method. In one sense it was an appropriate method for Sudan at the time because it was difficult to poll the entire population with the resources available. However, this method has been heavily criticized due to the aggregate nature of sample representation and sampling error. In short, small errors could and most likely did lead to huge discrepancies between the estimated population figures and the actual figures.

1374. The approach taken by the 1955 census is also predisposed to over-represent nomadic groups since their grazing areas are temporary, overlapping with the homelands of more sedentary groups. Sampling in such areas, like the Abyei region, can and most probably did undercount sedentary groups (i.e. the Ngok) where nomads were identified as representative respondents of the area.

1375. In any case, according to the census data, the 1955 Ngok Dinka population in the Misseriya Humr district, of which the Abyei region formed a part, was 31,135. The Government unequivocally states that the Ngok Dinka are a “relatively small group.” However, the Misseriya who typically entered the Abyei region to graze numbered even fewer in the same census at less than 30,000.<sup>1734</sup>

5. A Community Mapping Project Confirms that the Ngok Dinka Occupied and Used the Territory of the Abyei Region Centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab

1376. The witness testimony, oral traditions, environmental/cultural evidence and maps are corroborated by a separate community mapping project conducted by and for the Ngok Dinka (the “Community Mapping Evidence”), which documents reliably the historic Ngok Dinka settlements in, and use of, the Study Area over the course of the 20<sup>th</sup> century. Due to “time limitations and other serious obstacles surrounding this project,” it was “restricted” to a

<sup>1731</sup> M. Daly, *Darfur's Sorrow* 9 (2007).

<sup>1732</sup> M. Daly, *Darfur's Sorrow* 9 (2007).

<sup>1733</sup> M. Daly, *Darfur's Sorrow* 9 (2007).

<sup>1734</sup> The only omodiyas who come south to graze in the Abyei area are members of the Ajaira. Their population in 1955 totalled 30,947 and only a portion of these would have had summer seasonal grazing lands in the Abyei area. I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 8 (1966), **Exhibit-FE 4/16**.

“representative group of Ngok landmarks in the general region of Abyei town extending north in a semi-circle with a radius of approximately 40 miles (the “Study Area.”)<sup>1735</sup> The results of the Ngok Dinka Abyei Community Mapping Project (“Mapping Project”) provide further confirmation that the Ngok Dinka occupied and used the territory of the Abyei region centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. Other sources, including historical documentation, witness testimony and maps demonstrate the use and occupation of the land extending west and east, and to the northern most border of the *goz*.

1377. Community mapping is a recognized and accepted technique for “determining or defining areas of indigenous land use and occupation.”<sup>1736</sup> One of the world’s leading experts on community mapping, Peter Poole, developed the Mapping Project to create a map of a representative group of Ngok Dinka landmarks in the Study Area built from raw data. This data was recorded by the Ngok Dinka themselves to show “with geographic precision, the historical and cultural linkages” between the Ngok “and their ancestral territories”<sup>1737</sup> around the turn of the 20<sup>th</sup> century and in particular in 1905.

1378. The Mapping Project employed Global Positioning System (“GPS”) technology, which is easily taught and widely accepted as the standard in this type of project.<sup>1738</sup> According to Poole, who has spent more than twenty years refining his methodology, the Abyei Community Mapping Team (“Mapping Team”) “mastered the GPS units quickly and diligently.”<sup>1739</sup> Using GPS technology, the members of the Mapping Team drew on the resources of some 200 Ngok Dinka to identify specific sites in the Study Area, including settlements, burial places, age set initiation sites, cultivated areas, cattle camps (dugdugs), and other locations of importance, “tagging” each with a GPS coordinate.

1379. The Mapping Team recorded traditional occupation and use of Ngok lands in 1905 through a number of interviews and meetings with holders of traditional knowledge and field visits to record map coordinates of important Ngok landmarks. Poole concluded that the Mapping Team carried out the methodology “appropriately” and “effectively” and produced “sound and reliable” results in the Study Area.<sup>1740</sup>

1380. From the information gathering process, Poole reports that:

“the Ngok Dinka, in particular their chiefs and elders, have an *intimate and impressive knowledge of their ancestral lands* as they were in 1905. In particular, they *understand the manner in which their ancestors lived* in those lands and used the natural resources that those lands contained.”<sup>1741</sup>

1381. The Mapping Project confirms that Ngok land use, cultural practices and lifestyle are adapted to their territory: the Ngok are dependent on the lands and other resources in the Study Area for their food, medicine, clothing, building materials and other daily needs. The Project also demonstrated a longstanding spiritual connection between the Ngok and the Study Area, evident in sacred sites, burial places and initiation locations.

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<sup>1735</sup> Poole Expert Report, at p. 7.

<sup>1736</sup> Poole Expert Report, at p. 8.

<sup>1737</sup> Poole Expert Report, at p. 9.

<sup>1738</sup> Poole Expert Report, at p. 15.

<sup>1739</sup> Poole Expert Report, at p. 29.

<sup>1740</sup> Poole Expert Report, at p. 29.

<sup>1741</sup> Poole Expert Report, at p. 29 (emphasis added).

1382. Using the GPS coordinates collected by the Mapping Team in the Study Area, the Mapping Project produced the Community Map, which are attached to the Poole Expert Report at Annex H. The Community Maps depict a long-term relationship and interaction by the Ngok with the territory which was mapped.<sup>1742</sup>

1383. As set forth on the Community Maps, the Abyei Mapping Team recorded approximately 150 permanent settlements<sup>1743</sup> and 56 burial sites dating back to 1905 or earlier.<sup>1744</sup> These various sites are located north of the Kiir/Bahr el Arab,<sup>1745</sup> within the Study Area.<sup>1746</sup> The Mapping Project confirmed the Ngok's longstanding use of the land, identifying the following sites which date back to 1905 or earlier:

- a. 74 (cattle grazing sites);<sup>1747</sup>
- b. 35 cultivation sites;<sup>1748</sup>
- c. 45 community meeting and court locations;<sup>1749</sup>
- d. 11 sacred sites.<sup>1750</sup>

1384. In total, over a relatively short period, the Abyei Mapping Team recorded almost 400 important Ngok landmarks<sup>1751</sup> in the Study Area alone, which reflect traditional patterns of settlement and land use.<sup>1752</sup> The Community Maps reflect the “*strong oral history*”<sup>1753</sup> of the Ngok and their longstanding “*historic*” and continued “connection to their lands.”<sup>1754</sup> The recorded sites are spread across a Study Area distance of over 2,000 square miles.<sup>1755</sup>

1385. As set out above, the Community Map does not fully reflect the full measure of Ngok land use. The Poole Expert Report explains that a project such as the Mapping Project would ordinarily take “about a year.”<sup>1756</sup> A complete mapping project of the entire Abyei Area was not possible in light of the tight timetable for these arbitral proceedings together with the “combination of environmental factors (i.e. swollen rivers), limited infrastructure (i.e. lack of roads and bridges), and safety concerns (i.e. militia, Government controlled checkpoints and armed Misseriya).”<sup>1757</sup> Even so, as Dr. Poole testifies, the Abyei Mapping Team collected a reliable set of data for the Study Area.

1386. Swollen rivers and a dearth of infrastructure in the area to accommodate motor vehicles also severely restricted access to the interior even of the Study Area.<sup>1758</sup> Again, this

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<sup>1742</sup> Poole Expert Report, at Annex H.

<sup>1743</sup> This figure directly refutes the Government's bald and unsubstantiated assertion that the “Ngok inhabited a relatively small group of Dinka villages.” GoS Memorial, at para. 337. Poole Expert Report, at p. 23

<sup>1744</sup> Poole Expert Report, at p. 24.

<sup>1745</sup> As reflected in the Poole report, the Abyei Mapping Team focused their efforts on sites north of the Kiir due to time constraints, although Ngok land extends well into Bahr el Ghazal Province to the south.

<sup>1746</sup> Poole Expert Report, at Annex H.

<sup>1747</sup> Poole Expert Report, at p. 25.

<sup>1748</sup> Poole Expert Report, at p. 27.

<sup>1749</sup> Poole Expert Report, at p. 27.

<sup>1750</sup> Poole Expert Report, at p. 27.

<sup>1751</sup> In some cases, multiple landmarks were located at what was recorded as a single GPS coordinate (for eg. burial site and settlement).

<sup>1752</sup> Poole Expert Report, at pp. 22-28.

<sup>1753</sup> Poole Expert Report, at p. 29.

<sup>1754</sup> Poole Expert Report, at p. 29.

<sup>1755</sup> Poole Expert Report, at pp. 7, 21.

<sup>1756</sup> Poole Expert Report, at p. 29.

<sup>1757</sup> Poole Expert Report, at p. 29.

<sup>1758</sup> Poole Expert Report, at p. 29.

limited the scope of the Mapping Project to the Study Area, although even in the more limited area, time did not permit an exhaustive record of sites to be mapped. Despite these obstacles, the Poole Report concludes that the evidence of occupation and use was “considerable” and a fair representation of the Study Area.<sup>1759</sup>

1387. The findings of the Abyei Community Mapping Project corroborate the other evidence in the record, including the documentary record, cartographic evidence and witness testimony. These findings demonstrate the intimate knowledge and familiarity of the Ngok Dinka with the areas described in the evidentiary record, including the confirmation of specific latitudinal and longitudinal coordinates.

1388. In particular, the findings of the Abyei Community Mapping Project comprehensively rebut the Government’s claim that the Ngok Dinka were located below the Kiir/Bahr el Arab. On the contrary, as demonstrated by even the partial mapping of the Abyei Area that the Abyei Mapping Team was able to complete, the Ngok plainly lived well to the north of the Kiir/Bahr el Arab.

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1389. In sum, all of the evidence in the record demonstrates unequivocally that in 1905 the Ngok Dinka used and occupied land throughout the Bahr region, including in particular territory extending north of the current Bahr el Ghazal/Kordofan boundary, encompassing the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, to and including parts of the *goz* in the west, toward Lake Keilak in the northeast and with their eastern boundary extending past Miding. That evidence almost entirely confirms the ABC Experts’ conclusions, save that the Ngok in fact used territory extending all the way north to 10°35’N latitude.

1390. The Government’s contrary position that the Ngok Dinka lived only to the south of the Kiir/Bahr el Arab is impossible seriously to defend. It is supported by no documentary or cartographic evidence (save one obviously confused map by Comyn), and is instead contradicted by a uniform body of (pre- and post-1905) documentary evidence, map evidence, witness evidence (including evidence which the GoS adduced and relied upon in the ABC proceedings), oral traditions, and environmental/cultural evidence, as well as by a Mapping Project which the Ngok Dinka people have conducted over the past weeks.

*B. The Government Mischaracterizes the Kordofan/Bahr el Ghazal Boundary and the ABC Experts’ Analysis of that Boundary*

1391. Rather than addressing forthrightly and seriously where the Ngok Dinka and Misseriya were located in 1905, the GoS Memorial instead focuses on an attempted critique of the ABC Experts’ discussion of the Kordofan/Bahr el Ghazal boundary. According to the Government, there was in 1905 a clear, determinate provincial boundary between Kordofan and Bahr el Ghazal, located on the Kiir/Bahr el Arab. The Government also argues (as discussed in Part III(C) below) that this boundary is decisive to any definition of the Abyei Area because only territory south of the putative Kiir/Bahr el Arab boundary could have been transferred to Kordofan in 1905.

1392. The Government’s single-minded focus on the location of the purported Kordofan/Bahr el Ghazal boundary is irrelevant to the Tribunal’s decision and the definition

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<sup>1759</sup> Poole Expert Report, at pp. 29-30.

of the Abyei Area. As discussed in detail below (in Part III(C)), the Kordofan/Bahr el Ghazal boundary in 1905 has no bearing on the area of the nine Ngok Dinka Chiefdoms or the definition of the Abyei Area. On the contrary, as the ABC Experts correctly interpreted Article 1.1.2 of the Abyei Protocol, the only relevant issue in defining the Abyei Area is the extent of the territory of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905 – an issue that does not depend at all on the location of the Kordofan/Bahr el Ghazal provincial boundary.

1393. In any event, however, the Government’s discussion of the location and character of the Kordofan/Bahr el Ghazal boundary misinterprets both the historical record and the ABC Report. In particular, the Government misstates and attempts to confuse two simple points, both of which the ABC Experts correctly found: (a) because of geographic confusion over the term “Bahr el Arab,” there was no definite or determinate Kordofan/Bahr el Ghazal provincial boundary in 1905; and (b) regardless of the location of any general provincial boundary between Kordofan and Bahr el Ghazal, the Anglo-Egyptian administrators had regarded the Ngok Dinka as belonging to Bahr el Ghazal prior to 1905, when they were transferred to Kordofan.

1394. The Government concedes that there was considerable geographic confusion among Anglo-Egyptian authorities regarding the Bahr region and that these authorities frequently referred to the Ngol/Ragaba ez Zarga as the “Bahr el Arab.” Nonetheless, the Government disagrees sharply with the ABC Experts’ supposed conclusion that “the southern boundary of Kordofan before 1905 was the Ragaba ez Zarga,”<sup>1760</sup> urging instead that “the southern boundary of Kordofan prior to 1905 was the Bahr el Arab, not the Ragaba ez Zarga.”<sup>1761</sup> The Government’s analysis is confused and wrong. In fact, the ABC Experts did not conclude that the Kordofan/Bahr el Ghazal boundary was the Ngol/Ragaba ez Zarga, but that there was confusion surrounding the subject, with Condominium officials in practice frequently treating the boundary as the Ngol/Ragaba ez Zarga.

1395. The Government’s own view of the pre-1905 Kordofan/Bahr el Ghazal boundary is also mistaken. Although acknowledging the grave uncertainties surrounding the identity and location of the “Bahr el Arab” and other rivers of the Bahr region, the Government ignores the consequences of this uncertainty for the Kordofan/Bahr el Ghazal boundary. In fact, given this uncertainty, the Kordofan/Bahr el Ghazal boundary was indeterminate in 1905. That is demonstrated by the contemporaneous documents and cartographic evidence, as well as by the post-1905 treatment of the provincial boundary by Condominium officials.

1396. The Government also claims that the Condominium official’s confusion over the “Bahr el Arab” was short-lived and not widely-shared.<sup>1762</sup> In fact, the Anglo-Egyptian confusion over the “Bahr el Arab” was neither short-lived nor confined to one or two officials. Rather, a number of Condominium officials (including Mahon, Percival, Wilkinson, Boulnois and Lloyd) all confused the Bahr el Arab and the Ngol/Ragaba ez Zarga and continued to do so until at least 1907.

1397. At bottom, the Government fails to confront meaningfully the consequences of the geographic confusion surrounding the “Bahr el Arab.” Given that confusion, it is impossible to conclude that there was any definite or determinate Kordofan/Bahr el Ghazal boundary at the time of the 1905 transfer of the Ngok Dinka. In any event, as discussed in Part III(C)

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<sup>1760</sup> GoS Memorial, at para. 328.

<sup>1761</sup> GoS Memorial, at para. 331(a).

<sup>1762</sup> GoS Memorial, at para. 329.

below, the nature or location of any purported Kordofan/Bahr el Ghazal provincial boundary is irrelevant in these proceedings, because the definition of the Abyei Area does not depend on the location of any such boundary.

1. The ABC Experts Identified A Significant Mistake Made by Anglo-Egyptian Officials with Regard to the Locations of the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab and the Use of the Term “Bahr el Arab”

1398. Preliminarily, as discussed above, there is no dispute that Wilkinson and other Anglo-Egyptian officials made a significant mistake regarding the Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab, confusing what was the former with the latter, and calling what was the Ngol/Ragaba ez Zarga by the name “Bahr el Arab.”<sup>1763</sup> Although the Government (entirely wrongly) now heaps criticism on the ABC Experts for their supposed misreading of the historical record with regard to the Kordofan/Bahr el Ghazal provincial boundary, the starting point for the debate is the ABC Experts’ identification of a significant error in certain of the historical reports and (parenthetically) in the GoS factual submissions during the ABC proceedings.<sup>1764</sup>

1399. Of course, it was precisely to obtain such historical and geographical expertise that the ABC Experts were selected in the first place. There is more than a little irony, therefore, in the Government’s repeated attacks on a body of experts whose historical investigations identified and explained a significant geographic confusion, which the Government itself had omitted to identify in its submissions.

2. The Government’s Suggestion that the Ngol/Ragaba ez Zarga Was “A Seasonal Creek” Is Manifestly Wrong

1400. Also preliminarily, the Government’s suggestions that the Ngol/Ragaba ez Zarga was merely a minor “*seasonal creek*”<sup>1765</sup> is wrong. In fact, it is clear that the Ngol/Ragaba ez Zarga was a sizeable river, particularly during the wet season.

1401. The Government does not offer any accurate evidence of the Ngol/Ragaba ez Zarga’s geographic characteristics. The MENAS Expert Report sets out an analysis of the Ngol/Ragaba ez Zarga’s physical characteristics, an assessment of the historical record, including the detailed records of the treks undertaken by early Condominium officials (such as Mahon, Wilkinson, Percival and Lloyd), a range of satellite imagery across both wet and dry seasons and oral evidence.<sup>1766</sup> MENAS, having reviewed the historical and geographic record, oral evidence and the satellite imagery conclude that:

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<sup>1763</sup> See above at paras. 940-942, 943-952, 953-972, 975-982, 983-1011, 1012-1013, 1014-1022, 1023-1028, 1035-1053; GoS Memorial, at paras. 314-318, including para. 317 (“it becomes clear that Wilkinson mistook the Ragaba ez Zarga for the Bahr el Arab”).

<sup>1764</sup> The Government’s submissions to the ABC did not acknowledge either Wilkinson’s error or the general geographic confusion in early Condominium records concerning the “Bahr el Arab.” See for example GoS Opening Presentation, dated 11 April 2005, at pp. 27 to 28, **Exhibit-FE 14/2**; GoS Final Presentation, dated 16 June 2005, at pp. 10 to 12, at **Exhibit-FE 14/18**; Transcript of Ambassador Dirdeiry, Taped Recording GoS Final Presentation, File 1, at p. 1, (“The third area of focus was the reports of the travelers and British Officials who visited the area during the period 1902 up to 1905, especially Major Wilkinson and Bimbashi Percival because they were the people who told us where they found Sultan Rob and the people and the Ngok Dinka people.”), **Exhibit-FE 19/15**.

<sup>1765</sup> GoS Memorial, at para. 327(a).

<sup>1766</sup> **Map 64** (Abyei Area: Wet Season – Mosaic); **Map 65** (Abyei Area: Wet Season – Detail); **Map 66** (Abyei Area: Dry Season – Mosaic); **Map 67** (Dry Season – Detail); **Map 68** (Bahr Region) **Map 69** (Abyei Area: Wet Season – Vegetation); **Map 70** (Abyei Area: Dry Season – Vegetation).



“The satellite imagery confirms these conclusions:

a. As can be seen from **Map 64** (Abyei Area: Wet Season - Mosaic) and **Map 65** (Abyei Area: Wet Season - Detail) in the wet season the Ngol/Ragaba ez Zarga is clearly a well formed river with considerable water in it, with a substantial continuous form, running from at least the border at Darful to the Bahr el Ghazal and flooding in places. The southern boundary of the *goz* area is near the north bank of the Ngol/Ragaba ez Zarga in its western reaches (as is also depicted on **Map 68** (Bahr Region)). As can be seen from the images the Ngol/Ragaba ez Zarga is obviously similar in nature to the Kiir/Bahr el Arab during the wet season.

b. In the dry season the character of the Ngol/Ragaba ez Zarga changes, and whilst it retains flowing water in significant parts of its reaches, particularly in its western and central reaches within the Abyei Area. The course of the Ngol/Ragaba ez Zarga around Pawol/Fauwel retains a good flow of water, and of course this is the area of the river observed by the early Condominium officials Mahon, Wilkinson, Percival and Lloyd.”<sup>1767</sup>

1402. The Ngol/Ragaba ez Zarga is also consistently described by various Condominium and historical accounts in ways that are entirely inconsistent with being a “*seasonal creek*”:

a. Percival, a short way into the dry season, records the Ngol/Ragaba ez Zarga as “*80 to 150 yards*” wide and “*5 to 8 feet*” deep at the point he crossed.<sup>1768</sup> Needless to say, that would make the Ngol/Ragaba ez Zarga the world’s largest creek.

b. Similarly, Wilkinson describes the course of the Ngol/Ragaba ez Zarga near Fauwel/Pawol as “*very broad, 300 yards in places and the water is 3 feet 6 inches deep, generally the surface is covered with grass and weeds, and very little open water is seen,*”<sup>1769</sup> further down where he crossed Wilkinson describes it as “*120 yards broad, with water 3 to 3 feet 6 inches deep.*”<sup>1770</sup> Again, this is in no way a creek, but rather a very substantial river.

c. Wingate’s report on Percival’s November 1904 “patrol” states that the Kiir/Bahr el Arab, the Ngol/Ragaba ez Zarga and the Lol “*are all described as large rivers with strong currents at this time of year (December).*”<sup>1771</sup>

d. Lyons in 1906 states that “Both of these rivers, the Bakr (sic) El Homr and the Bahr El Arab, *must closely resemble each other in the regimen.*”<sup>1772</sup>

e. Lloyd made a tour of inspection of southwest Kordofan in December 1907,<sup>1773</sup> proceeding from Dawas along what he called the Bahr el Homr (meaning the

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<sup>1767</sup> MENAS Expert Report, at paras 118.

<sup>1768</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

<sup>1769</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), **Exhibit-FE 2/15**.

<sup>1770</sup> Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 155 (1905), **Exhibit-FE 2/15**.

<sup>1771</sup> Reports on the Finances, Administration and Condition of the Sudan in 1904, at p. 8, **Exhibit-FE 2/4**.

<sup>1772</sup> Sudan Intelligence Report No. 141, April 1906, **Appendix C**, p. 6, **Exhibit-FE 17/23**.

<sup>1773</sup> Sudan Intelligence Report, No. 160, dated November 1907, Appendix B, at p. 5, **Exhibit-FE 17/29**. **Map 38** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907).

Ngol/Ragaba ez Zarga).<sup>1774</sup> Lloyd variously describes the course of the Ngol/Ragaba ez Zarga as a “*river*,” as “*150 yards wide*” at Abu Azala (Mabek) “*with well defined banks 10 feet high, and containing 2 feet of water, but full of grass (burdi)*. It winds much but the only sign I could find that it ever flows was that the water always reached its deepest on the concave sides of the bends.”<sup>1775</sup>

f. A short while later Lloyd records the water as “just moving,” and a mile or two further east he described the Ngol/Ragaba ez Zarga as “*the banks, 10 to 15 feet high, were well defined, and the river 250 yards wide*, with forest on both banks, talh, higlig, and a few ardeib trees on the bank predominating. At Hasoba the banks almost disappear (see Wilkinson Bey’s report in Compendium, Vol. II), and when I was there in 1906 I was inclined to think the river was really a Ragaba. *There is, however, no doubt, that the Arab account that the water actually flows during the rains, and when full it must be a considerable stream*. But, on account of the grass and shallows, I doubt if it will ever be navigable, and the Gurf (or Bahr El Arab or Bahr El Rizeigat) seems to offer much greater possibilities.”<sup>1776</sup>

1403. Professor Cunnison confirms these historical descriptions. Cunnison refers to the “Regeba Zarga [Ngol/Ragaba ez Zarga] as one of “*the largest watercourses in “the ‘Bahr.’*”<sup>1777</sup> He also describes how the “Mezaghna [omodiya]” traditionally camped “along the Regeba Zarga [Ngol/Ragaba ez Zarga]” in “the dry season” in the course of their seasonal grazing pattern.<sup>1778</sup> This could only have been possible if the Ngol/Ragaba ez Zarga continued to carry water during the dry season, enabling the Misseriya to drink and water their cattle, as well as to water surrounding pasture land.<sup>1779</sup>

1404. Likewise, Sir James Robertson recorded that he “trekked southward to the Ragaba Zerga [Regaba ez zarga/Ngol] a tributary of the Bahr el Arab [Kiir]” and then “the omda Riheid Diran, who had been scouting around, came galloping back in joy with his horse dripping water from its haunches downwards, and shouting ‘elmi, elmi!’ – ‘water, water!’”<sup>1780</sup> Robertson reported that the Ngol/Regabe ez zarga had “abundant pools of water.”<sup>1781</sup>

1405. This is confirmed by Henderson, who comments in his 1939 article that it is “possible that the ‘Regeba Zerga [Ngol/Regaba ez zarga], the Bahr El Ada of the eighteenth century travellers’ was the “Regeba Um Bieiro [Nyamora], the Bahr El Arab [Kiir] or even...the Wadi El Ghalla.”<sup>1782</sup> Henderson also notes that “*the general similarity of conditions along the rivers east from Kafia Kingi make it difficult to identify the references we have*

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<sup>1774</sup> Macdonald concludes that what Lloyd called the Bahr el Homr is today known to be the Ragaba ez Zarga. See Macdonald Report, at para 3.28.

<sup>1775</sup> Sudan Intelligence Reports, No. 160, dated November 1907, Appendix B, at p. 5, **Exhibit-FE 17/29. Map 38** (Kordofan: Map of Dar Homr, Watkiss Lloyd, 1907).

<sup>1776</sup> Sudan Intelligence Reports, No. 160, dated November 1907, Appendix B, at p. 5, **Exhibit-FE 17/29. Map 38** (Kordofan: Map of Dar Homr, Watkiss Lloyd, 1907).

<sup>1777</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 18 (1966), **Exhibit-FE 4/16**.

<sup>1778</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 26-27 (1966), **Exhibit-FE 4/16**.

<sup>1779</sup> MENAS Expert Report, at para. 115.

<sup>1780</sup> J. Robertson, *Transition in Africa: From Direct Rule to Independence* 49-50 (1954), **Exhibit-FE 5/10**.

<sup>1781</sup> J. Robertson, *Transition in Africa: From Direct Rule to Independence* 50 (1954), **Exhibit-FE 5/10**.

<sup>1782</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 51 (1939), **Exhibit-FE 3/15**.

*seen.*<sup>1783</sup> In a footnote to that sentence, he describes the extent of the confusion in practical terms: “e.g. Bahr el Salamat = Shari River but Bahr al Abyad sometimes = Shari, sometimes B. El Arab, sometimes the Jur, sometimes the White Nile. Bahr el Taeisha = R. Umm Belasha? ... Bahr el Homr = Um Bieiro, B. el Arab or B. el Ghazal. Bahr Solongo = B. el Arab or Wadi Shelengo. Bahr Keilak = R. Zerga or Lake Keilak or Kwak regeba.”<sup>1784</sup>

1406. Conversely, while the Government denigrates the Ngol/Ragaba ez Zarga as “seasonal,” it neglects the fact that the Kiir/Bahr el Arab was also significantly affected by the seasonal rainfalls (like every other watercourse in the area).<sup>1785</sup> Howell observed that 1947 was “a remarkably dry year” and in particular that “[t]he Ragaba Um Biero [Nyamora] is nearly dry already and only the dam holds any water. It may well dry out before the rains” and that “[t]he *Bahr El Arab is very low indeed.*”<sup>1786</sup> The reality is that all of the waterways of the Bahr region are significantly affected by seasonal weather, including the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga.

1407. The witness statement of Wieu Dau Nouth similarly records that the Ngol/Ragaba ez Zarga is a “significant river” and that:

“in the wet season [the Ngol] is very broad and large. It is because of the size of the Ngol/Ragaba ez-Zarga and the volume of water it holds, together with the fact it floods in the wet season, that the Ngok villages closest to the Ngol/Ragaba ez-Zarga are actually some distance from its banks.”<sup>1787</sup>

This description is entirely consistent with the nature of the Ngol/Ragaba ez Zarga and the geography of the areas on its banks, which are flat plains.<sup>1788</sup>

1408. The MENAS Expert Report, based on the satellite imagery, modern knowledge of the geography of the Bahr region and the historical record, confirms that the physical characteristics of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga could be seen as equivalent.<sup>1789</sup> The MENAS Expert Report states:

“Speaking generally, the geographic characteristics of the Ngol/Ragaba ez Zarga are similar to the Kiir/Bahr el Arab. This is so in at least three material respects: (a) both traverse the width of Kordofan Province from Darfur to their mouths at the Bahr el

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<sup>1783</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 61 (1939), **Exhibit-FE 3/15**.

<sup>1784</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 61 (1939), **Exhibit-FE 3/15**.

<sup>1785</sup> See above at paras 1344-1360. The Kiir/Bahr el Arab is described as “*impermanent*” by the former Professor of Geography and Dean of Arts, Khartoum University, J. H. G. Lebon: Lebon, *Land Use in Sudan*, The World Land Use Survey, No. 4, Geographical Publications Limited 18 (1965), **Exhibit-FE 18/25**. It is described as a “fine” river i.e. “a stream in which, in the dry season one finds a large pool of water every few hundred yards, and which, in the wet season, brings down a large, deep flow of water” in both *A Handbook of Anglo-Egyptian Sudan* 92-93 (1922), **Exhibit-FE 18/7** and Comyn, *The Western Sources of the Nile*, The Geographical Journal, 30 (1907), at pp. 524, 528, **Exhibit-FE 17/27**. Henderson’s writings confirm the seasonal character of the Kiir/Bahr el Arab described the “*Bahr el Arab [as] a seasonal torrent between the Toich Marrol and Abyei, scooping out a dry trough dry enough to use in summer as a motor road...*” Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 51 (1939), **Exhibit-FE 3/15**. The Government also cites the “renowned civil engineer,” Sir W.E. Garstin, who described the Kiir/Bahr el Arab in the nature of a “stream”: GoS Memorial, at para. 320 (citing Garstin, *Fifty years of Nile Exploration and Some of its Result*, The Geographical Journal, 33 (1909), at pp. 117, 142, **Exhibit-FE 18/1**).

<sup>1786</sup> Howell, *Introduction to Handing-Over Notes on the Ngork Dinka*, P.P. Howell Papers, 768/1/19 (1948), **Exhibit-FE 18/15**.

<sup>1787</sup> Witness Statement Wieu Dau Nouth (Mareng elder), at p. 3, ¶14.

<sup>1788</sup> MENAS Expert Report, at para 117.

<sup>1789</sup> MENAS Expert Report, at para. 122.

Ghazal; (b) both are heavily seasonal in nature and are dry in parts during the dry season; (c) both flow as rivers of at least 100 metres in width for substantial reaches.

For the purposes of comparing the two rivers as they were understood by the early Condominium officials we take the central region, which is where early 20th Century Condominium officials (Mahon, Wilkinson, Percival, Lloyd) observed them. This area the dry and wet season geographic characteristics of the Ngol/Ragaba ez Zarga are similar to the Kiir/Bahr el Arab:

- a. In the wet season the relative geographic and hydrological characteristics of Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab are basically similar.
- b. In the dry season (when the Condominium explorers' descriptions were recorded) the rivers have a very similar appearance at the areas visited by Mahon, Wilkinson, Lloyd and Percival, namely around Pawol/Fauwel on the Ngol/Ragaba ez Zarga and the reaches of the Kiir/Bahr el Arab by Sultan Rob's old village. They are also of generally a similar character flowing east from Pawol to the Unity State boundary, and for a distance (approximately 20-30 miles) to the west of Pawol."<sup>1790</sup>

1409. Thus, the MENAS Expert Report concludes:

"In our view it is absolutely understandable and explicable that Condominium officials - observing at ground levels - would confuse the Ngol/Ragaba ez Zarga and Bahr el Arab. Of course, it is patently obvious as a matter of historical record that the officials did so. Further, the Government's position that it was only the Bahr el Arab that could ever be considered a physical barrier or boundary is clearly unsustainable. The rivers are and were similar, and this is only highlighted by the confusion of the Condominium officials of the time."<sup>1791</sup>

The modern and historical records both show that either river could have been the reference point the Condominium officials sought to identify for the Kordofan and Bahr el Ghazal boundary proposed by the Government in its Memorial.<sup>1792</sup>

1410. In sum, there is no substance at all to the Government's claim that the Ngol/Ragaba ez Zarga was a "seasonal creek." Rather, the Ngol/Ragaba ez Zarga was a river that was more than 100 yards wide, which was readily confused with the Kiir/Bahr el Arab, and had similar proportions. Whatever the Government's current position, the essential point is that Wilkinson and his Anglo-Egyptian colleagues consistently **DID** confuse the Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab in the first years of the 20<sup>th</sup> century. It was that confusion – not the Government's current confusion – that is relevant.

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<sup>1790</sup> MENAS Expert Report, at para. 122.

<sup>1791</sup> MENAS Expert Report, at para. 125.

<sup>1792</sup> MENAS Expert Report, at paras. 50, 125.

3. The Government's Suggestion that the Confusion About the "Bahr el Arab" Was Not Widely Shared by Anglo-Egyptian Officials Is Demonstrably Wrong

1411. The Government's Memorial suggests in passing that "Wilkinson's confusion of 1902 never became a *communis* error,"<sup>1793</sup> apparently implying that other Anglo-Egyptian administrators did not share the confusion regarding the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. That is demonstrably wrong, as the ABC Experts correctly found.

1412. As discussed below, the ABC Experts concluded that a number of Anglo-Egyptian officials confused the "Bahr el Arab" and the Ngol/Ragaba ez Zarga:

*"The Commission discovered that there was considerable geographic confusion about the Bahr el-Arab and Bahr el-Ghazal regions for the first two decades of Condominium rule. ... The map accompanying the [Gleichen] Supplement showed the Bahr el-Arab joining the Bahr el-Ghazal north of a second river labelled the Bahr el-Homr, which joined the Bahr el-Ghazal just north of Lake Ambadi. The location and identity of these two rivers were to be a source of confusion over the next few years. ... It is apparent from [a number of Condominium] reports that administrative officials mistook the Ragaba ez Zarga/Ngol for the Bahr el-Arab..."*<sup>1794</sup>

*"Wilkinson was not alone in erroneously demarcating geographical features in the Sudan. ... [o]ther reports make it clear that administrative officials mistook the Ragaba ez-Zarga/Ngol for the Bahr el-Arab, and thought the Kir was a different river."*<sup>1795</sup>

1413. This was exactly right. As discussed in detail above, the confusion was shared by Percival, Mahon, Boulnois and Lloyd – whose descriptions of the region clearly proceeded on the premise that the Ngol/Ragaba ez Zarga was the watercourse that Wilkinson had described as the "Bahr el Arab."<sup>1796</sup> Nor is this shared confusion unusual; on the contrary, what would have been very odd if other Anglo-Egyptian administrators had not shared the error.

1414. As discussed above, careful reading of the documentary record shows very clearly that Percival was in possession of Wilkinson's map describing his trek through the Abyei region.<sup>1797</sup> The record also shows that Wilkinson likely met with Mahon during their travels in the region.<sup>1798</sup> Given this, it would have been virtually inconceivable that they would have had different understandings of the basic geographic features of the region – and their respective descriptions of the region show that they did not.

1415. Other Anglo-Egyptian officials shared the same error. As discussed above, W.A. Boulnois, Governor Bahr el-Ghazal province, clearly regarded the "Bahr el Arab" as what is in reality the Ngol/Ragaba ez Zarga, as stated in his 1904 letter to Governor General Wingate.<sup>1799</sup> Lloyd made exactly the same mistake, treating the "Bahr el Arab" as a different

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<sup>1793</sup> GoS Memorial, at para. 329.

<sup>1794</sup> ABC Report, Part I, at p. 38, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>1795</sup> ABC Report, Part I, at pp. 17-18, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>1796</sup> See above at paras. 941, 986, 1013.

<sup>1797</sup> See above at paras. 988.

<sup>1798</sup> See above at para. 981.

<sup>1799</sup> See above at paras. 1012-1013 W. Boulnois to Wingate, dated 3 January 1904, **Exhibit-FE 1/28**.

river from the Kiir, lying to the north of it (and obviously being the Ngol/Ragaba ez Zarga).<sup>1800</sup>

1416. The same error is also evidenced on a number of maps from the period, including the official Anglo-Egyptian Sudan Intelligence office map reproduced in the 1905 *Gleichen Handbook* (at **Map 36**).<sup>1801</sup>

1417. Contrary to the Government's suggestion that "Wilkinson's" confusion of the "Bahr el Arab" and Ngol/Ragaba ez Zarga was an isolated anomaly, the record demonstrates the opposite. In fact, the confusion was widespread among Anglo-Egyptian administrators – shared by at least Mahon, Wilkinson, Percival, Boulnois and Lloyd, and by a number of maps from the period.

4. The Government's Suggestion that Anglo-Egyptian Confusion over the "Bahr el Arab" Was Short-Lived Is Demonstrably Wrong

1418. The Government also attempts to portray the confusion between the Bahr el Arab and the Ngol/Ragaba ez Zarga as a "short-lived" error that was quickly corrected.<sup>1802</sup> That is incorrect. As the ABC Experts correctly concluded, it is clear that the confusion about the "Bahr el Arab" persisted among Anglo-Egyptian officials from prior to 1905 through at least 1907 or 1908.

1419. Most importantly, the essential point is that the geographic confusion about the "Bahr el Arab" was in full force exactly at the time of the 1905 transfer of the Ngok Dinka. The Government's characterization of Condominium officials' knowledge of the Abyei Area's geography ignores the fact that the error was not corrected until 1907 or 1908, *two or three years after the 1905 transfer of the Ngok Dinka*.

1420. As discussed above, the Government relies on Macdonald to assert that a report by Bayldon in 1905 corrected the Anglo-Egyptian administrators' geographical confusion about the "Bahr el Arab."<sup>1803</sup> According to the Government's Memorial, Bayldon identified the "Bahr el Arab" as the Kiir/Bahr el Arab and referred to "what we now know as the Ragaba ez Zarga" as the "Bahr el Homr."<sup>1804</sup>

1421. The Government claims that Bayldon's "correction" of Wilkinson's error occurred in "*February 1905*"<sup>1805</sup> – and thus at least theoretically prior to both Percival's March 1905 trek (discussed above) and the 1905 transfer of the Ngok Dinka. In fact, the Government engages in an outright misquotation of the documents which are in evidence. Bayldon's report is undeniably dated *20 March 1905*, not "*February 1905*," as claimed in the GoS Memorial. Bayldon's report, and his views about the "Bahr el Arab," were therefore not available at the time the transfer of the Ngok Dinka had occurred.

1422. Moreover, Bayldon's report would in any event not have been circulated until some time after March 1905 (if at all, given that the Sudan Intelligence Report annexing his report was marked "*secret*"). Bayldon's March 1905 report manifestly did not affect either

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<sup>1800</sup> See above at paras. 1038.

<sup>1801</sup> See above at paras. 1211-1212.

<sup>1802</sup> GoS Memorial, at para. 318.

<sup>1803</sup> See above at paras. 1023-1025, 1041. See also Macdonald Report, at para 3.13.

<sup>1804</sup> Macdonald Report, at para 3.13.

<sup>1805</sup> GoS Memorial, at para. 313.

Percival's 20 March 1905 trek report, or the decision to transfer the Ngok Dinka (which was first reported in the same Sudan Intelligence Report that included Bayldon's report).

1423. Further, even after Bayldon reported his own views regarding the "Bahr el Arab" there was no immediate acceptance of that position. Rather, Bayldon's views were understandably regarded as one perspective on a subject that was regarded as confused and confusing. In fact, as the ABC Report concluded, after careful analysis:

"1905-06 surveys correctly identified the Kir as the Bahr el-Arab and the Ragaba ez-Zarga/Ngol for what it actually was (and labeled it the 'Bahr el-Humr'). *It was not until 1908, however, that the local administrators in Khartoum consistently described the Ragaba ez Zarga as the 'Bahr el-Humr' in their official reports.*"<sup>1806</sup>

1424. This is the same conclusion that Professor Daly reaches:

"[E]ven after Wilkinson's mistake was realized, that mistake continued to influence views of the regional geography. It bears repeating that the precise nature of southern Kordofan's hydrology was both extremely complex and of little if any concern to the Sudan Government in only its third year after occupation of El Obeid."<sup>1807</sup>

1425. The correctness of the ABC Experts and Professor Daly is confirmed by Lloyd's observations, reported in 1907, regarding the Bahr el Arab. As discussed above, Lloyd observed in 1907 that the "southern boundary [of Dar Homr] is *between the Bahr el Arab and the river Kir*, the latter being *occupied by the Dinkas under Sultan Rob*."<sup>1808</sup> There can be no doubt, as the MENAS Expert Report confirms, that Lloyd was still referring to the Ngol/Ragaba ez Zarga as the "Bahr el Arab" in 1907.<sup>1809</sup>

1426. This conclusion regarding the timing of the Condominium officials' recognition of Wilkinson's error is further confirmed by the cartographic evidence. The Sudan Intelligence Office's official map of Sudan, produced in May 1904 (and discussed above), incorrectly labeled what was the Ngol/Ragaba ez Zarga as the "Bahr el Arab."<sup>1810</sup> This May 1904 map was included in Gleichen's 1905 *The Anglo-Egyptian Sudan Handbook*.<sup>1811</sup>

1427. Not until 1907 or 1908 did Sudan Government maps begin to identify a river north of the Kiir/Bahr el Arab.<sup>1812</sup> These depictions of the Ngol/Ragaba ez Zarga – then labeled the Bahr el Homr – were, like earlier depictions of the region's river systems, incomplete and inaccurate.<sup>1813</sup>

1428. The reality was that, it was not until 1907 or 1908 at the earliest, that the Anglo-Egyptian officials had common understanding that the "Bahr el Arab" referred to the

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<sup>1806</sup> ABC Report, Part I, at p. 18, **Appendix B to SPLM/A Memorial** (emphasis added). *See also* ABC Report, Part I, at pp. 38-39, **Appendix B to SPLM/A Memorial**.

<sup>1807</sup> Daly Supplemental Expert Report, at p. 54.

<sup>1808</sup> Lloyd, *Some Notes on Dar Homr*, *The Geographical Journal*, 29 (January to June 1907), at p. 649, **Exhibit- FE 3/4** (emphasis added). The Government omits Lloyd's further observation that there were sometimes disputes with the Ngok when the Homr travelled to the region in the dry season, "usually as a result of elephant poaching by the Arabs" who refused to acknowledge that they had "*no right to hunt in another tribe's country.*" *Ibid.*

<sup>1809</sup> MENAS Expert Report, at para. 48, 49.

<sup>1810</sup> *See above* at paras. 1212; **Map 36 (The Anglo Egyptian Sudan, Intelligence office Khartoum, 1904 (in Gleichen 1905))**.

<sup>1811</sup> *See above* at paras. 1211.

<sup>1812</sup> *See* **SPLM Map 40** and **Map 42**.

<sup>1813</sup> *See* **SPLM Map 41** and **Map 43**.

Kiir/Bahr el Arab, rather than the Ngol/Ragaba ez Zarga or some other waterway. This was precisely what the ABC Experts concluded: “*It was not until 1908, however, that the local administrators in Khartoum consistently described the Ragaba ez Zarga as the ‘Bahr el-Humr’ in their official reports.*”<sup>1814</sup>

1429. Ignoring the ABC Experts’ discussion of the specific confusion over the “Bahr el Arab” and Ngol/Ragaba ez Zarga, the Government quotes the ABC Report’s statement that “*geographical uncertainty for the Bahr el-Arab continued until the end of the World War One,*” and criticizes this view by the ABC Experts as “*verging on the absurd.*”<sup>1815</sup> The more accurate characterization is that the Government’s effort to create another straw man out of the ABC Report is itself absurd and grossly misleading.

1430. First, the Government’s Memorial simply misquotes the verbatim text of the ABC Report as allegedly saying “*geographical uncertainty for the Bahr el-Arab continued until the end of the World War One*”;<sup>1816</sup> in fact, what the ABC Report said was “*geographical uncertainty for the Bahr el-Arab BASIN continued until the end of the World War One.*”<sup>1817</sup> Remarkably, and unfortunately, the Government’s quotation omits, without mention or ellipses, the word “*basin*” from the ABC Report, before then going on pejoratively to characterize the ABC Experts’ analysis as “*verging on the absurd.*”

1431. The Government’s misquotation appears aimed at alleging that the ABC Experts concluded that the confusion of the identities of the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab lasted until after WWI. To rebut this (as “*verging on the absurd*”), the Government goes on to identify maps in 1907 and 1910 (discussed above) that did not contain the confusion.

1432. In fact, it is perfectly obvious that the ABC Experts were not referring in the quoted passage to the specific confusion of the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, but instead referred to general geographical confusion about the entire “*Bahr el Arab basin.*” That is why the ABC Report used the wording that it did, which the Government’s Memorial simply chose to misquote.

1433. When one reads the paragraph of the ABC Report that the Government attacks in its context, it is obvious that the ABC Experts were making the general and entirely correct point that there was confusion and ignorance about the geography and hydrology of the Bahr river system until well past 1905:

“The map accompanying the Supplement showed the Bahr el-Arab joining the Bahr el-Ghazal north of a second river labelled the Bahr el-Homr, which joined the Bahr el-Ghazal just north of Lake Ambadi. The location and identity of these two rivers were to be a source of confusion over the next few years. ... This geographical uncertainty for the Bahr el-Arab basin continued until the end of the World War One. The 1912 edition of the Sudan Survey 1:250,000 map 65-K, covering what was later to be known as the Abyei area, warned that ‘The course of the Bahr el Arab is entirely unsurveyed.’ This was not corrected until December 1918, when major changes to

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<sup>1814</sup> ABC Report, Part I, at p. 18, **Appendix B to SPLM/A Memorial**. See also ABC Report, Part I, at pp. 38-39, **Appendix B**.

<sup>1815</sup> GoS Memorial, at para. 329 (quoting ABC Report, Part I, at p. 38, **Appendix B to SPLM/A Memorial**).

<sup>1816</sup> GoS Memorial, at para. 329 (quoting ABC Report, Part I, at p. 38, **Appendix B to SPLM/A Memorial**).

<sup>1817</sup> GoS Memorial, at para. 329 (quoting ABC Report, Part I, at p. 38, **Appendix B to SPLM/A Memorial**) (emphasis added).



the courses of the Bahr el-Arab and the Ragaba ez-Zarga to the north were added to the map.”<sup>1818</sup>

1434. The ABC Experts were very clear in this discussion regarding the “geographical uncertainty for the Bahr el-Arab basin” as a general matter. That is obvious from the context of their sentence and from the subsequent examples given to illustrate the point. The Government’s criticism is as ill-founded as its misquotation is misleading.

1435. With regard to the Anglo-Egyptian authorities’ specific confusion of the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, the ABC Report reached a different conclusion, which the Government chooses not to criticize. On this issue, the ABC Experts stated explicitly that:

“1905-06 surveys correctly identified the Kir as the Bahr el-Arab and the Ragaba ez-Zarga/Ngol for what it actually was (and labeled it the ‘Bahr el-Humr’). *It was not until 1908, however, that the local administrators in Khartoum consistently described the Ragaba ez Zarga as the ‘Bahr el-Humr’ in their official reports.*”<sup>1819</sup>

This conclusion, which is in fact the most relevant one for purposes of this case, is not materially different from the Government’s view that “*a true understanding of which river was the Bahr el Arab had been reached in published form in 1907.*”<sup>1820</sup>

1436. Given all this, it is clear that the Government’s attack on the ABC Experts’ analysis of Wilkinson’s confusion of the “Bahr el Arab” and Ngol/Ragaba ez Zarga is contrived and gratuitous. It rests on a misleading and unacceptable misquotation of the ABC Report, coupled with an obvious effort to distort the meaning of the Report, in order to raise doubts about the professionalism of the ABC Experts. In reality, what the evidence shows is that the ABC Experts were entirely correct and the Anglo-Egyptian confusion over the location and identity of the “Bahr el Arab” was not clarified until 1907 or 1908 at the earliest.

5. The Provincial Boundary between Kordofan and Bahr el Ghazal Was Indefinite and Indeterminate in 1905

1437. The Government also fails to appreciate the impact of the geographic confusion surrounding the “Bahr el Arab” in 1905 on the putative Kordofan/Bahr el Ghazal boundary. In fact, when the confusion regarding the “Bahr el Arab” is taken into account, it is clear from both the documentary record and the cartographic evidence that the Kordofan/Bahr el Ghazal boundary was indefinite and indeterminate in 1905.

- a) The Documentary Record Demonstrates that the Provincial Boundary between Kordofan and Bahr el Ghazal Was Indefinite and Indeterminate in 1905

1438. As discussed in detail in the SPLM/A’s Memorial, Sudan’s provincial boundaries in 1905 were in the process of development and remained indefinite, vague and approximate, as well as provisional and mistaken.<sup>1821</sup> That was particularly true as to Bahr el Ghazal and Kordofan, where the putative provincial boundary was occasionally referred to by Anglo-

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<sup>1818</sup> ABC Report, Part I, at p. 38, **Appendix B to SPLM/A Memorial.**

<sup>1819</sup> ABC Report, Part I, at p. 18, **Appendix B to SPLM/A Memorial** (emphasis added). *See also* ABC Report, Part I, at pp. 38-39, **Appendix B to SPLM/A Memorial.**

<sup>1820</sup> GoS Memorial, at para. 329 (quoting Macdonald Report, at para. 4.3).

<sup>1821</sup> *See* SPLM/A Memorial, at paras. 315-343.

Egyptian officials as the “Bahr el Arab,”<sup>1822</sup> but remained approximate, indefinite and indeterminate in 1905.

1439. In general terms, the relevant Sudanese administrative boundaries were only two or three years old in 1905 (the Condominium only having been established in 1898/1899 and the Province of Bahr el Ghazal only having been established in 1902<sup>1823</sup>). Moreover, the Sudanese provincial boundaries had never been fixed by constitutional, legislative or executive action, and were only referred to in various of the working communications of Sudan Government administrators. At the same time, these boundaries had not been delimited and were expressly treated as “approximate,”<sup>1824</sup> based on little or no information of Sudan’s people and territories,<sup>1825</sup> while also being regarded as provisional and subject to repeated alterations.<sup>1826</sup>

1440. The Government’s Memorial does not seriously contest these characterizations of the character of the Kordofan/Bahr el Ghazal boundary. On the contrary, the Government acknowledges generally that “no internal boundaries, in Sudan ... were demarcated,” that “no boundaries in Africa ... were ‘precisely delimited...’”<sup>1827</sup> The GoS also acknowledges “*that provincial boundaries at this period [1902-1922] were not laid down or recorded in any very formal way, and they were often stated to be approximate.*”<sup>1828</sup>

1441. Specifically addressing the Kordofan/Bahr el Ghazal border region, the Government Memorial concedes that “[t]he region of southern Kordofan and northern Bahr el Ghazal is vast in size and its drainage system exceptionally complex,” and that well past 1905 there “were uncertainties and confusions about the drainage in general and, in particular, about the precise course of the major river that drained the area, the Bahr el Arab, in its middle reaches [e.g., in the Abyei region specifically].”<sup>1829</sup>

1442. The Government’s Memorial and the sources it cites go on repeatedly to acknowledge the extent of the “*uncertainty*” regarding the Bahr el Arab’s course,<sup>1830</sup> that the location and course of the Bahr el Arab was “*ill-defined,*”<sup>1831</sup> “*vaguely-defined,*”<sup>1832</sup> “*uncertain,*”<sup>1833</sup> and “*bewildering.*”<sup>1834</sup> As discussed above, the Government also acknowledges specifically that

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<sup>1822</sup> E. Gleichen, *Handbook of the Sudan* 110 (1898), **Exhibit-FE 1/6**; Annual Report on the Sudan, 1902, Province of Bahr el Ghazal, at p. 230, **Exhibit-FE 1/20**; Annual Report on the Sudan, 1903, Province of Bahr el Ghazal, at p. 71, **Exhibit-FE 1/26**.

<sup>1823</sup> The Sudan Gazette reported in April 1902 that the “Bahr-el-Ghazal Occupation” was being transferred to the Sudan Government. Sudan Gazette No. 34, dated 1902, at p. 1 (“The Bahr-el-Ghazal Occupation having been transferred to the Sudan Government from 1-1-1902”), **Exhibit-FE 1/17**; Annual Report on the Sudan, 1902, Province of Bahr el Ghazal, at p. 230, **Exhibit-FE 1/20**; Gazette No. 45, dated March 1903, at p. 45 lists Bahr el Ghazal as one of the 8 Mudiria, **Exhibit-FE 1/22**. See also SPLM/A Memorial, at para. 289. This is conceded by the Government. See GoS Memorial, at para. 282.

<sup>1824</sup> See SPLM/A Memorial, at para. 356.

<sup>1825</sup> See SPLM/A Memorial, at paras. 331-336.

<sup>1826</sup> See SPLM/A Memorial, at paras. 355-357.

<sup>1827</sup> GoS Memorial, at para. 231(c).

<sup>1828</sup> GoS Memorial, at para. 368.

<sup>1829</sup> GoS Memorial, at para. 289.

<sup>1830</sup> GoS Memorial, at para. 290.

<sup>1831</sup> GoS Memorial, at para. 293 (quoting *Report of the Egyptian Province of the Sudan, Red Sea and Equator* 91 (1884), **Exhibit-FE 17/5**).

<sup>1832</sup> GoS Memorial, at para. 294 (quoting E. Gleichen, *Handbook of the Sudan* 110 (1898), **Exhibit-FE 1/6**).

<sup>1833</sup> GoS Memorial, at para. 309.

<sup>1834</sup> GoS Memorial, at para. 320 (quoting Garstin, *Fifty Years of Nile Exploration, and Some of its Results*, *The Geographical Journal*, 33 (1909), at p. 142, **Exhibit-FE 18/1**).

there was “*confusion*”<sup>1835</sup> about what river the Bahr el Arab even was – referring to Wilkinson’s “*mistaken identification*”<sup>1836</sup> of the Bahr el Arab and Ragaba ez-Zarga.<sup>1837</sup>

1443. Mr. Macdonald’s report underscores these observations, characterizing the 1905 Gleichen *Handbook*’s description of the Bahr al-Ghazal boundaries as “*easily the most cryptic in the Appendix* consisting of only four half lines, suggesting that the sources seen by the Editor were limited.”<sup>1838</sup> (Parenthetically, Macdonald’s Report is limited to a discussion of the rivers of the Bahr region themselves, and he does not consider whether there existed any Kordofan/Bahr el Ghazal provincial boundary or what it might be.)

1444. Professor Cunnison’s published works also underscore the uncertain and highly approximate character of references to the “Bahr el Arab.” As discussed above, Professor Cunnison’s published works specify what was meant by the term Bahr el Arab:

“The river system is known to the Arabs as the Bahr, although they subdivide the area into the Regeba (consisting of the Regeba ez zerga and the Regeba Umm Bioro): and *the Bahr, or the Bahr al Arab which consists of all river beds between the Regeba ez Zerga and the main river.* ... The nomenclature [of the rivers] is confusing. The river which is generally shown on maps as the Bahr el Arab – and in one section as the Jurf – is always known by the Arabs as the Jurf. They point out that it is not the Bahr al Arab, for the Arabs do not settle by it at this part, but the Bahr ed Deynka.”<sup>1839</sup>

1445. He reiterates this description some years later as follows:

“Giraffe move from [the Upper Nile Province] in the early rains and distribute themselves *over the wide area known as the Bahr el Arab, penetrate north over the Regeba Zerga and Regeba Umm Bioro*, enter the Goz district between there and Muglad, and reach the north-eastern regebas in the neighbourhood of Kwak and Keylak.”<sup>1840</sup>

1446. It is important again to emphasize Cunnison’s explanation that “*the Bahr, or the Bahr al Arab ... consists of all river beds between the Regeba ez Zerga and the main river.*” This description of the term “Bahr el Arab” confirms the high degree of uncertainty that surround the reference and the river system to which it referred.

1447. Given the number and magnitude of these various uncertainties and confusions, the Kordofan/Bahr el Ghazal boundary had not only not been delimited in 1905, but it was indeterminate. As discussed above, there was widespread confusion surrounding the term “Bahr el Arab” among Anglo-Egyptian officials prior to and during 1905, who simply did not have a common or accurate understanding of what the term referred to.<sup>1841</sup>

1448. As a consequence, on those occasions when the “Bahr el Arab” was referred to as the provincial boundary between Kordofan and Bahr el Ghazal, the Anglo-Egyptian administrators simply did not have a clear or common understanding of where that boundary was in fact located. As discussed above, the boundary might have been the Ngol/Ragaba ez

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<sup>1835</sup> GoS Memorial, at para. 317.

<sup>1836</sup> GoS Memorial, at para. 321.

<sup>1837</sup> GoS Memorial, at para. 321.

<sup>1838</sup> Macdonald Report, at para. 3.11 (emphasis added).

<sup>1839</sup> Cunnison, “*The Humr and their Land*,” 35(2) SNR 50, 51 (1954), **Exhibit-FE 4/5** (emphasis added).

<sup>1840</sup> Cunnison, “*Giraffe Hunting among the Humr Tribe*,” 35 SNR 49, 49-50 (1958) (emphasis added).

<sup>1841</sup> See above at paras. 1391-1397.

Zarga (as Wilkinson, Percival, Mahon, Boulnois and Lloyd thought), it might have been the entire region between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab (as Cunnison and the Misseriya later thought),<sup>1842</sup> it might have been the Kiir/Bahr el Arab (as Bayldon thought), it might have been the Lol or it might have been something else.<sup>1843</sup>

1449. The MENAS Expert Report considers the record, including a review of the early Condominium officials' knowledge of the geography and hydrology of the Bahr region. In this regard, the MENAS Expert Report concludes that:

“by 1905, in our opinion, the Condominium administrators possessed and maintained very limited practical knowledge and conflicting understandings of the rivers in the Bahr region. Specifically, confusion with regard to the meaning of “Bahr el Arab” evidently prevailed at the time of the 1905 transfer of the Ngok Dinka to Kordofan, with that name being used variously for the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga. There are also indications that the term referred more generally to the entire Bahr river basin region, rather than to a specific waterway.”<sup>1844</sup>

1450. The consequence, concludes the MENAS Expert Report, is that:

“This uncertainty rendered, of necessity, the description of any territorial limit between Kordofan and Bahr el Ghazal provinces uncertain and indeterminate.”<sup>1845</sup>

1451. Ultimately the MENAS Expert Report, dismissing the suggestion that there is any rule in favor of natural features forming territorial limits,<sup>1846</sup> concludes that:

“as of 1905 no boundary or territorial limit between Kordofan and Bahr el Ghazal provinces had been prescribed in any constitutional, legislative or executive decree or proclamation. Nor was there any certain or accepted practical understanding of what the boundary or territorial limit between Kordofan and Bahr el Ghazal provinces might be. The references to the “Bahr el Arab” had no common or determinate meaning, given the geographic confusion.”

- b) The Cartographic Evidence Demonstrates that the Provincial Boundary between Kordofan and Bahr el Ghazal Was Indefinite and Indeterminate in 1905

1452. The cartographic evidence further confirms that the pre-1905 Kordofan-Bahr el Ghazal provincial boundary was indefinite and indeterminate.<sup>1847</sup> As summarized below, and detailed at greater length in Appendix B, there was no official Sudan Government map as of 1905 that delimited a provincial boundary between Kordofan and Bahr el Ghazal; on the contrary, the only official map that existed (from 1904) conspicuously *omitted* any such boundary, while identifying the boundaries of other Sudanese provinces.

1453. As detailed in Appendix B, there was only a single official map issued by the Sudan Government prior to 1905 which is relevant to the Kordofan-Bahr el Ghazal boundary and

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<sup>1842</sup> See also MENAS Expert Report, at paras. 50, 88 (see also at paras. 62-63).

<sup>1843</sup> See also above at paras. 1418-1436.

<sup>1844</sup> MENAS Expert Report, para 50.

<sup>1845</sup> MENAS Expert Report, para 51.

<sup>1846</sup> MENAS Expert Report, para 62-63, 88.

<sup>1847</sup> See above at paras. 1452-1458.

that map confirms that the pre-1905 Kordofan-Bahr el Ghazal boundary was undefined.<sup>1848</sup> The 1904 Anglo-Egyptian Sudan map (**Map 36**), prepared by the Intelligence Office in Khartoum, identified a number of Sudanese provincial boundaries, but *it specifically omitted the boundary between Kordofan and Bahr el Ghazal*.<sup>1849</sup> The omission of the Kordofan-Bahr el Ghazal boundary on this map, produced just one year before the 1905 transfer, confirms that the pre-1905 Kordofan-Bahr el Ghazal boundary had not been delimited and remained approximate, indeterminate and provisional.

1454. The Government ignores the official 1904 Anglo-Egyptian Sudan map and instead relies on a single 1901 map (produced privately by Mardon) in arguing that the provincial boundary between Kordofan and Bahr el Ghazal could be determined in 1905.<sup>1850</sup> The Government ignores the fact that Mardon produced his textbook, which contained his maps, “mainly to meet the needs of Egyptian schools,”<sup>1851</sup> and not with any official authorization or for any official purpose.

1455. The Government also ignores the fact that Mardon himself noted in 1906 that “[t]he exact limits of the provinces, especially those in the south, are not yet definitely fixed,” a qualification that applied *a fortiori* to his earlier 1901 map.<sup>1852</sup> Moreover, it is more than a little puzzling for the Government to rely on a private 1901 map as evidence of the Kordofan/Bahr el Ghazal boundary – given that the map was produced a year before the Bahr el Ghazal was even established as a province of the Sudan Government.<sup>1853</sup>

1456. The Mardon map is included in the 1905 Gleichen *Handbook*, but with no particular status. On the contrary, the *Handbook’s* Bibliography states at page 349 that “For general maps the following are recommended: The Anglo-Egyptian Sudan. I.D.W.O., No. 1856, 1904. 1:4,000,000 (Latest and most up-to-date general map).” A number of other maps are also mentioned. In contrast, no reference is made of the Mardon map in the Bibliography.

1457. Similarly, the 1901 Mardon Map is included in the second volume of Gleichen’s 1905 *The Anglo-Egyptian Sudan*, which is a volume of “Routes.” Notably, however, the Editorial Note to this volume cautions readers:

“It being impossible to provide a map showing even all the terminal places mentioned [in this volume], *intending travellers are referred to the map at the end of Vol. I*, and to the Sudan Ordnance Survey Maps (scale, 1:250,000)”<sup>1854</sup>

1458. The absence of any official Sudan Government map, prior to 1905, depicting the Kordofan-Bahr el Ghazal boundary is entirely understandable, given the geographical confusion (described above) regarding the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. In circumstances where the Anglo-Egyptian authorities were confused about the identity and location of the “Bahr el Arab,” it makes perfect sense that the “Bahr el Arab” would not have been adopted as fixed and definite provincial boundary.

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<sup>1848</sup> Map Analysis, at para. 43, **Appendix B**.

<sup>1849</sup> SPLM Memorial, at para. 307; SPLM Map 36.

<sup>1850</sup> GoS Memorial, at p. 11 (Figures 4a and 4b). *See also* SPLM Maps 37-39.

<sup>1851</sup> H. Mardon, *A Geography of Egypt and the Anglo-Egyptian Sudan* 174 (1906), **Exhibit-FE 2/20**.

<sup>1852</sup> SPLM Memorial, at para. 308.

<sup>1853</sup> *See above* at paras. 1439; GoS Memorial, at para. 289.

<sup>1854</sup> E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, Editorial Note to Volume II (1905), **Exhibit-FE-17/13** (emphasis added).

c) No Definite Provincial Boundary between Kordofan and Bahr el Ghazal Was Adopted Until Well After 1905

1459. There is a similar lack of cartographic evidence indicating the Kordofan-Bahr el Ghazal boundary in the years following 1905. As discussed above, the Government asserts that the 1905 transfer moved the Kordofan-Bahr el Ghazal boundary south of the Bahr el Arab, but is unable to say what area was transferred in 1905.<sup>1855</sup> Similarly, as detailed in Appendix B, Sudan Government maps did not depict any determinate Kordofan-Bahr el Ghazal boundary for a number of years following the 1905 transfer.<sup>1856</sup>

1460. Thus, the Survey Department's 1907 map titled "The White Nile and Kordofan" (**Map 42**) did not delimit any boundary between the two provinces.<sup>1857</sup> Similarly, the Survey Office's 1907 map of northern Bahr El Ghazal (**Map 40**) partially marked the Ngol/Ragaba ez Zarga's course with the notation, "(?) *From Kordofan*," but depicted no boundary. No other map between 1905 and 1910 depicts any new (or old) boundary between Bahr el Ghazal and Kordofan.

1461. Not until a 1913 Kordofan Map (**Map 48**) did the Sudan Government map attempt to identify the Kordofan/Bahr el Ghazal boundary. Even then, however, the boundary's location varied widely from map to map, reflecting the continuing uncertainty and indefiniteness of any provincial boundary.<sup>1858</sup> This is illustrated in GoS Figure 14, which depicts the continuing changes of the Kordofan/Bahr el Ghazal boundary during the decades following 1911.<sup>1859</sup> To illustrate this uncertainty, and the period for which it continued, a comprehensive illustration of the "boundaries" between Kordofan and Bahr el Ghazal from the 19<sup>th</sup> century to the 1920s is included at **Map 60** in the SPLM/A Supplemental Map Atlas.

1462. At the same time, even when a Kordofan/Bahr el Ghazal boundary was depicted between 1914 and the 1930, the boundary was consistently labelled "Approx. Province Bdy."<sup>1860</sup> Again, that label, as well as the continuous changes (and undoing of changes) that characterized the provincial boundary underscored its uncertain and indefinite character. More fundamentally, these various features of the boundary confirm that it was the territory of the Ngok Dinka, who had been transferred in 1905, rather than some geographical feature or latitudinal coordinate, that defined the location of the boundary between Kordofan and Bahr el Ghazal after 1905.

1463. MENAS Expert Report reaches the same conclusion, drawing an insight into the reasons behind the state of affairs at the time:

"The post-1905 uncertainty and lack of definition of the post-transfer Kordofan/Bahr el Ghazal provincial boundary only highlights the lack of practical concern the Condominium Government had as to its definition. Absent the urgency of political frontiers between other nations, the administrative concerns of the Anglo-Egyptian Condominium were more concerned with the on the ground exigencies of

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<sup>1855</sup> GoS Memorial, at paras 374-382.

<sup>1856</sup> Map Analysis, at paras. 70-74, **Appendix B**.

<sup>1857</sup> SPLM Map 42.

<sup>1858</sup> See GoS Memorial, at Figure 14 and **Map 60 to SPLM/A Memorial**.

<sup>1859</sup> A more comprehensive discussion is at **Appendix B** ("Map Analysis") to this Reply Memorial.

<sup>1860</sup> See Map Analysis, **Appendix B**. See in particular, Map Analysis, at paras. 50, 52, 83, 86, 88, 89, 91, 92, 94, **Appendix B**.

administering the territories and collecting tribute from pastoral groups, whose territories often waxed and waned, than with fixing provincial boundaries.”<sup>1861</sup>

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1464. In sum, the extent of the confusion regarding the “Bahr el Arab” and the putative Kordofan/Bahrel Ghazal boundary makes it clear that any such boundary was indeterminate in 1905. There had been no constitutional, legislative or executive declaration establishing the boundary, and what few administrative references existed were indeterminate because of the widespread geographical confusion among Anglo-Egyptian officials about the identity and location of the “Bahr el Arab.” The cartographic evidence is precisely consistent with this, not depicting any provincial boundary between Kordofan and Bahr el Ghazal prior to 1905 or, for that matter, until at least 1913.

1465. As a result of this confusion, references to the “Bahr el Arab” as the Kordofan/Bahr el Ghazal boundary simply did not possess a commonly-understood identity or location in 1905. The same conclusion is drawn by the MENAS Expert Report<sup>1862</sup> The phrase “Bahr el Arab” could have referred to any of a number of waterways, or to the entire river system of the Bahr region, and this confusion was not resolved until 1907 at the earliest. Moreover, even after the 1905 transfer of the Ngok Dinka, the Condominium did not adopt any revision to the Kordofan/Bahr el Ghazal provincial boundary.

6. The Government Misinterprets the Conclusions that the ABC Experts Drew from Anglo-Egyptian Confusion About the “Bahr el Arab”

1466. The Government’s Memorial goes on to misinterpret the conclusions that the ABC Report drew from the Anglo-Egyptian confusion about the “Bahr el Arab,” in an effort to construct another straw man which it can criticize. In the Government’s view, the ABC Experts concluded that “references in contemporary documents to the Bahr al Arab should be taken as references to the Ragaba ez Zarga”;<sup>1863</sup> and (b) “correspondingly, the southern boundary of Kordofan before 1905 was the Ragaba ez Zarga.”<sup>1864</sup> The Government’s analysis is confused and wrong.

1467. It is correct that the ABC Experts concluded that, as a general matter, references to the “Bahr el Arab” in Anglo-Egyptian documents between 1902 and 1907 or so should be interpreted as references to what was in fact the Ngol/Ragaba ez Zarga. Thus, the ABC Report observed that “*Wilkinson was not alone in erroneously demarcating geographical features in the Sudan,*” giving as an example Percival “describing the Kir as being 50 miles south of the Bahr el Arab.”<sup>1865</sup> (As discussed above, the ABC Experts were clearly correct in reaching this conclusion with regard to Percival.)<sup>1866</sup> More generally, the ABC Experts noted that:

“[o]ther reports make it clear that *administrative officials mistook the Ragaba ez-Zarga/Ngol for the Bahr el-Arab*, and thought the Kir was a different river.”<sup>1867</sup>

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<sup>1861</sup> MENAS Expert Report, para 76.

<sup>1862</sup> MENAS Expert Report, para 43, 50, 88.

<sup>1863</sup> GoS Memorial, at para. 324(a).

<sup>1864</sup> GoS Memorial, at para. 324(b).

<sup>1865</sup> ABC Report, Part I, at pp. 17-18, **Appendix B to SPLM/A Memorial**.

<sup>1866</sup> See above at paras. 1016-1022.

<sup>1867</sup> ABC Report, Part I, at p. 18, **Appendix B to SPLM/A Memorial** (emphasis added).

1468. Again, this conclusion was clearly correct: as discussed above, Wilkinson, Percival, Mahon, Boulnois and Lloyd, as well as the 1904 map in Gleichen's 1905 *Handbook*, were all confused with regard to the identities and locations of the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab.<sup>1868</sup> It is nonetheless an overstatement when the Government says that the ABC Experts concluded that "references in contemporary documents to the Bahr al Arab should be taken as references to the Ragaba ez Zarga."<sup>1869</sup> The ABC Experts did not conclude that every reference in every pre-1905 Anglo-Egyptian document to the Bahr el Arab should be read as a reference to the Ngol/Ragaba ez Zarga.

1469. In fact, the ABC Experts concluded that there was general "*geographical confusion*," that "Wilkinson was not alone" in making his mistake (citing example) and that "administrative officials" made the same mistake. The ABC Report's conclusions were thus more nuanced than the Government suggests, finding that there was general geographic confusion and identifying a number of instances of Wilkinson's error, without generically concluding that every single reference in all pre-1907 Condominium documents to the Bahr el Arab was really a reference to the Ngol/Ragaba ez Zarga.

1470. The ABC Experts were also nuanced in what conclusions and consequences they drew from the confusion about the "Bahr el Arab." The Government argues that the ABC Experts concluded that, because of Wilkinson's error, "the southern boundary of Kordofan before 1905 was the Ragaba ez Zarga."<sup>1870</sup> According to the Government's Memorial, this "theory is entirely novel" and an "imaginative figment."<sup>1871</sup>

1471. The Government's characterizations of the ABC Experts' conclusions are again inaccurate and misleading. In fact, the ABC Experts did not state that the southern boundary of Kordofan was the Ngol/Ragaba ez Zarga. The Government's Memorial cites to no such statement in the ABC Report and there is none.

1472. Rather, the ABC Experts again adopted a more nuanced conclusion than the Government attempts to attribute to them. The ABC Report begins its discussion of this issue by noting that "[t]he evidence presented supporting the government's interpretation of the 1905 boundary [between Kordofan and Bahr el Ghazal as being the Bahr el Arab] is strong."<sup>1872</sup> The ABC Experts then never return to this issue – the evidence of what was stated by Condominium officials to be the boundary between Kordofan and Bahr el Ghazal – in their discussion.

1473. Instead, the ABC Experts looked to the separate question of "*what the local administrative understanding and practice of the day was on the ground*" with regard to where the "Bahr el Arab" was located. Importantly, the ABC Experts did not disagree that the "Bahr el Arab" had been referred to in Anglo-Egyptian documentation at the time as the Kordofan/Bahr el Ghazal boundary, but instead considered the separate question of identifying what the Condominium administrators who used the term understood this boundary (the "Bahr el Arab") actually to refer to.

1474. The ABC Experts then went on and analyzed the Anglo-Egyptian documents sharing the confusion over the "Bahr el Arab." Following this discussion, the ABC Experts

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<sup>1868</sup> See above at paras. 940-972, 983-1022, 1029-1032, 1035-1053.

<sup>1869</sup> GoS Memorial, at para. 324(a).

<sup>1870</sup> GoS Memorial, at para. 324(b).

<sup>1871</sup> GoS Memorial, at para. 330.

<sup>1872</sup> ABC Report, Part I, at p. 36, **Appendix B to SPLM/A Memorial**.



concluded that “*the full context*” of the Anglo-Egyptian record “reveals that *the Ragaba ez-Zarga/Ngol, rather than the river Kir, which is now known as the Bahr el-Arab, was treated as the province boundary.*”<sup>1873</sup>

1475. Again importantly, the ABC Experts did not conclude (as the Government argues) that “the southern boundary of Kordofan before 1905 *was* the Ragaba ez Zarga.”<sup>1874</sup> On the contrary, recognizing that the Anglo-Egyptian administrators referred to the provincial boundary as the “Bahr el Arab,” the ABC Experts considered what this reference was actually understood to mean by Anglo-Egyptian authorities. As to this issue, the ABC Experts concluded that the Ngol/Ragaba ez Zarga “*was treated as* the province boundary” by Condominium administrators at the relevant time.

1476. It is nothing more than semantics for the Government to criticize the ABC Experts for having supposedly concluded that the Kordofan/Bahr el Ghazal boundary “was the Ragaba ez Zarga.”<sup>1875</sup> That is manifestly not what the ABC Report said. Rather, the ABC Experts concluded that the provincial boundary “was” referred to as the “Bahr el Arab” and that, because of the geographic confusion prevailing in 1905, in practice the Ragaba ez Zarga “was treated as” the boundary by Anglo-Egyptian administrators.

7. The Government Draws Implausible Consequences from Its Misinterpretation of the Conclusions that the ABC Experts Drew from Anglo-Egyptian Confusion About the “Bahr el Arab”

1477. The Government’s Memorial next opines that “even if one were to credit this theory” – referring to the ABC Experts’ supposed conclusion that the Kordofan/Bahr el Ghazal boundary “was” the Ngol/Ragaba ez Zarga – “the consequence should have been that it was the area south of the Ragaba ez Zarga which was defined as the northern boundary of the transferred area.”<sup>1876</sup> The GoS then goes on in what is a truly remarkable line of argument to criticize the ABC Report because “[b]ased on *the assertion that the Ragaba ez-Zarga ‘was’ the Bahr el Arab*, the ABC Experts included in the ‘Abyei Area’ more than twice the area to the north of the Ragaba ez Zarga than there is to the south.”<sup>1877</sup>

1478. The Government’s argument here is entirely implausible. According to the Government, since the ABC Experts supposedly erroneously concluded that the Kordofan/Bahr el Ghazal boundary “was” the Ngol/Ragaba ez Zarga, the Experts committed an even greater error by not then taking the purportedly logical next step of defining the Abyei Area as the area south of the Ngol/Ragaba ez Zarga.

1479. In fact, as discussed above, the ABC Report does not state that the Kordofan/Bahr el Ghazal boundary “was” the Ngol/Ragaba ez Zarga. In this regard, the Government’s Memorial (in paragraph 325) again adopts the unfortunate and misleading tactic of outright misquotation of the relevant documents: contrary to the GoS Memorial’s attribution of a quotation to the ABC Experts (“[b]ased on the assertion that the Ragaba ez-Zarga ‘was’ the Bahr el Arab”), the ABC Report does *not* contain the language that the Government attributes by quotation to them. Again, it is regrettable that these sorts of misquotations would occur, much less occur repeatedly, in a formal legal submission on behalf of the Government.

<sup>1873</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>1874</sup> GoS Memorial, at para. 324(b).

<sup>1875</sup> GoS Memorial, at para. 324(b).

<sup>1876</sup> GoS Memorial, at para. 325.

<sup>1877</sup> GoS Memorial, at para. 325.

1480. Given the Government’s mischaracterization of what the ABC Report said, it is hardly surprising that the ABC Experts did not adopt the approach to the Kordofan/Bahr el Ghazal boundary that the Government says that they should have. The simple reality is that the ABC Experts never reached the conclusions regarding the Kordofan/Bahr el Ghazal boundary that the Government claims, so the notion that they should have taken the next step identified by the Government is complete fantasy. Simply put, since the ABC Experts did not conclude that the Ngol/Ragaba ez Zarga “was” the Kordofan/Bahr el Ghazal boundary, they had no reason to treat that waterway as if it were the boundary.

1481. In any event, as discussed below,<sup>1878</sup> the Government’s argument as to what the ABC Experts “should have done” if the Kordofan/Bahr el Ghazal boundary had been the Ngol/Ragaba ez Zarga rests on a manifestly erroneous interpretation of the parties’ agreed definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol. As discussed in Part III(C) below, the GoS Memorial proceeds on the (entirely unexplained and unsupported) basis that the Abyei Area is limited to that sub-part of the area of the nine Ngok Dinka Chiefdoms which was transferred to Kordofan in 1905.<sup>1879</sup> As a consequence, in the Government’s view, the 1905 Kordofan/Bahr el Ghazal boundary has decisive importance for determining the boundaries of the Abyei Area.

1482. In fact, the Government is manifestly wrong in adopting this interpretation of the definition of the Abyei Area. For the reasons set forth in the SPLM/A Memorial and elaborated below, the parties’ agreed definition of the Abyei Area does not provide for subdivision of the area of the nine Ngok Dinka Chiefdoms based upon the putative location of the Kordofan/Bahr el Ghazal boundary.<sup>1880</sup> On the contrary, the parties’ definition of the Abyei Area clearly includes all of the territory of the Ngok Dinka as it stood in 1905 – regardless where the boundary between Kordofan and Bahr el Ghazal was considered to have run.

1483. Accordingly, the ABC Experts’ conclusion that the Ngol/Ragaba ez Zarga “was treated as the provincial boundary” in no way suggested that this waterway should serve to divide the Ngok Dinka’s historic homeland. Rather, as discussed in Part III(C) below, the ABC Experts correctly concluded that the Abyei Area includes all of the historic territory of the Ngok Dinka as that territory stood in 1905. The fact that the Kordofan/Bahr el Ghazal boundary was the “Bahr el Arab,” the Ngol/Ragaba ez Zarga, the Lol or some other waterway was simply irrelevant to this determination. What is decisive is what land the Ngok Dinka occupied and used in 1905 – not what provincial boundaries, confused or otherwise, the Anglo-Egyptian officials understood to exist at the time.

8. The Government Ignores the ABC Experts’ Conclusion That the Anglo-Egyptian Considered the Nine Ngok Dinka Chiefdoms the Nine Ngok Dinka Chiefdoms to Belong to Bahr el Ghazal in 1905

1484. The Government’s discussion of the Kordofan/Bahr el Ghazal boundary also ignores the specific question of the 1905 transfer of the Ngok Dinka. Rather than considering what the Anglo-Egyptian authorities considered that they transferred to Kordofan in 1905, the Government’s Memorial adopts the circuitous route of attempting to infer what the Condominium authorities transferred based on the putative location of the Kordofan/Bahr el Ghazal boundary. This analysis is artificial and speculative – particularly given the

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<sup>1878</sup> See below at paras. 1498-1500.

<sup>1879</sup> GoS Memorial, at paras. 19, 401.

<sup>1880</sup> See below at paras. 1501-1575.

indeterminate character of the purported provincial boundary – was properly rejected by the ABC Experts.

1485. As the ABC Experts found, the Sudan Government’s 1905 instruments relating to the transfer of the Ngok Dinka in 1905 all proceeded on the basis that “Sultan Rob” and all of his “territories” or “country” were being transferred to Kordofan from Bahr el Ghazal. Thus, the 1905 Kordofan Annual Report provided that:

“The Dinka Sheikhs, *Sultan Rob* and Sultan Rihan Gorkwei are *now included in Kordofan INSTEAD OF THE BAHR EL GHAZAL...*”<sup>1881</sup>

Likewise, the 1905 Bahr el Ghazal Annual Report provided that:

“*the territories of Sultan Rob ... HAVE BEEN TAKEN FROM THIS PROVINCE and added to Kordofan.*”<sup>1882</sup>

Similarly, the Sudan Intelligence Report No. 128 reported:

“It has been decided that *Sultan Rob*, whose country is on the Kir river, and Sheikh Rihan of Toj ... *are to belong to Kordofan Province.*”<sup>1883</sup>

In each of the Sudan Government’s transfer records, the express premise was that “Sultan Rob” and “the territories of Sultan Rob” had previously been located in Bahr el Ghazal, but were then transferred in 1905 to Kordofan.

1486. As a consequence, the ABC Experts quite properly concluded that “the Ngok people were regarded [by the Anglo-Egyptian administration] *as part of the Bahr el-Ghazal Province until their transfer in 1905*”<sup>1884</sup> and that “*the government’s claim that only the Ngok Dinka territory south of the Bahr el Arab was transferred to Kordofan in 1905 is therefore found to be mistaken.*”<sup>1885</sup> Thus, rather than attempting to draw speculative inferences about the 1905 transfer of the Ngok Dinka based upon the indeterminate (or, at best, very confused) Kordofan/Bahr el Ghazal boundary, the ABC Experts looked more directly at the language of the relevant transfer records. Those records all said the same thing – that the Ngok Dinka were regarded as belonging to Bahr el Ghazal before 1905 and to Kordofan after 1905.

1487. The Government nowhere challenges the ABC Experts’ analysis. Nowhere in its Memorial does the Government claim that the ABC Experts misinterpreted the various 1905 Condominium transfer records or advance an alternative interpretation. As discussed below, however, the ABC Experts’ interpretation of the historical record, set forth in the 1905 transfer records, is an independently sufficient basis for rejecting the Government’s criticisms of the ABC Experts’ definition of the Abyei Area.<sup>1886</sup>

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<sup>1881</sup> See Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13** (emphasis added).

See also SPLM/A Memorial, at paras. 346-357.

<sup>1882</sup> See Annual Report of the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13**. See also SPLM/A Memorial, at paras. 346-357.

<sup>1883</sup> Sudan Intelligence Report, No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

<sup>1884</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>1885</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial**.

<sup>1886</sup> See below at paras. 1576-1589.

9. The Government Ignores the Evidentiary Consequences that Must Be Drawn from Anglo-Egyptian Confusion About the “Bahr el Arab”

1488. In addition to its other errors, the Government’s Memorial also ignores the evidentiary consequences that must be drawn from the Anglo-Egyptian confusion about the “Bahr el Ghazal.” These consequences concern the evaluation of the various reports made between 1905 and 1907 by Anglo-Egyptian administrators concerning the location of the Ngok Dinka. The GoS Memorial completely ignores these consequences.

1489. The reason that the ABC Experts discussed the Anglo-Egyptian confusion regarding the “Bahr el Arab” was because of its evidentiary consequences for the location of the Ngok Dinka in 1905. As discussed in detail above, the principal Anglo-Egyptian records affected by the Wilkinson mistake were the reports made between 1902 and 1905-1906 by Mahon, Percival, Wilkinson, Boulnois and Lloyd.<sup>1887</sup> All of these reports made statements regarding the location of the Ngok Dinka in relation to various rivers (particularly the “Bahr el Arab”). Obviously, if the Anglo-Egyptian administrators were confused about what watercourse had which name, then their statements about where different groups were located in relation to these waterways must be evaluated with care.

1490. The ABC Report did precisely this, carefully examining the Anglo-Egyptian reports to assess their meaning in light of possibly incorrect references to the “Bahr el Arab.” Having discussed Wilkinson’s error, the ABC Experts then identified other Anglo-Egyptian officials who also confused the Bahr el Arab and the Ngol/Ragaba ez Zarga. The officials identified by the ABC Experts who made similar errors included Percival,<sup>1888</sup> O’Connell,<sup>1889</sup> and Lloyd.<sup>1890</sup>

1491. As discussed above, almost all of these officials made observations about the locations of “Sultan Rob” or “Sultan Rob’s country,” in relation to the Bahr el Arab.<sup>1891</sup> In understanding the true geographical meaning of these references, it is essential to take into account the fact that these officials’ references to the “Bahr el Arab” were in fact references to the watercourse named the Ngol/Ragaba ez Zarga; thus, when the Anglo-Egyptian administrators said that “Sultan Rob’s country was on the Bahr el Arab,” they really meant that Sultan Rob’s country was on the watercourse today referred to as the Ngol/Ragaba ez Zarga.

1492. The ABC Report then confirmed this point, concluding that “[a]ll references before 1908 to ‘*Sultan Rob’s’ northern boundary with the Arabs*’ being the Bahr el-Arab now must be understood as meaning the Ragaba ez-Zarga/Ngol.”<sup>1892</sup> Notably, this was a reference to the location of the Ngok Dinka and their territory (“Sultan Rob’s northern boundary with the Arabs”) and not to the identity or of the Kordofan/Bahr el Ghazal provincial boundary, as to which, as discussed above, the ABC Experts adopted a more qualified conclusion. The important evidentiary point, however, is that the confusion about the “Bahr el Arab” requires that both the documentary reports and the cartographic evidence be considered with care, to ensure that Wilkinson’s error does not lead to further inaccuracies.

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<sup>1887</sup> See above at paras. 879, 922-924, 945-948, 955-956, 981, 986-989, 1012-1013, 1016-1019, 1038-1043.

<sup>1888</sup> ABC Report, Part I, at p. 38, **Appendix B to SPLM/A Memorial**.

<sup>1889</sup> ABC Report, Part I, at p. 39, n. 14, **Appendix B to SPLM/A Memorial**.

<sup>1890</sup> ABC Report, Part I, at p. 39, n. 14, **Appendix B to SPLM/A Memorial**.

<sup>1891</sup> See above at paras. 1000-1011, 1047.

<sup>1892</sup> ABC Report, Part I, at p. 40, **Appendix B to SPLM/A Memorial** (emphasis added).

1493. In sum, the Government’s treatment of the putative Kordofan/Bahr el Ghazal provincial boundary is no less mistaken than its treatment of the location of the Ngok Dinka and Misseriya. The Government’s analysis is characterized by gross mischaracterizations and misquotations of the ABC Experts’ conclusions, designed for the shabby end of discrediting what was a highly-professional and erudite study of the subject.

1494. What the evidence in fact shows is that there was no determinate Kordofan/Bahr el Ghazal provincial boundary as of 1905. There had been no constitutional, legislative or executive act or declaration establishing any such provincial boundary, which was only occasionally referred to in administrative communications by Anglo-Egyptian officials. Moreover, while all Sudanese provincial boundaries were uncertain, approximate and provisional at the time, the Kordofan/Bahr el Ghazal boundary was characterized by particular uncertainty. That is conceded by the Government (whose expert describes the putative boundary as “cryptic”) and is confirmed by the official Sudan Government maps (which omit any pre-1905 depiction of a Kordofan/Bahr el Ghazal boundary).

1495. What the evidence also shows is that the Anglo-Egyptian authorities were gravely confused about the identity and location of the “Bahr el Arab” between 1902 and 1907 or 1908. Throughout this period, Anglo-Egyptian officials attributed different meanings to “Bahr el Arab,” with the Ngol/Ragaba ez Zarga, Kiir/Bahr el Arab, Lol and entire Bahr region being referred to by that name. As a consequence, even if one assumed that the “Bahr el Arab” was the putative provincial boundary, this label was in fact indeterminate at the time. When Anglo-Egyptian authorities referred to the Bahr el Arab, it is impossible to say which of the numerous watercourses in the region they actually meant to refer to.

1496. Moreover, the evidence clearly contradicts the Government’s effort to suggest either that “Wilkinson’s mistake” was some private, idiosyncratic error, or that it was a “short-lived” confusion. In fact, as the ABC Experts correctly concluded, numerous Anglo-Egyptian officials confused the “Bahr el Arab” for the Ngol/Ragaba ez Zarga and the confusion was not clarified until 1907 or 1908 at the earliest. Importantly, there is no serious doubt but that, at the time of the transfer of the Ngok Dinka in 1905, there was no common understanding as to what constituted the “Bahr el Arab” or the Kordofan/Bahr el Ghazal provincial boundary.

1497. In any event, as discussed below, the location of the putative Kordofan/Bahr el Ghazal boundary in 1905 has no bearing on the area of the nine Ngok Dinka Chiefdoms or the definition of the Abyei Area. On the contrary, as the ABC Experts correctly interpreted Article 1.1.2 of the Abyei Protocol, the only issue relevant to defining the Abyei Area is the extent of the territory of the nine Ngok Dinka Chiefdoms which were transferred to Kordofan in 1905 – an issue that does not depend at all on the location of the Kordofan/Bahr el Ghazal provincial boundary.

*C. The Government’s Interpretation of the Parties’ Agreed Definition of the Abyei Area Is Manifestly Wrong*

1498. As noted above, the Government claims (without attempting to explain) that the Abyei Area must be defined as “the area of the nine Ngok Dinka chiefdoms which was

transferred to Kordofan in 1905”<sup>1893</sup> and in particular as “*the area which was not within Kordofan prior to 1905 but which falls within Kordofan now by reason of the transfer of 1905.*”<sup>1894</sup> In the Government’s view, the “*areas which were already part of Kordofan in 1905 could not have been transferred to it.*”<sup>1895</sup>

1499. The ABC Report properly rejected this interpretation of Article 1.1.2 of the Abyei Protocol on two independent grounds, instead concluding that (a) the Abyei Area was to be defined as “*the area of the nine Ngok Dinka Chiefdoms as it was in 1905*”<sup>1896</sup> or, as alternatively phrased in the Report, “*the territory occupied and used by the nine Ngok Dinka Chiefdoms*”<sup>1897</sup>; and (b) in any event, as discussed above, “*the Ngok people were regarded as part of the Bahr el-Ghazal Province until their transfer in 1905,*”<sup>1898</sup> and “the government’s claim that only the Ngok Dinka territory south of the Bahr el Arab was transferred to Kordofan in 1905 is therefore found to be mistaken.”<sup>1899</sup>

1500. Each of these two separate grounds justifying the ABC Experts’ interpretation is manifestly correct – and are summarized below. It bears emphasis, however, that both of these issues concern the ABC Experts’ substantive decision or fact-finding, and do not concern a purported excess of mandate. That is discussed in detail above<sup>1900</sup> and is confirmed by the Government’s discussion of these issues (in Chapter 6 of its Memorial).

1. The Abyei Area Was the Entire Area of the Nine Ngok Dinka Chiefdoms Which Were Transferred to Kordofan in 1905

1501. The proper interpretation of the definition of the Abyei Area, set forth in both Article 1.1.2 of the Abyei Protocol and elsewhere in the parties’ agreements, is discussed in detail in the SPLM/A’s Memorial.<sup>1901</sup> The Tribunal is respectfully referred to that discussion to supplement the following summary.

1502. Article 1.1.2 of the Abyei Protocol defines the Abyei Area as “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”<sup>1902</sup> The natural grammatical meaning of this language encompasses the entire territory of the nine Ngok Dinka Chiefdoms *that were* collectively transferred to Kordofan in 1905. That meaning is consistent with, and required by, the purposes of the Abyei Protocol and it is confirmed by the witness testimony of the participants in the negotiations of the Abyei Protocol. It is also precisely consistent with the interpretation of the language that the ABC Experts repeatedly adopted, without objection from the parties, during the ABC proceedings.

a) The Language and Grammatical Structure of Article 1.1.2’s Definition of the Abyei Area

1503. Article 1 of the Abyei Protocol provided:

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<sup>1893</sup> GoS Memorial, at para. 19.

<sup>1894</sup> GoS Memorial, at para. 401.

<sup>1895</sup> GoS Memorial, at para. 19.

<sup>1896</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial.**

<sup>1897</sup> ABC Report, Part I, at p. 18 (Proposition 8), **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>1898</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial.** See also above at paras. 602, 768.

<sup>1899</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial.** See also above at para. 602.

<sup>1900</sup> See above at paras. 223-225, 285-297, 488.

<sup>1901</sup> See SPLM/A Memorial, at paras. 1096-1197.

<sup>1902</sup> Abyei Protocol, Art. 1.1.2, **Appendix C to SPLM/A Memorial.**

“1.1.1 Abyei is a bridge between the north and the south, linking the people of Sudan;

1.1.2 *The territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.*

1.1.3 The Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.”<sup>1903</sup>

1504. In turn, the parties agreed in Article 5.1 of the Abyei Protocol to the establishment of the ABC:

“[t]here shall be established by the Presidency, Abyei Boundaries Commission (ABC) *to define and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.*”<sup>1904</sup>

1505. The definition of the Abyei Area used in Article 1.1.2 and incorporated into Article 5.1 – “*the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905*” has an obvious and clear meaning, in accordance with the rules of English grammar. Further to the grammatical rule of proximity, it is clear that Article 1.1.2 refers to the collective transfer of the nine Ngok Dinka Chiefdoms in their entirety to Kordofan in 1905, and not to the transfer of some sub-part of the area of the Ngok Dinka Chiefdoms.

1506. As Professor David Crystal OBE notes in his Expert Report, attached to this Reply as **Appendix A**, the Article 1.1.2 language is a “noun phrase consisting of a head noun (area) which is then postmodified by a prepositional phrase (of the nine Ngok Dinka chiefdoms), and this is then followed by a non-finite clause (transferred to Kordofan in 1905). The question is how the non-finite clause relates to the preceding two constructions.”<sup>1905</sup>

1507. It is natural (and grammatically correct) to interpret a postmodifying construction in a noun phrase as relating to the immediately previous noun. As discussed in the SPLM/A’s Memorial,<sup>1906</sup> this is referred to as the grammatical rule of proximity, which is explained in greater detail in the attached Expert Report of Professor Crystal.<sup>1907</sup> That rule can be illustrated by the classic English nursery rhyme:

“This is the dog *that* worried the cat *that* killed the rat *that* ate the malt *that* lay in the house *that* Jack built.”<sup>1908</sup>

1508. At least theoretically, any of the “that” clauses in the sentence above might relate to “the dog,” but such a reading would be unnatural and absurd. Instead, the natural reading is to take each “that” clause as defining the immediately preceding noun. This is a simple and

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<sup>1903</sup> Abyei Protocol, Art. 1.1, **Appendix C to SPLM/A Memorial** (emphasis added). As confirmed in the witness statements of General Sumbeiywo and Minister Deng Alor, the ‘Principles of Agreement’ document as presented to the parties on 19 March 2004 contained identical language to Article 1 of the Abyei Protocol. See Witness Statement of Lt. Gen. Sumbeiywo, at p. 12, ¶61; Witness Statement of Minister Deng Alor Kuol, at p. 11, ¶64.

<sup>1904</sup> Abyei Protocol, Art. 5.1, **Appendix C to SPLM/A Memorial** (emphasis added).

<sup>1905</sup> Crystal Expert Report, at para. 4, **Appendix A**.

<sup>1906</sup> See SPLM/A Memorial, at para. 1105.

<sup>1907</sup> Crystal Expert Report, at para. 9-12, **Appendix A**.

<sup>1908</sup> Crystal Expert Report, at para. 9, **Appendix A**.

straightforward application of the rule of proximity, which is confirmed in Professor Crystal's Expert Report.<sup>1909</sup>

1509. Applied to the language of Article 1.1.2, the natural and clear reading of the text is to relate the postmodifying construction of "transferred to Kordofan" back to the immediately preceding noun of "chiefdoms."<sup>1910</sup> It would disregard the rule of proximity and strain the syntax of the sentence to breaking point to interpret it in any other way. It is therefore the "chiefdoms" which are referred to as having been "transferred to Kordofan" in Article 1.1.2, not the "area."

1510. Consistent with this, the term "area" in Article 1.1.2 serves to describe quantitatively the nine Ngok Dinka Chiefdoms being transferred, indicating that the nine Ngok Dinka Chiefdoms are capable of being properly defined and demarcated. The phrase makes perfect sense grammatically and is the most plausible reading of the provision.<sup>1911</sup>

1511. Thus, considered from the perspective of its ordinary meaning, and applying basic rules of English grammar, Article 1.1.2 means "the area of the nine Ngok Dinka chiefdoms *that were* transferred to Kordofan in 1905." Contrary to the Government's (unelaborated) construction, Article 1.1.2's language does not mean "*the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905*"<sup>1912</sup> or "that part of the area of the nine Ngok Dinka chiefdoms that was transferred to Kordofan in 1905." If the draftsman of the Article 1.1.2 phrase had intended it to refer to that part of the "area of the nine Ngok Dinka chiefdoms" that was being transferred to Kordofan, then the phrase would have read "*that part of the area* of the nine Ngok Dinka chiefdoms *that was* transferred to Kordofan in 1905."

1512. This conclusion is confirmed by the fact that Article 1.1.2 referred to *all* of the area of the nine Ngok Dinka Chiefdoms that were transferred in 1905. That is clear from the inclusion of the term "the area of the *nine* Ngok Dinka chiefdoms," ensuring that *all* nine Ngok Dinka Chiefdoms were included in the definition of the Abyei Area and that their territory was treated as a single, unitary area. As discussed in the SPLM/A's Memorial, this result is consistent with, and required by, the unified, cohesive character of the Ngok Dinka and the centralized political and cultural character of the Paramount Chief.<sup>1913</sup>

1513. Further, the language of Article 1.1.2 would not admit of a definition of the Abyei Area that excluded the vast majority of the lands occupied and used by *all* of the nine Ngok Dinka Chiefdoms, and excluded in particular *three* of the nine Ngok Dinka Chiefdoms in their entirety (specifically the Alei, Achaak and Bongo,<sup>1914</sup> which were located entirely to the north of the Kiir/Bahr el Arab River in 1905).

1514. An interpretation of Article 1.1.2 that excluded one or more of these Chiefdoms would be irreconcilable with the plain language of Article 1.1.2 ("*nine* Ngok Dinka chiefdoms") and with the purposes of the provision.<sup>1915</sup> Rather, consistent with the linguistic structure of the provision, Article 1.1.2 referred to the complete area of the nine Ngok Dinka Chiefdoms that transferred to Kordofan in 1905, instead of positing a scenario in which only

<sup>1909</sup> Crystal Expert Report, at para. 10, **Appendix A**.

<sup>1910</sup> Crystal Expert Report, at para. 3, **Appendix A**.

<sup>1911</sup> Crystal Expert Report, at paras. 3, 13, **Appendix A**.

<sup>1912</sup> GoS Memorial, at para. 19.

<sup>1913</sup> See SPLM/A Memorial, at paras. 140-155, 1125.

<sup>1914</sup> See SPLM/A Memorial, at paras. 1015-1063, 1130-1132.

<sup>1915</sup> See SPLM/A Memorial, at paras. 1123-1147; see below at paras. 1507-1508.



some (or some parts) of the nine Ngok Dinka Chiefdoms were included within the Abyei Area.

b) The Purposes of Article 1.1.2's Definition of the Abyei Area

1515. The purpose of Article 1.1.2 of the Abyei Protocol confirms that the Abyei Area includes all of the territory of the nine Ngok Dinka Chiefdoms as they stood in 1905. Indeed, as discussed in the SPLM/A's Memorial, it would contradict the basic objectives of the Abyei Protocol (and the Comprehensive Peace Agreement) to limit the Abyei Area to only a truncated portion of the Ngok Dinka's historic territory or to only some of the nine Ngok Dinka Chiefdoms.

1516. Strikingly, nothing in the Government's Memorial makes any reference to these purposes, instead treating Article 1.1.2 (and Article 5.1) of the Abyei Protocol as some sort of odd alien utterance whose context and purposes are completely irrelevant to their interpretation. That is because, as discussed below, the very evident and mutually-accepted purposes of the parties in agreeing to the Abyei Protocol demonstrate the absurdity of the Government's view of the definition of the Abyei Area.

(1) Abyei Referendum and Ngok Dinka's Opportunity for Self-Determination

1517. First, the basic purpose of the parties' agreement on the definition of the Abyei Area was to specify that region whose residents would be entitled to participate in the Abyei Referendum (provided for by Article 8 of the Abyei Protocol). Only residents of the Abyei Area will be entitled to participate in the Referendum, conducted simultaneously with the main Southern Referendum, on the question whether or not they would be included in the South or the North.<sup>1916</sup>

1518. The entire reason for the Abyei Referendum was to permit the Ngok Dinka – who had consistently contended over the past decades that their people belonged to the southern Sudan<sup>1917</sup> – to vote on whether to be included in the South.<sup>1918</sup> In these circumstances, it would make no sense to treat the Abyei Area as only including *some* of the Ngok Dinka and *some* of their historic territories.

1519. Dividing the Ngok Dinka territories and peoples in two would contradict the basic principles of self-determination underlying the Abyei Protocol,<sup>1919</sup> as well as the SPLM/A's consistent assertion that the Ngok Dinka were a unitary and highly cohesive political and cultural entity.<sup>1920</sup> Indeed, dividing the Ngok Dinka artificially between those inside the Abyei Area and those outside the Abyei Area would have been unthinkable given the centralized political structure and exceptionally high degree of cultural unity of the Ngok

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<sup>1916</sup> Abyei Protocol, Art. 8, **Appendix C to SPLM/A Memorial**.

<sup>1917</sup> See SPLM/A Memorial, at paras. 417-423, 445-486.

<sup>1918</sup> This right of the Ngok to decide for themselves whether to stay with Kordofan or 'go south' recognised and openly stated by the British prior to Sudan's independence. See Letter from G. Hawkesworth (Governor Kordofan) to Editor Kordofan Magazine, dated 3 April 1951, **Exhibit-FE 18/17**.

<sup>1919</sup> See SPLM/A Memorial, at paras. 473-486.

<sup>1920</sup> See SPLM/A Memorial, at paras. 473-486. See also Bahr el Ghazal Region's Consultative and Coordinating Committee (CCC)'s Position Paper on the Abyei issue, dated 12 November 2002, at p. 2 ("the Ngok Dinka of Abyei is homogeneously, culturally, historically, ethnically, traditionally and socially part and parcel of the Mounjang (Dinka) nationality of the Sudan and geographically located in the South Sudan."), **Exhibit-FE 10/2**.

Dinka people.<sup>1921</sup> (It is noteworthy in this regard that the Government’s Memorial expressly concedes that the Ngok Dinka were “unusual ... in having centralised leadership.”<sup>1922</sup>)

(2) Implausibility of the Government’s Claims that Abyei Town Would Have Been Excluded from the Abyei Area

1520. Second, it would be even less plausible to claim – as the Government does – that the Abyei Area could extend no further north than the Kiir/Bahr el Arab River, on the grounds that this was the Kordofan/Bahr el Ghazal border in 1905. That would have the bizarre result that *Abyei town* – the undisputed center of Ngok Dinka political, cultural and commercial life for more than a century<sup>1923</sup> – ***could not be within the Abyei Area***. It is inconceivable that the Abyei Protocol could have been intended to produce such a result.

1521. The Government’s reliance on the fact that Abyei town was not demarcated on a British map until 1916<sup>1924</sup> misses the point. The relevant question is whether, when the GoS and the SPLM/A negotiated the definition of the Abyei Area in 2004/2005 for purposes of the Comprehensive Peace Agreement, it is plausible to think either party would seriously have expected that the Abyei Area would not include Abyei town – the geographic location of the historic center of Ngok Dinka political, cultural and commercial life and the seat of its past four Paramount Chiefs. The obvious answer is that neither the Government nor the Ngok Dinka could have had any such expectation in 2004/2005.

(3) Implausibility of the Government’s Claims that the Abyei Area Is A 14 Mile Wide Strip of Swampland Along the Kiir/Bahr el Arab’s Southern Bank

1522. Third, it also bears emphasis that the Government’s interpretation of the Abyei Protocol would necessarily confine the Abyei Area to (on average) a 14 mile wide strip of swampland running along the southern bank of the Kiir/Bahr el Arab.<sup>1925</sup> The suggestion that the historic homeland of the Ngok Dinka was a narrow strip of land along one bank of a (seasonally-flooding) river is ridiculous.

1523. In addition to excluding Abyei town from the Abyei Area, that strip of land would exclude the majority of the lands occupied and used by the nine Ngok Dinka Chiefdoms, and the lands of three of those chiefdoms in their entirety. It would also exclude Mijok Alor (Abyior settlement; location of former Ngok Paramount Chief’s shrine and altar), important settlements on and above the Ngol/Ragaba ez-Zarga River such as Mabek (seat of Bongo; age-set location), Dak Jur (Alei/Achaak settlements; age-set location) Pachol (burial site of 18th century Paramount Chief Monydhang Kuol) and Pakur (early Ngok settlement during migration; burial place of 18th century Ngok Paramount Chief Kuol Dongbek), as well as Thur [Arabic: Turda] and Nyama (permanent northern Ngok settlements and age-set locations) and Miding (birthplace of early 18th century Ngok Paramount Chief Kuol Dongbek; Achaak settlement; Ngok grazing area).<sup>1926</sup>

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<sup>1921</sup> See SPLM/A Memorial, at paras. 111-113, 133-163 and 206-216.

<sup>1922</sup> GoS Memorial, at para. 337.

<sup>1923</sup> See above at paras. 951, 1000, 1137, 1184-1193; SPLM/A Memorial, at paras. 961-967.

<sup>1924</sup> GoS Memorial, at para. 6.

<sup>1925</sup> GoS Memorial, at para. 401. See GoS Fig. 17. The strip of land measures approximately 14 miles on average east to west across Kordofan Province.

<sup>1926</sup> These locations are discussed in the SPLM/A Memorial, at paras. 136, 144, 871, 885, 895, 1030-1072.

1524. It is inconceivable that the parties could have anticipated that the definition of the Abyei Area would have excluded these central locations in Ngok Dinka history and culture. The notion that this would result from application of a putative Condominium provincial boundary – which was at most three years old, evidenced only in occasional administrative correspondence, and left indeterminate due to widespread geographic confusion – is even less conceivable.

1525. Moreover, historically there were relatively small populations of Ngok Dinka in the area along the southern bank of the Kiir/Bahr el Arab. This is explained by both historical and environmental reasons.

1526. Historically, the Ngok migrated from the east (under Jok)<sup>1927</sup> heading west toward Darfur to Mijok Alor (where Paramount Chief Alor Monydhang was buried and there remains an altar<sup>1928</sup>) and from Muglad in the north (the Alei).<sup>1929</sup> Accordingly, the Ngok historical connection with the region south of the Kiir/Bahr el Arab was not as strong as the north, east and western regions of the Abyei Area. This not only explains why the Ngok are located in the east (Miding), the west (Kol Ruth [Arabic: Grinti], Kol Arouth (near Mieram)) and at Turda and Nyama in the north, but it also explains why the Ngok population is less dense in the southwest of the Abyei Area.

1527. Moreover, the area to the south of the Kiir/Bahr el Arab is environmentally and geographically unattractive and was not a plausible location for a substantial number of local inhabitants. As the MENAS Expert Report explains, during the dry season this area (particularly away from the course of the Kiir/Bahr el Arab), displays a marked lack of any watercourses, with either dry areas or occasional local swamps.<sup>1930</sup> This environment would be comparatively unattractive during the dry season and either side because it would not provide the water and grazing necessary to support the Ngok agro-pastoral lifestyle (and, in particular, would not provide resources comparable to those in the Ngok territories to the north).<sup>1931</sup>

1528. In contrast, as the MENAS Expert Report also concludes, in the wet season the area to the south and southwest of the Kiir/Bahr el Arab turns into a waterlogged marsh that is much less hospitable than the central and northern areas of the Bahr region.<sup>1932</sup> This is in part because the Kiir/Bahr el Arab would flood seasonally, spilling into the strip of land to the south of the river. Moreover, to the north, the river systems provide a drainage outlet for the waters across the plains, and the soil composition, which gradually becomes more sand based in the north, provides drainage for the rainwater and providing comparatively less waterlogged grazing pastures for the Ngok cattle. In contrast, there was less drainage south of the Kiir/Bahr el Arab, rendering this land much more swampy and inhospitable.<sup>1933</sup> In turn, that increased the risks of insects, disease and other hazards, particularly for the Ngok cattle.

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<sup>1927</sup> SPLM/A Memorial, at paras. 883-896.

<sup>1928</sup> Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), p. 5, ¶¶27, 29.

<sup>1929</sup> SPLM/A Memorial, at paras. 888-892.

<sup>1930</sup> MENAS Expert Report, at paras. 161, 162. **Map 66** (Abyei Area: Dry Season – Mosaic); **Map 70** (Abyei Area: Dry Season – Vegetation).

<sup>1931</sup> MENAS Expert Report, at paras. 161, 162. **Map 66** (Abyei Area: Dry Season – Mosaic); **Map 70** (Abyei Area: Dry Season – Vegetation).

<sup>1932</sup> MENAS Expert Report, at para. 163. **Map 64** (Abyei Area: Wet Season – Mosaic); **Map 69** (Abyei Area: Wet Season – Vegetation).

<sup>1933</sup> MENAS Expert Report, at para. 163. **Map 64** (Abyei Area: Wet Season – Mosaic); **Map 69** (Abyei Area: Wet Season – Vegetation).

1529. The combination of these factors meant that historically the Ngok Dinka did not live in substantial numbers along the southern bank of the Kiir/Bahr el Arab or further south still. The Government's purported interpretation of the definition of the Abyei Area would thus not only provide for a particularly unjust result, by confining the Ngok to a marginal 14 mile strip of swampland, but would in effect exile them to a territory where very few of their ancestors had lived. That would be as unfair as it would be contrary to the historical record.

(4) Implausibility of the Government's Claims that the Some of the Ngok Dinka Chiefdoms Would Have Been Excluded from the Abyei Area

1530. Fourth, a further implausible anomaly would arise from interpreting Article 1.1.2 to divide the territory of the nine Ngok Dinka Chiefdoms into two parts, along the line of the 1905 boundary between Kordofan and Bahr el Ghazal. As already noted, that interpretation would result in excluding *entirely* several of the nine Ngok Dinka Chiefdoms from the Abyei Area – for the reason that *at least three Chiefdoms* (the Alei, Achaak and Bongo) lay entirely north of the putative Kordofan/Bahr el Ghazal border claimed by the GoS.<sup>1934</sup>

1531. Again, it is inconceivable that the parties – when specifically referring in Article 1.1.2 to the area of the “*nine* Ngok Dinka chiefdoms” – intended to include only *six* of the nine Ngok Dinka tribes in the definition of the Abyei Area, and even then only *some* of the lands of those six Chiefdoms, as *all* of the nine Ngok Dinka Chiefdoms occupied and used lands above the Kiir/Bahr el Arab. That would not only have rendered otiose Article 1.1.2's reference to “*nine*” Chiefdoms, but it would have disregarded the essential and exceptional political, cultural and historic unity of the Ngok Dinka people,<sup>1935</sup> which was the premise of the Abyei negotiations, while tearing into two the Ngoks' unique and prized centralized political structure, with a Paramount Chief above nine sub-tribes and chiefs.

1532. This result would contradict virtually every element of the parties' discussions of the Abyei Area for nearly three decades. It would also have permitted some Ngok Dinka tribes, but not others, to vote in the Abyei Referendum and, potentially, to live in the South, while their Ngok Dinka relatives were left in the North. That is utterly contrary to the purposes of the Abyei Protocol and the Comprehensive Peace Agreement more generally.

(5) Implausibility of the Government's Claims that An Uncertain, Approximate and Provisional Boundary Would Have Been Accorded Decisive Importance

1533. Fifth, the foregoing absurdities are underscored by the character of the provincial Sudanese boundaries in 1905. As discussed above, and in detail in the SPLM/A's Memorial, those boundaries were in the process of development and remained indefinite, vague and approximate, as well as provisional and mistaken.<sup>1936</sup> That was particularly insofar as any boundary between Bahr el Ghazal and Kordofan was concerned, where the putative boundary was indeterminate in 1905.

1534. In these circumstances, it is particularly implausible to suggest that the parties would have intended to truncate the historic homelands of the Ngok Dinka based on the general

<sup>1934</sup> See above at para. 882; SPLM/A Memorial, at paras. 1015-1063 and **Map 15** (Achaak Chiefdom, 1905) and **Map 17** (Alei Chiefdom, 1905) and **Map 19** (Bongo Chiefdom, 1905).

<sup>1935</sup> See SPLM/A Memorial, at paras. 111-113, 133-163 and 206-216.

<sup>1936</sup> See SPLM/A Memorial, at paras. 315-343.

character of the putative 1905 Bahr el Ghazal/Kordofan boundary. Given that the 1905 boundary was uncertain and approximate, any application of the putative boundary would by definition be arbitrary and random, and would have the result of denying the Ngok Dinka people portions of their historic homelands based on what is at its highest a modern extrapolation of an uncertain and arbitrary colonial approximation.

1535. The Government nonetheless suggests in passing that the uncertain, provisional character of the Kordofan/Bahr el Ghazal boundary is irrelevant to the Tribunal's analysis and that the only relevant fact was that "boundaries existed and could be determined, even in remote areas."<sup>1937</sup> The Government also comments that, while the Kordofan/Bahr el Ghazal boundary was "not laid down or recorded in any very formal way, and [was] stated to be approximate," this does not mean the putative boundary was "indeterminate, still less inexistent."<sup>1938</sup> According to the GoS Memorial, "an international tribunal called on to delimit the" boundary could do so, which renders its uncertain and provisional character irrelevant.<sup>1939</sup>

1536. For the reasons discussed above, there was in fact no determinate Kordofan/Bahr el Ghazal provincial boundary in 1905. It is important to note that the boundary in question was an internal boundary, not an international boundary, and that the relevant sources of authority for determining the location of the boundary were internal Anglo-Egyptian records – not a treaty provision or claim of effective occupation (Condominium forces occupied both Kordofan and Bahr el Ghazal). As discussed above, these Condominium records reveal that there was no common understanding among Anglo-Egyptian authorities in 1905 as to the location of any provincial boundary between Kordofan and Bahr el Ghazal.

1537. More importantly, the Government's analysis also misses the point. The point is not only whether there was a boundary of some sort between Kordofan and Bahr el Ghazal in 1905 or whether that boundary might be ascertained by an international tribunal.

1538. Instead, the decisive point is that the concededly uncertain, provisional and approximate character of the 1905 Kordofan/Bahr el Ghazal boundary makes it implausible to think that the SPLM/A and Government would have agreed – impliedly and contrary to the language of their agreement in the Abyei Protocol – to use such a boundary to define the area of the nine Ngok Dinka Chiefdoms. In circumstances where the relevant "boundary" was uncertain and approximate in 1905, and known to be subject to serious errors and confusion, it makes no sense to treat that putative boundary as having decisive significance.

1539. Moreover, given the uncertainty and known errors concerning the location of the "Bahr el Arab" in 1905, it would be impossible to determine what area was transferred in 1905 from Bahr el Ghazal to Kordofan based upon the general Kordofan/Bahr el Ghazal boundary. That boundary was, in 1905, indeterminate in the sense that the Anglo-Egyptian administrators did not have a coherent or accurate understanding of where the boundary was located. As discussed above, it might have been the Ngol/Ragaba ez Zarga, the entire region between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab, the Kiir/Bahr el Arab, the Lol or something else.

1540. Given that the Anglo-Egyptian administrators did not have either a certain, definite or even coherent understanding of what the "Bahr el Arab" meant – in 1905, which is the

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<sup>1937</sup> GoS Memorial, at para. 231(c).

<sup>1938</sup> GoS Memorial, at para. 368.

<sup>1939</sup> GoS Memorial, at para. 370.

critical date – it makes no sense to interpret the definition of the Abyei Area to depend on the Kordofan/Bahr el Ghazal boundary. Doing so would involve determining that the parties had selected an indeterminate and fundamentally flawed definition of the Abyei Area.

1541. Furthermore, no conceivable public or other purpose is advanced by treating an uncertain, confused and ultimately arbitrary colonial provincial boundary as decisive for the parties' rights here. A putative Kordofan/Bahr el Ghazal boundary had been first mentioned in 1903 and, if had existed at all, it lasted at most until early 1905; whatever boundary had been referred to, it had been arbitrarily drawn, based on no information. Even if one might determine what the reference to the "Bahr el Arab" meant (which one cannot), giving effect to this putative boundary would serve no conceivable public or other purposes.

1542. In contrast, the boundaries of the historic area of the nine Ngok Dinka Chiefdoms serve powerful public purposes – being to effectuate the fundamental objective and purpose of the Abyei Referendum to permit the Ngok Dinka people to exercise a right to vote concerning their future. To divide the Ngok Dinka's historic homeland into parts, based upon an indeterminate, arbitrary colonial provincial boundary that at its best lasted from 1902 until 1905, would be fundamentally wrong.

(6) Implausibility of the Government's Claims that the Ngok Dinka Territory Would Have Been Divided in Two

1543. Finally, it is important to note the emphasis that the Government places on its factual claim that "the Western Dinkas (including the Ngok Dinkas) were located to the south of the Bahr el Arab."<sup>1940</sup> As discussed above, this claim is absurd; there is no conceivable way that the documentary and other evidence can be interpreted to place the Ngok Dinka south of the Bahr el Arab, as the Government claims.<sup>1941</sup>

1544. It is nonetheless important to consider the reason why the Government insists so implausibly on the Ngok Dinka being located exclusively south of the Bahr el Arab. That reason is because any other position produces the even more absurd result of dividing the historic Ngok Dinka territories and the nine Ngok Dinka Chiefdoms in two. That is an outcome that the parties manifestly would never have agreed to and that is contrary to the most basic objectives of the Abyei Protocol and the Abyei Referendum. Yet, this is precisely the result that the Government's interpretation of the definition of the Abyei Area produces when applied to the facts.

c) The Language of the 1905 Transfer Records Referred to by Article 1.1.2 of the Abyei Protocol

1545. The definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol is also only sensibly interpreted as referring to the territory of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905 because this is the way in which the relevant Sudan Government transfer documents in 1905 addressed the issue. As discussed above,<sup>1942</sup> in every one of the Sudan Government instruments referring to the 1905 transfer of the Ngok Dinka, reference was made to a transfer of the Ngok Dinka Paramount Chief or of all the territory of the Ngok Dinka Paramount Chief, not to some portion thereof; each instrument addresses the

<sup>1940</sup> GoS Memorial, at para. 332. *See also* GoS Memorial, at paras. 335-336, 354, 400(d).

<sup>1941</sup> *See above* at paras. 602-607, 885-890.

<sup>1942</sup> *See above* at para. 1485.

disposition of either “Sultan Rob” himself or of all of “Sultan Rob’s” “territories” or “country,” not to some sub-Chiefs or some part of those territories or country:

- a. Sudan Intelligence Report No. 128: “It has been decided that *Sultan Rob, whose country is on the Kir river*, and Sheikh Rihan of Toj ... are to belong to Kordofan Province.”<sup>1943</sup>
- b. 1905 Kordofan Annual Report: “*The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei* are now included in Kordofan....”<sup>1944</sup>
- c. Bahr el Ghazal Province Annual Report 1905: “In the north *the territories of Sultan Rob* and Sheikh Gokwei *have been taken from this Province and added to Kordofan.*”<sup>1945</sup>

1546. In each of these Sudan Government instruments, the reference was to (a) “Sultan Rob” (not one or a few of his sub-chiefs) and his “country” (not a part thereof) belonging to Kordofan; or (b) the “Dinka Sheikh[, Sultan Rob” (not some of his people or territories) or (c) “the territories of Sultan Rob,” being included in Kordofan. In none of these instruments was there any indication that only some of Sultan Rob’s people, sub-Chiefs, country or territory would belong to Kordofan.<sup>1946</sup>

1547. It is clear that the GoS and SPLM/A were familiar with the Sudan Government’s records regarding its 1905 decision to transfer Sultan Rob and the Ngok Dinka; the parties referred specifically to the Government’s records during the course of their negotiation of the Abyei Protocol.<sup>1947</sup> Indeed, the Government’s Memorial acknowledges precisely this point, referring to Sudan Intelligence Report No. 128 (quoted above) and stating “*it was precisely this passage which led to the formulation of the ABC’s mandate.*”<sup>1948</sup>

1548. Thus, when the parties referred in Article 1.1.2 of the Abyei Protocol to the “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905,” their obvious and natural intention was to refer to all of Sultan Rob’s people, and all nine Ngok Dinka Chiefdoms. It was these Chiefdoms and people that were transferred by the Sudan Government’s 1905 instruments and it was the territory of these people to which the 1905 transfer instrument refer.

1549. Indeed, the Government’s Memorial itself acknowledges that the 1905 transfer instruments transferred Sultan Rob and the Ngok Dinka people. It concedes that “[a]s the Misseriya [who were engaged in slave raids against the Ngok Dinka and Twic Dinka] were under the Province of Kordofan and the Ngok and Twic Dinkas, who were the subject of these raids, were under Bahr el Ghazal, it was decided in early 1905 *to transfer THESE LATTER GROUPS to Kordofan,*”<sup>1949</sup> and “a decision was promptly made *to transfer both THE NGOK and the Twic to Kordofan.*”<sup>1950</sup> These express acknowledgements by the

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<sup>1943</sup> Sudan Intelligence Report, No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

<sup>1944</sup> Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13** (emphasis added).

<sup>1945</sup> Annual Report on the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13** (emphasis added).

<sup>1946</sup> On the contrary, the purpose of the Sudan Government’s actions in 1905 was to ensure that all of the Ngok Dinka and all of the Misseriya were under the same administrative control in the same province. *See* SPLM/A Memorial, at paras. 346-357.

<sup>1947</sup> *See* SPLM/A Memorial, at paras. 1169-1170.

<sup>1948</sup> GoS Memorial, at paras. 51 (citing Dr. Johnson’s description of the transfer of the Ngok Dinka in SIR No. 128, at p. 359. *see* Sudan Intelligence Report, No. 128, dated March 1905, **Exhibit-FE 2/8**).

<sup>1949</sup> GoS Memorial, at para. 357 (emphasis added).

<sup>1950</sup> GoS Memorial, at para. 359 (emphasis added).

Government are correct: the plain meaning of the 1905 transfer documents, like Article 1.1.2 of the Abyei Protocol, concerned the transfer of the Ngok Dinka people.

1550. In interpreting the definition of the Abyei Area, it therefore makes particular sense to read the phrase “*area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905*” as referring to the “area of the nine Ngok Dinka chiefdoms” which were transferred to Kordofan in 1905. That is because the Sudan Intelligence Report No. 128 and other 1905 transfer instruments – with which the parties to the Abyei Protocol were familiar – referred to a transfer of “Sultan Rob” and his “people.” When the Government and the SPLM/A later defined the Abyei Area by reference to the 1905 transfer, the natural and obvious reference was to the 1905 transfer of the Ngok Dinka Chiefdoms; it was the area of those nine Ngok Dinka Chiefdoms, which were transferred in 1905, that constitutes the Abyei Area.

d) The Anglo-Egyptian Treatment of the Kordofan/Bahr el Ghazal Provincial Boundary After 1905

1551. The Government also ignores the manner in which the transfer of the Ngok Dinka was treated after it had been made in 1905. The Anglo-Egyptian administrators took no steps in 1905 (or six years thereafter) to identify the territorial consequences of the transfer that had been made in 1905. The Government’s Memorial acknowledges this, noting that it was only in 1911/1912 that a “boundary line ... never more than 25 km from the Bahr el Arab and ... generally following the ‘course’ of the river” was noted.<sup>1951</sup>

1552. This course of action by the Anglo-Egyptian administration in the years following 1905 was precisely consistent with the fact that the 1905 transfer was directed towards, and phrased in terms of, the Ngok Dinka tribe (“Sultan Rob’s people”).<sup>1952</sup> What the Condominium records show is that in 1905 the Anglo-Egyptian administrators transferred a people – the Ngok Dinka people – from Bahr el Ghazal to Kordofan in order to ensure their protection. It is these Ngok Dinka people – Sultan Rob’s people – that were, in the words of Article 1.1.2 “transferred to Kordofan in 1905.”

1553. The Anglo-Egyptian administrators also intended – naturally and inevitably – that the area that the Ngok Dinka people inhabited would be transferred from Bahr el Ghazal to Kordofan. Importantly, however, the Anglo-Egyptian administrators could not in 1905 transfer any defined “area” – precisely because they did not know the extent of the area of the Ngok Dinka people that they had transferred.

1554. Thus, as the Government’s Memorial concedes, it was not until 1911/1912 that a change to the Kordofan/Bahr el Ghazal boundary was even roughly described by the Condominium administrators,<sup>1953</sup> and this process of description was only completed in 1931.<sup>1954</sup> Had the Anglo-Egyptian administrators transferred some defined “area,” then they could have drawn the Kordofan/Bahr el Ghazal boundary to reflect that transfer; in fact, however, they had transferred a people and whatever territory they inhabited, with the extent of that territory being unknown, and thus not a basis for delimiting the Kordofan/Bahr el Ghazal boundary.

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<sup>1951</sup> GoS Memorial, at para. 379.

<sup>1952</sup> See above at para. 1054.

<sup>1953</sup> See above at para. 1551.

<sup>1954</sup> GoS Memorial, at para. 383(6).



1555. Given these actions of the Anglo-Egyptian administration, the natural and only plausible reading of Article 1.1.2 of the Abyei Protocol is that it refers to the “nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” and not to an “area that was transferred to Kordofan in 1905.” Again, that is for the simple and undisputed reason that what the Anglo-Egyptian administrators transferred in 1905 was a people – the Ngok Dinka people – and that the Anglo-Egyptian administrators did not and could not in 1905 transfer an area. It was only in later years, beginning in 1911/1912 that the Anglo-Egyptian administrators began even to attempt to identify an “area” associated with the Ngok Dinka who had been transferred.

1556. Ironically, the Government’s insistence on 1905 as the “stipulated date” – which the ABC Experts supposedly ignored – in fact demonstrates the implausibility of the Government’s interpretation of Article 1.1.2 and definition of the Abyei Area. The Government’s definition of the Abyei Area relies exclusively on purported Kordofan/Bahr el Ghazal provincial boundaries, which in turn rest necessarily on events that occurred long after 1905 – and in particular on the (first rough) sketching of the area in 1911/1912 and then on subsequent alterations to that area through 1931.

1557. The Government’s definition of the Abyei Area necessarily relies on these post-1905 events and documents precisely because there was not a transfer of a particular area in 1905, but instead there was a transfer of a people. It is the transfer of that people – Sultan Rob’s people as they were in 1905 – that the 1905 transfer records and Article 1.1.2 refer to. It is the area that Sultan Rob’s people inhabited in 1905, the year when they were transferred, that can be ascertained through “scientific research and analysis,” while the Government’s interpretation of the Abyei Area can only proceed on the basis of inquiry into post-1905 documents and decisions – because it was only well after 1905 that a territorial addition to Kordofan was identified by the Anglo-Egyptian officials.

e) The Witness Testimony

1558. The witness testimony of the individuals involved in drafting the Abyei Protocol, including Article 1.1.2, precisely collaborates the ABC Experts’ interpretation of the definition of the Abyei Area. This testimony is set out in the SPLM/A’s Memorial and includes the witness statements of Lieutenant General Lazaro Sumbeiywo (IGAD mediator), Mr. Jeffrey Millington (Chargé d’Affairs at the U.S. Embassy in Khartoum, and the U.S. Department of State representative to IGAD), and Minister Deng Alor (Chief SPLM/A negotiator of the Abyei Protocol).<sup>1955</sup>

1559. Each one of these participants in the negotiation and drafting of the Abyei Protocol confirms the simple, common-sense meaning of Article 1.1.2. Each witness explains the simple proposition that the Abyei Area was intended to include all of the territories of the Ngok Dinka as they existed in 1905, and not some sub-set of those territories. That view merely reflected the obvious intentions and purposes of the parties’ agreement.

f) ABC Experts’ Statements During the ABC Proceedings

1560. Finally, the ABC Experts, based on their intensive familiarity with the parties and their dispute, unanimously concluded that the Abyei Area was to be defined by reference to the entire territory of the nine Ngok Dinka Chiefdoms which were collectively transferred to Kordofan in 1905. Thus, as discussed above, the Commission repeatedly said during its

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<sup>1955</sup> See SPLM/A Memorial, at paras. 1140-1141.

meetings with the parties and local residents that it understood the Abyei Area to comprise the:

- a. *“boundaries of the nine Dinka Chiefdoms as they existed 100 years ago,”*<sup>1956</sup>
- b. *“boundaries that existed in 1905 between the Misseriya and Ngok Dinka,”*<sup>1957</sup>
- c. *“area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan from Bahr el-Ghazal province in 1905,”*<sup>1958</sup> or
- d. *“area of the Nine Ngok Dinka Chiefdoms, which were transferred to Kordofan Province from Bahr El-Ghazal Province in 1905.”*<sup>1959</sup>

1561. Each one of these formulations uniformly expressed the same interpretation of Article 1.1.2. In each instance, the Commission referred to the territory of the Ngok Dinka as it existed in 1905, when the nine Ngok Dinka Chiefdoms were transferred to Kordofan; the Commission did not limit this definition of the Abyei Area by reference to the Kordofan/Bahr el Ghazal boundary, nor suggest that anything other than all of the territory historically occupied by the Ngok Dinka in 1905 was involved. The Commission’s interpretation is precisely consistent (as discussed above) with the natural meaning and structure of Article 1.1.2’s language and with the purposes of the provision.

1562. It bears emphasis that the Commission formed these views after spending an intensive period of time with the parties, including those responsible for the drafting of the Abyei Protocol, and with General Sumbeiywo, who oversaw the negotiations of the CPA and the Abyei Protocol.<sup>1960</sup> The ABC’s deep involvement, together with the parties, in the Abyei problem provided it with a unique depth and quality of knowledge regarding the issues before it. The resulting conclusions of the Commission are entitled to the greatest respect and deference. That is particularly true given the unanimity of the Commission’s conclusions and their unparalleled expertise in the region.

1563. The Commission’s interpretation of Article 1.1.2 ought also be treated with particular deference because of the absence of objection by the GoS to the statements quoted above. Had the GoS genuinely considered that a fundamentally different interpretation of the definition of “Abyei Area” was appropriate, then it surely would have raised the point directly – querying, if only in polite and cordial terms, the Commission’s statements. As discussed above, it did not do so.<sup>1961</sup>

1564. In these circumstances, the ABC’s consistent interpretation of Article 1.1.2 is entitled to particular deference. Not only was the interpretation arrived at on the basis of a uniquely intensive immersion in the problem, together with the parties’ representatives, but it was expressed openly and repeatedly to the parties – without drawing protest or objection. The silence of the GoS’s representatives, in the face of the Commission’s repeated statements, is at a minimum highly probative as to its own contemporaneous understanding of the definition of Abyei Area.

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<sup>1956</sup> ABC Report, Part II, App. 4, at p. 41, **Exhibit-FE 15/1**.

<sup>1957</sup> ABC Report, Part II, App. 4, at p. 53, **Exhibit-FE 15/1**.

<sup>1958</sup> ABC Report, Part II, App. 4, at p. 79, **Exhibit-FE 15/1** (emphasis added).

<sup>1959</sup> ABC Report, Part II, App. 4, at p. 58, **Exhibit-FE 15/1** (emphasis added).

<sup>1960</sup> See SPLM/A Memorial, at paras. 453 and 458. Witness Statement of Lt. Gen. Sumbeiywo, at p. 1, ¶1.

<sup>1961</sup> See SPLM/A Memorial, at paras. 626-631; Witness Statement of James Lual Deng, at pp. 12-13, ¶¶68-71; Witness Statement of Minister Deng Alor Kuol, at pp. 19-22, ¶¶122, 123, 130, 134 and 135.

g) The Drafting History

1565. As detailed in the SPLM/A Memorial, in cases of the ambiguity, the drafting history of the Abyei Protocol can also be of relevance.<sup>1962</sup> The Government has not addressed this issue and the Tribunal is respectfully referred to the discussion of the drafting history in the SPLM/A Memorial.<sup>1963</sup>

h) The Composition of the ABC and the Relevance of “Scientific Analysis and Research”

1566. It is also relevant to consider the composition of the ABC and the experience of the ABC Experts. As discussed in the SPLM/A Memorial, the five ABC Experts were selected by the United States, United Kingdom and IGAD, subject to the parties’ right to object to inappropriate appointments.<sup>1964</sup> The ABC Experts were to be “knowledgeable in history, geography and any other relevant expertise.”<sup>1965</sup>

1567. The individuals selected as ABC Experts had extensive experience in African and Sudanese history, geography, ethnography, and other relevant disciplines.<sup>1966</sup> Only one of the five ABC Experts was a lawyer; none of the ABC Experts had international arbitration experience, nor significant experience in international boundary disputes.

1568. There were no objections from either party to any of the appointees, whether on grounds that they lacked the requisite expertise or that they were not impartial.<sup>1967</sup> On the contrary, the Government repeatedly and unconditionally commended the ABC Experts for their diligence and expertise.<sup>1968</sup>

1569. The qualities of the ABC Experts – selected on behalf of the parties, without any objection – corroborate the parties’ intended meaning of the definition of the Abyei Area. The reason for selecting experts in Sudanese and African history, geography, ethnography, and political science, and not international boundary experts, was because the parties contemplated that an historical evaluation of the area of the Ngok Dinka would be necessary.

1570. Had the parties contemplated – as the Government now claims – that this was a case that involved no witness evidence, no oral traditions, no “populations movements” or “land usage,” they would have chosen very different individuals as ABC Experts. Conversely, had the parties contemplated – as the Government also now claims – that this was a case that only involved identifying the Bahr el Arab as the 1905 boundary of Kordofan, they again would have chosen very different individuals.

1571. Similarly, the parties contemplated that the ABC Experts would make their decision on the basis of “scientific analysis and research,”<sup>1969</sup> and following extensive sets of witness meetings and site inspections in the Abyei Area. None of the cost, burden and delay that this entailed would have been required if the parties had contemplated that the only relevant issue was – as the Government now claims – identifying the boundary of Kordofan in 1905. All of

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<sup>1962</sup> See SPLM/A Memorial, at paras. 669 and 1148 fn 1899.

<sup>1963</sup> See SPLM/A Memorial, at paras. 1148-1189.

<sup>1964</sup> See SPLM/A Memorial, at para. 499.

<sup>1965</sup> Abyei Annex, Art. 2.2, **Appendix D to SPLM/A Memorial**.

<sup>1966</sup> See SPLM/A Memorial, at paras. 496, 604.

<sup>1967</sup> See SPLM/A Memorial, at para. 606.

<sup>1968</sup> See SPLM/A Memorial, at paras. 855-856.

<sup>1969</sup> Abyei Annex, Art. 9., **Appendix D to SPLM/A Memorial**.

the ABC Experts' efforts, interviews and travels would not only have been a waste of time, but would have risked an excess of mandate by delving into such topics as "population dynamics" and "land usage."<sup>1970</sup>

1572. In fact, the parties did not behave either wastefully or irrationally. On the contrary, they selected a group of ABC Experts with complementary expertises precisely tailored to the task before them – defining the area used and occupied by the Ngok Dinka in 1905 – and they provided a set of procedures that were equally well-tailored to the same task. Both the character of the parties' chosen decision-maker, and the nature of its procedures, bears importantly on the meaning of the definition of the Abyei Area.

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1573. In sum, for all of these reasons, the ABC Experts were perfectly right to define the Abyei Area to include all of the territory of the nine Ngok Dinka Chiefdoms which were transferred to Kordofan in 1905. That conclusion is compelled by the language ("*the* area of the *nine* Ngok Dinka chiefdoms...") and grammatical structure of Article 1.1.2. It is also compelled by the basic purposes and drafting history of the Abyei Protocol (and the CPA), which preclude the Government's effort to limit the Abyei Area to only a truncated portion of the Ngok Dinka's historic territory or to only some of the nine Ngok Dinka Chiefdoms.

1574. It also bears repetition that the Government's disagreement with the ABC Experts' interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol is a substantive disagreement with the ABC Experts' conclusions, not a potential excess of mandate. As discussed above, it is well-settled that a decision-maker's incorrect resolution of the dispute submitted to it is not an excess of mandate; it is at most an error of law or fact. Only if a decision-maker decides disputes that have not been submitted to it – rather than incorrectly deciding those which have – is there an arguable excess of mandate.

1575. Here, as the Government's discussion of the definition of the Abyei Area in Chapter 6 of its Memorial confirms, the most that is involved is a disagreement between the Government and ABC Experts over the meaning of "the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905." That is simply not an excess of mandate and, in any event, for the reasons outlined above, the ABC Experts were perfectly right in the interpretation that they adopted.

2. Alternatively, the Area That the Anglo-Egyptian Government Transferred to Kordofan in 1905 Consisted of All of the Territory of the Nine Ngok Dinka Chiefdoms

1576. Alternatively, even if Article 1.1.2 of the Abyei Protocol was interpreted as referring to the area of the Ngok Dinka which was transferred to Kordofan in 1905, the same result would apply. That is because, as the ABC Experts found, the Sudan Government's 1905 instruments relating to the transfer all proceeded on the explicit basis that "Sultan Rob" and all of his "territories" or "country" were being transferred to Kordofan from Bahr el Ghazal. As discussed above, that factual finding was correct<sup>1971</sup> (and, in any case, may not be challenged in these proceedings: "It is not the case that a mere disagreement, however

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<sup>1970</sup> See above at paras. 515, 527, 534, 541-544.

<sup>1971</sup> See above at paras. 601-602, 1537-1538.

justified, with the Experts' appreciation of the facts is sufficient to indicate an excess of mandate"<sup>1972</sup>).

1577. As detailed in the SPLM/A's Memorial, the 1905 Kordofan Annual Report provided that:

"The Dinka Sheikhs, *Sultan Rob* and Sultan Rihan Gorkwei are now included in Kordofan *instead of the Bahr El Ghazal*...."<sup>1973</sup>

Likewise, the 1905 Bahr el Ghazal Annual Report provided that:

"*the territories of Sultan Rob ... have been taken from this Province* and added to Kordofan."<sup>1974</sup>

Similarly, the Sudan Intelligence Report No. 128 reported:

"It has been decided that *Sultan Rob*, whose country is on the Kir river, and Sheikh Rihan of Toj ... *are to belong to Kordofan Province*."<sup>1975</sup>

As discussed above, each of the Sudan Government's transfer records rested expressly on the premise that "Sultan Rob" and "the territories of Sultan Rob" had previously been located in Bahr el Ghazal, but were then transferred in 1905 to Kordofan.

1578. This is exactly the interpretation of the Anglo-Egyptian Government's 1905 transfer that the ABC Experts adopted in concluding that "the Ngok people were regarded [by the Anglo-Egyptian administration] *as part of the Bahr el-Ghazal Province until their transfer in 1905*,"<sup>1976</sup> and that "*the government's claim that only the Ngok Dinka territory south of the Bahr el Arab was transferred to Kordofan in 1905 is therefore found to be mistaken*."<sup>1977</sup> As the ABC Experts correctly interpreted the historical facts, the Anglo-Egyptian administrators regarded the Ngok Dinka and their territory as part of Bahr el Ghazal before 1905, and transferred them and their territory to Kordofan in 1905; it is that specific decision that is decisive, not the Government's more general and circuitous claims about the location of the Bahr el Ghazal/Kordofan boundary.

1579. It is not open to the Government to rewrite or second-guess either the Anglo-Egyptian administrators' decision in 1905 (or the ABC Experts' interpretation of that decision). The 1905 Condominium records detailing the transfer of the Ngok Dinka provide explicitly that the decision by the Anglo-Egyptian administrators was to transfer all of the territory of the nine Ngok Dinka Chiefdoms from what those administrators said they regarded at the time as Bahr el Ghazal to Kordofan. It is these terms of the 1905 Condominium records, and not the Government's arguments about the location of the more general Kordofan/Bahr el Ghazal boundary, that are decisive.

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<sup>1972</sup> GoS Memorial, at para. 161.

<sup>1973</sup> See Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13** (emphasis added). See also SPLM/A Memorial, at paras. 346-357.

<sup>1974</sup> See Annual Report of the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13** (emphasis added). See also SPLM/A Memorial, at paras. 346-357.

<sup>1975</sup> Sudan Intelligence Report, No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

<sup>1976</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial**.

<sup>1977</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial**.

1580. The Government's interpretation of Article 1.1.2 rests on the claim that an area was transferred from Bahr el Ghazal to Kordofan in 1905 and that the proper way to determine what area was transferred is to consult the provincial boundary. According to the Government, the Abyei Area must be defined as "the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905,"<sup>1978</sup> and in particular the "**areas which were already part of Kordofan in 1905 could not have been transferred to it.**"<sup>1979</sup> That analysis requires indirect and speculative inferences, drawn from the putative Kordofan/Bahr el Ghazal provincial boundary, to determine what was transferred in 1905. The more direct, less speculative and reliable approach is, as discussed above, simply to look at what the Condominium administrators said that they transferred to Kordofan in 1905 – which was the Ngok Dinka people and their territory.

1581. It bears emphasis (as discussed in detail above) that the Sudan Government administration did not have a well-informed, definite or consistent view in 1905 of what the provisional boundaries of Kordofan and Bahr el Ghazal were or where "Sultan Rob" was located in relation to those boundaries.<sup>1980</sup> As discussed above, some Sudan Government communications referred to the "Bahr el Arab" as the provisional boundary between Kordofan and Bahr el Ghazal, but also regarded this boundary as indefinite, merely approximate and subject to change; at the same time, the Anglo-Egyptian officials were uncertain where the "Bahr el Arab" lay and were (in 1905) in the process of realizing that their understanding of the river's location was badly mistaken.<sup>1981</sup>

1582. The Government expressly (if grudgingly) concedes that, in 1902, "Wilkinson mistook the Ragaba ez Zarga for the Bahr el Arab," that "Wilkinson's observations created some confusion as to the position of the real Bahr el Arab and its relations to other rivers and seasonal watercourses," and that "this confusion influenced the official map of the Sudan produced [in 1904]."<sup>1982</sup> The Government goes on to say that the confusion over the Kiir/Bahr el Arab was "short-lived" and was corrected by the Anglo-Egyptian government in 1907.<sup>1983</sup> As discussed above, the Government's position is mistaken (because the geographic confusion was both more wide-spread and longer-lived than it claims); nonetheless, even the Government's own claim confirms that, **at the very time of the decisive 1905 transfer of the Ngok Dinka**, there was confusion about the Kordofan/Bahr el Ghazal boundary.

1583. In light of this confusion about the identity and location of any general Kordofan/Bahr el Ghazal boundary at the decisive time of the 1905 transfer of the Ngok Dinka, it would be entirely wrong to ignore the explicit terms of the Anglo-Egyptian administrators' 1905 transfer records regarding the Ngok Dinka transfer. Those records say in terms that the Ngok Dinka were transferred from Bahr el Ghazal to Kordofan. It would ignore both the specific statements of the Anglo-Egyptian officials, and the unresolved confusion about the general

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<sup>1978</sup> GoS Memorial, at para. 19.

<sup>1979</sup> GoS Memorial, at para. 19.

<sup>1980</sup> See above at paras. 1437-1458. See also SPLM/A Memorial, at paras. 315-330.

<sup>1981</sup> See above at paras. 1437-1451. See also SPLM/A Memorial, at paras. 337-343. As also discussed above, Professor Cunnison's published works underscore the uncertain and highly approximate character of references to the "Bahr el Arab": "The river system is known to the Arabs as the Bahr, although they subdivide the area into the Regeba (consisting of the Regeba ez zerga and the Regeba Umm Bioro): and **the Bahr, or the Bahr al Arab which consists of all river beds between the Regeba ez Zerga and the main river.** ... The nomenclature [of the rivers] is confusing. **The river which is generally shown on maps as the Bahr el Arab – and in one section as the Jurf – is always known by the Arabs as the Jurf.** They point out that **it is not the Bahr al Arab, for the Arabs do not settle by it at this part, but the Bahr ed Deynka.**" Cunnison, "The Humr and their Land," 35(2) SNR 51 (1954), **Exhibit-FE 4/5** (emphasis added).

<sup>1982</sup> GoS Memorial, at para. 317.

<sup>1983</sup> GoS Memorial, at paras. 321-322.

Kordofan/Bahr el Ghazal boundary, to rely on inferences about the putative provincial boundary to determine whether the Ngok Dinka territories were “really” transferred to Kordofan.

1584. Similarly, as also discussed above, the uncertainty and confusion in 1905 concerning the identity and location the “Bahr el Arab” prevent any reliable determination of what area was transferred in 1905 from Bahr el Ghazal to Kordofan based upon the general Kordofan/Bahr el Ghazal boundary. In 1905, the Kordofan/Bahr el Ghazal boundary was indeterminate in the sense that the Anglo-Egyptian administrators did not have a coherent or accurate understanding of where the boundary was located.<sup>1984</sup>

1585. The same uncertainties also attended the new boundary between Kordofan and Bahr el Ghazal which resulted after the 1905 transfer of the Ngok Dinka. As the Government’s Memorial concedes, and as discussed above, no immediate change to the Kordofan/Bahr el Ghazal boundary was made in 1905; indeed, no change was made until 1911 or 1912.<sup>1985</sup> Even then, in 1911, the new boundary was described only as “divid[ing] certain tribal districts to Lake No,” while in 1912 the new boundary is, in the Government’s words, “described ... somewhat indefinitely.”<sup>1986</sup> After 1912, the Kordofan/Bahr el Ghazal boundary continued, in the Government’s understatement, to go through “a certain evolution.”<sup>1987</sup> In fact, as discussed above, the boundary was repeatedly and confusingly revised in 1912, 1924, 1925, 1931 and 1935.<sup>1988</sup>

1586. The essential point is that the Anglo-Egyptian administration’s actions following the 1905 transfer of the Ngok demonstrate that the provincial boundary between Kordofan and Bahr el Ghazal remained undetermined. That is, the Anglo-Egyptian administration’s records did not determine any boundary following the 1905 transfer and did not do so for much of the next several decades.

1587. With this geographic confusion about the “Bahr el Arab” and the general Kordofan/Bahr el Ghazal provincial boundary as background, the ABC Experts correctly found that what the Anglo-Egyptian authorities did in 1905 was to transfer the Ngok Dinka from Bahr el Ghazal – where the Condominium officials said the Ngok Dinka were – to Kordofan – where the Condominium officials said the Ngok Dinka would be in the future. The ABC Experts found as a matter of historical fact that it was these statements by the Condominium officials that determined what it was that was transferred in 1905. That finding was clearly right, and it is a separate and independent answer to the Government’s substantive objections to the ABC Experts’ decision.

1588. With this historical background, it would make no sense to interpret the Sudan Government’s 1905 transfer of the Ngok Dinka – much less Article 1.1.2 of the Abyei Protocol – as only involving a part of the Ngok territory. In particular, it would make no sense to conclude that the 1905 transfer of Sultan Rob and his territories only affected that portion of Ngok territory lying south of the Kiir/Bahr el Arab River or some other waterway. This would be directly contrary to what was specifically stated in the 1905 transfer instruments – which were those actions and statements by the Sudan Government that were most specifically focused on where the Ngok Dinka were located in relation to the

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<sup>1984</sup> See also above at paras. 1411-1417, 1437.

<sup>1985</sup> GoS Memorial, at paras. 376-379. See also above at para. 1551, 1554-1556.

<sup>1986</sup> GoS Memorial, at paras. 377-378.

<sup>1987</sup> GoS Memorial, at para. 381 and Figure 14.

<sup>1988</sup> See above at paras. 1197-1264, 1554-1556.

Kordofan/Bahr el Ghazal boundary – and would accord a level of certainty, permanence and definiteness to the Kordofan/Bahr el Ghazal boundary that would be inconsistent with the knowledge and attitude of the Sudan Government administration with regard to that boundary.

1589. Finally, it is again clear that the Government’s purported excess of mandate complaints in this arbitration are really a disagreement with the ABC Experts’ interpretation and assessment of the historical documents. At bottom, the Government’s complaint is that the ABC Experts failed to give decisive importance to Anglo-Egyptian documents and maps indicating that the Kordofan/Bahr el Ghazal boundary was the “Bahr el Arab.” The short answer to that complaint is that the ABC Experts evaluated those historical documents and maps and concluded – as the 1905 transfer records stated – that the Anglo-Egyptian administrators transferred all of the Ngok Dinka and their territory from Bahr el Ghazal to Kordofan. As the Government itself concedes, it is simply not open to the Government in these proceedings to challenge this sort of factual finding by the ABC Experts.

*D. The Area of the Nine Ngok Dinka Chiefdoms Transferred to Kordofan in 1905 Comprises All of the Territory North of the Current Bahr el Ghazal/Kordofan Boundary to Latitude 10°35’N*

1590. As discussed above, there is no reason or basis for the ABC Experts’ decision to be disturbed, because there are no grounds for finding an “excess of mandate” within the meaning of Articles 2(a) and 2(b) of the Abyei Arbitration Agreement. Nonetheless, for the sake of completeness, the SPLM/A confirms the request, made in its Memorial, that if this Tribunal concludes that there was an excess of mandate, then it should go on to define the Abyei Area to include all of the territory north of the current Kordofan/Bahr el Ghazal boundary to latitude 10°35’N (with the east and west boundaries identified by the ABC Experts).

1591. As detailed in the SPLM/A Memorial, Article 2(c) of the Abyei Arbitration Agreement sets forth the following direction: “If the Tribunal determines, pursuant to Sub-article (a) herein, that the ABC experts exceeded their mandate, it shall make a declaration to that effect, and shall proceed to define (i.e., delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the parties.”<sup>1989</sup>

1592. The ABC considered the SPLM/A claim that the Ngok Dinka territory extended historically to latitude 10°35’N, but found the evidence in support of this inconclusive.<sup>1990</sup> The Commission concluded that “[i]n the absence of a copy of the presidential decree [of 1974, establishing the Abyei area], or verbatim quotation from the text, and a more precise location of the sites mentioned, it is impossible to accept this definition [offered by the SPLM/A] as conclusive.”<sup>1991</sup> The ABC therefore concluded that the Abyei Area’s northern boundary fell midway between latitudes 10°10’N and 10°35’N.<sup>1992</sup>

1593. In contrast, the record before this Tribunal contains a much more detailed factual account showing that the Ngok Dinka occupied and used the territory extending north to

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<sup>1989</sup> Abyei Arbitration Agreement, Art. 2(c), **Appendix A to SPLM/A Memorial**. See SPLM/A Memorial, paras. 870-880.

<sup>1990</sup> See SPLM/A Memorial, at para. 528(i).

<sup>1991</sup> ABC Report, Part II, App. 4, at p. 44, **Exhibit-FE 15/1**.

<sup>1992</sup> ABC Report, Part I, at pp. 21-22, **Appendix B to SPLM/A Memorial**.



latitude 10°35'N. That evidentiary showing is outlined above and in the SPLM/A Memorial. It demonstrates that the area of the nine Ngok Dinka Chiefdoms in 1905 comprised all of the territory south of latitude 10°35'N to the current Bahr el Ghazal/Kordofan boundary.<sup>1993</sup>

1594. It is clear that portions of the Ngok Dinka lands were, in some instances, also used by other tribes (including particularly the Misseriya),<sup>1994</sup> but that in no way alters the fact that this area was Ngok Dinka territory. The Ngok built and inhabited permanent settlements in the Abyei region, using its lands for twice-yearly agricultural cultivation, while developing cultural and legal regimes regarding ownership and transfer of such lands.<sup>1995</sup> In contrast, the Misseriya were nomadic cattle-herders, who used particular parts of the Ngok Dinka lands intermittently for the limited purpose of cattle-grazing during a limited part of the dry season.<sup>1996</sup>

1595. There is no historical evidence at all that was considered by either the Ngok, Sudan Government administration or the Misseriya themselves as contradicting the Ngoks' historic land rights. On the contrary, the Misseriya's seasonal migratory patterns were merely one part of a broader set of migration patterns involving the tribes of the region – with the Misseriya, the Ngok and tribes to the south all participating in a regional system of southern cattle-herding migrations in the dry season.<sup>1997</sup>

1596. The Misseriya's seasonal use of the Ngok Dinka territory was foreseen and incorporated into the Abyei Protocol and the definition of the Abyei Area. Article 1.1.3 of the Abyei Protocol specifically provides that the "Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei."<sup>1998</sup> It was through this mechanism, of guaranteed rights of access and usage, that questions of the Misseriya's use of the Abyei Area was resolved. Conversely, the fact that the Misseriya (or others) *also* used particular territory is not grounds for excluding that area from the Abyei Area.

1597. As a consequence, the definition of the Abyei Area encompasses all of the Ngok Dinka areas, regardless of whether the use of those areas was shared with either the Misseriya or with other tribes. Indeed, Article 1.1.3 provides further confirmation that the Abyei Area was intended to encompass precisely areas which the Misseriya historically used alongside the Ngok Dinka (and not that the Abyei Area would be limited to only areas that the Ngok used exclusively). Were this not the case, then there would have been no need to include Article 1.1.3 in the Abyei Protocol's provisions regarding the Abyei Area.

1598. Thus, if the Tribunal were to reach the question presented by Article 2(c) of the Abyei Arbitration Agreement, as to defining and delimiting the Abyei Area, then the complete historical record demonstrates that the area of the nine Ngok Dinka Chiefdoms which were transferred in 1905 encompasses the entire region extending north from the current Kordofan/Bahr el Ghazal boundary to the northern boundary at a latitude 10°35'N.

1599. In the east and west, the evidence confirms the boundaries of the Abyei Area fixed by the ABC Experts. In the east, the boundary of the Abyei Area is appropriately fixed at the

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<sup>1993</sup> See SPLM/A Memorial, Section VIII(1).

<sup>1994</sup> See SPLM/A Memorial, at paras. 168-216, 238-248 and 968-977.

<sup>1995</sup> See SPLM/A Memorial, at paras. 168-216.

<sup>1996</sup> See SPLM/A Memorial, at paras. 217-227 and 233-254.

<sup>1997</sup> See SPLM/A Memorial, at paras. 202-203.

<sup>1998</sup> Abyei Protocol, Art. 1.1.3, **Appendix C to SPLM/A Memorial.**

north/south perpendicular line extending the Southern Kordofan/Upper Nile provincial boundary northwards until it reach latitude 10°35'N. This boundary is both appropriate and required by the evidence for the reasons discussed above.<sup>1999</sup>

1600. Similarly, in the west, the boundary of the Abyei Area is the current boundary of Kordofan and Darfur. There was no dispute between the parties at any point during the ABC process, and no question raised in the Government's Memorial, as to this boundary.

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<sup>1999</sup> *See above* at paras. 852-854.

#### IV. REQUEST FOR RELIEF

1601. For the reasons set forth in this Memorial, the SPLM/A respectfully requests that the Arbitral Tribunal make an Award granting the following relief:

- a. A declaration that the ABC Experts did not, on the basis of the agreement of the Parties as per the CPA, "exceed their mandate which is 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' as stated in the Abyei Protocol, and reiterated in the Abyei Annex and the ABC Terms of Reference and Rules of Procedure;"
- b. On the basis of relief in the terms of sub-paragraph (a) above, a declaration that the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are as defined and delimited by the ABC Experts in the ABC Report, and that definition and delimitation, and the ABC Report shall be fully and immediately implemented by the parties;
- c. In the alternative, if the Tribunal determines that the ABC Experts exceeded their mandate and makes a declaration to that effect, a declaration that the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are the current boundary of Kordofan and Bahr el Ghazal to the south extending to 10°35'N latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 29°32'15"E longitude to the east;
- d. A declaration that the Tribunal's Award is final and binding on the parties;
- e. Costs, including the direct costs of the arbitration, as well as fees and other expenses incurred in participating in the arbitration, including but not limited to, the fees and/or expenses incurred in relation to the Tribunal, solicitors and counsel, and any experts, consultants and witnesses, internal legal costs, the costs of translations, archival research and travel; and
- f. Such additional or other relief as may be just.

The SPLM/A reserves the right to amend or supplement this request for relief.

Respectfully submitted this 13th day of February 2009



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## **APPENDIX A**

**Grammatical Interpretation of the phrase: 'Area of the Nine Ngok Dinka  
Chieftdoms Transferred to Kordofan in 1905'**

**A report prepared for Wilmer, Cutler, Pickering, Hale & Dorr LLP**

**Professor David Crystal  
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## **Introduction**

1. I have been a professional linguist for some 45 years, and was formerly professor of linguistic science at the University of Reading (1975-84). Several of my books reflect my specialization in English language studies, including *The Cambridge Encyclopedia of the English Language*, *The English Language*, and *English as a Global Language*. With specific reference to English grammar, my books include *Rediscover grammar*, *Discover grammar*, *Making sense of grammar*, and *The grammatical analysis of language disability*. I was a member of the team which compiled the leading reference grammar, *A Comprehensive Grammar of the English Language* (Quirk, Greenbaum, Leech, Svartvik), responsible for the index to that work. In 1995 I was awarded an OBE for services to the English language and in 2001 became a Fellow of the British Academy.

2. I was instructed by Wilmer, Cutler, Pickering, Hale & Dorr LLP to prepare the following report in support of the SPLM/A's case in arbitration proceedings to be heard before the Permanent Court of Arbitration at The Hague in early 2009. I was instructed to provide an answer to the following question, using solely my knowledge and experience as a grammarian of the English language and in contextual isolation:

*What is being transferred in the following sentence: 'the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905'. Is it: (i) the 'area'; or (ii) the 'chiefdoms'?*

## **Summary**

3. The analysis of all the grammatical factors involved in this sentence, taken in contextual isolation, points to the clear conclusion that it is the chiefdoms which are being transferred.

## Report

4. The above phrase (it is not, grammatically speaking, a complete sentence) is a noun phrase consisting of a head noun (*the area*) which is then postmodified by a prepositional phrase (*of the nine Ngok Dinka chiefdoms*), and this is then followed by a non-finite clause (*transferred to Kordofan in 1905*). The internal features of these three constructions are unimportant. The question is how the non-finite clause relates to the preceding two constructions.

5. If it is to be interpreted as postmodifying the head noun, then solution (i) is correct. If it is to be interpreted as postmodifying the prepositional phrase, then solution (ii) is correct.

6. This kind of syntactic ambiguity is very common in English, but is usually resolved by the context. For example: in *the huntsmen on horses wearing red coats*, we know that people typically wear coats, not animals. By contrast, in *the huntsman on horses with long tails*, we know that horses have tails, not people. In the case of *the huntsmen with servants wearing red coats*, context cannot help, and the text remains ambiguous - though other factors can suggest a likely interpretation (see further below).

7. With regard to the above phrase, the problem resides in the non-finite clause, which is inexplicit. A non-finite clause is so called because it is, literally, 'not finite', that is, it imposes no limitations on the time, number, or person of the verb. It is contrasted with a finite clause, where such limitations are present and are explicitly stated. For example, if a sentence began with the clause *Parked in the street...*, we have no way of knowing whether the rest of the sentence is going to be about a singular or a plural entity, whether the parking took place now, in the past, or in the future; or whether it is about a first, second, or third person. Only a following finite clause resolves the ambiguity. All these options are illustrated below:

### *Number resolution:*

Parked in the street, the car caused a traffic problem.

Parked in the street, the cars caused a traffic problem.

### *Time resolution*

Parked in the street, the car caused a traffic problem.

Parked in the street, the car is causing a traffic problem.

Parked in the street, the car will cause a traffic problem.

### *Person resolution*

Parked in the street, I caused a traffic problem.

Parked in the street, you caused a traffic problem.

Parked in the street, it caused a traffic problem.

8. Transferring this to the present case, if finite clauses had been used, the text would have been clear, as singular/plural concord would decide the matter:

the area of the nine Ngok Dinka chiefdoms **which was** transferred to Kordofan in 1905

the area of the nine Ngok Dinka chiefdoms **which were** transferred to Kordofan in 1905

Without this option, one has to look for clues elsewhere in the text.

9. Taken as an autonomous construction, the natural reading of the contentious text would support the interpretation as (ii) above. The chief argument is one of proximity. One normally interprets a postmodifying construction in a noun phrase as relating to the immediately previous noun, as in the famous nursery rhyme:

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

10. Any of the *that*-clauses could relate to *dog*, but the natural reading is to take each one as defining the immediately preceding noun. This would support the interpretation of the contentious text as (ii) above.

11. There are many other examples in English, structurally parallel to the contentious sentence, where proximity is the operating grammatical principle, such as:

the cost of the suit in the window  
the accuracy of the points listed in the document

In these examples it is the suit which is in the window, not the cost; and the points which are being listed, not the accuracy.

12. It is also possible to cite parallels to the contentious sentence using similar vocabulary, such as:

an area of concern expressed by all parties  
the area of the garage shown on the plans

where quite plainly it is the concern that is expressed and the garage that is being shown.

13. For the reasons stated above, I believe that, taken in contextual isolation, it is the 'chiefdoms' which are being transferred in the above phrase, not the 'area'.



*Professor David Crystal*  
*4 February 2009*



## APPENDIX B

1. The cartographic evidence also confirms that there was no determinate provincial boundary between Kordofan and Bahr el Ghazal in 1905 (or at any time before 1911 at the earliest). As discussed below, there was no official Sudan Government map prior to 1905 that identified a Kordofan/Bahr el Ghazal provincial boundary (although official Condominium maps did identify *other* provincial borders). At the same time, the cartographic evidence also shows very clearly that the “Bahr el Arab” was used variously to refer to a number of different watercourses in the Bahr region, with no consistent use of the term being arrived at until at least 1907 or 1908.

2. Preliminarily, the GoS Memorial and accompanying Macdonald Report suggest that the Abyei region was well mapped from the late 19<sup>th</sup> century. The Government’s Memorial acknowledges that “[a]t the beginning of the Condominium,” the “course of the western rivers was uncertain.”<sup>2000</sup> The Government nonetheless goes on to declare, without support, that “determining the precise course and navigability of the waterways became a high priority.”<sup>2001</sup>

3. As Professor Daly observes, the Government’s acknowledgment of the limited Condominium understanding of the Bahr region is correct, but the suggestion of some substantial exploratory effort into the Abyei region or southern river systems is historically inaccurate:

“The interest of a few British soldiers, seconded to the Egyptian Army or the Sudan Government, in trekking into the wilds of southern Kordofan was consistent with their general remit of learning about the country, but the urgency ascribed to this in the GOS Memorial “reads back” to the first years of the 20<sup>th</sup> century the political issues of the 21<sup>st</sup>. It is telling that the GOS Memorial provides no actual evidence of such urgency.”<sup>2002</sup>

4. The lack of any real understanding by Anglo-Egyptian officials of the course of the Kiir/Bahr el Arab prior to 1905 is illustrated on **Map 61**, which depicts how the river is shown on maps prepared prior to 1905. Contrary to the Government’s suggestions, this map, together with the Condominium officials’ own expressions of confusion,<sup>2003</sup> makes clear that there was no consistent or accurate understanding of the location or course of the Kiir/Bahr el Ghazal until well past 1905.

*i. Map ‘Mentioned by Browne’ - 1799*

5. As indicated above, Macdonald refers to a map mentioned by Browne which referred to the Bahr el Arab as the “Bahr el Ada.”<sup>2004</sup> Macdonald accepts that “the depiction was vague and of little use,” but goes on to rely on it as evidence of “awareness” of a river in the general area of the Abyei region. A copy of the Browne map is attached as **Map 72** in the SPLM/A Supplemental Map Atlas.

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<sup>2000</sup> GoS Memorial, at para. 309 (citing Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 153 (1905), **Exhibit- FE 2/15**).

<sup>2001</sup> GoS Memorial, at para. 310.

<sup>2002</sup> Daly Supplemental Expert Report, at p. 18.

<sup>2003</sup> See SPLM/A Memorial, paras. 337-343; *above* at paras. 1411-1417.

<sup>2004</sup> See *above* at para. 1201 (citing Macdonald Report, at para. 2.1).

6. In fact, there are two maps in Browne's "*Travels in Africa, Egypt and Syria from the Year 1792 to 1798*." One is Browne's map of the route of the Sudan caravan from Assiut to Darfur, including some of the routes of the Jelabs or slave merchants from the latter to the adjacent countries, and the other is a map of Darfur. The map of Darfur, reproduced at **Map 72**, contains the reference to "Bahr el Ada."

7. As Browne's map makes plain, not only is the river relied upon by Macdonald as supposed evidence of "awareness" of the Kiir/Bahr el Arab given a completely different name ("Bahr el Ada"), but the river is in fact barely depicted on the map at all and, insofar as it is, the depiction is wildly inaccurate. The Bahr el Ada is depicted at 29° E longitude and north of 10° N latitude, far from the location of the Kiir/Bahr el Arab. Although not mentioned by the Government, there is no suggestion whatsoever on the map of any boundary between Bahr el Ghazal and Kordofan provinces.

ii. *Carte du Cours du Fleuve - Sources du Nile - 1863*

8. As also indicated above, a map was prepared by Erhard Bonaparte in 1863 based on the itineraries of Captain Speke and Captain Grant ("*1863 Sources du Nile*").<sup>2005</sup> A copy of this map is at **Map 78** in the SPLM/A Supplemental Map Atlas.

9. Given that Speke and Grant had only just discovered the White Nile during their 1862 expedition, it is unsurprising that they did not document its many tributaries from the west. The only western tributary of the White Nile mentioned by Grant was the Jur, with no mention of the Kiir/Bahr el Arab.

10. In fact, as is clear from their book, "*A Walk Across Africa*," Speke and Grant did not venture far from the White Nile. They merely observed the Bahr el Ghazal as an 'affluent' of the White Nile, commenting that "[o]ur river, which had lately been averaging eighty and a hundred yards wide, kept its course, not mingling its waters with the Bahr-el-Ghazal, which here was without debris or apparent current, looking more like a backwater or still pond half a mile square."<sup>2006</sup>

11. The 1863 *Sources du Nile* map shows a river running broadly along the course of the Kiir/Bahr el Arab, and tentatively names that river "*Bahr el Arab?*" at its source at Hofrat. The river "Bahr el Arab?" is recorded on the map as a tentative, dotted line, indicating that it was either not regarded as a major river or was considered uncertain. This treatment can be contrasted to other rivers in the region to the south of the Kiir/Bahr el Arab, which are clearly marked as major, navigable waterways.

12. The *Sources du Nile* map depicts the river as connecting in the east with the Ngol/Ragaba ez Zarga (labeled El Kidi), and ultimately to the Bahr el Ghazal at the location of the convergence of the Ngol/Ragaba ez Zarga and Bahr el Ghazal. An overlay of the 1863 *Sources du Nile* map, at **Map 78a**, shows precisely how far off course these rivers were.

13. No provincial boundaries in Sudan are marked on the 1863 French map. The province/area name "Kordofan" is written in the general Kordofan region, which is only above 11°N latitude. There is no mention of a Bahr el Ghazal province.

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<sup>2005</sup> See above at paras. 1202-1203.

<sup>2006</sup> J. Grant, *A Walk Across Africa* 380 (1864), **Exhibit-FE 17/1**.

iii. *Wadai und Dar-for Landerm im Soden Davon – 1875 (and Maps of Schweinfurth’s Routes and Discoveries – 1869-1871)*

14. Schweinfurth produced at least three maps of the region. A 1875 map of Schweinfurth’s explorations<sup>2007</sup> (included at **Map 76**) shows a southern boundary of Kordofan at 12° N latitude. Neither the southern boundary between Kordofan and Bahr el Ghazal, nor the southern boundary of Darfur and Bahr el Ghazal, follow the Kiir/Bahr el Arab. Consistent with that, Schweinfurth’s Routes Map places Kordofan above 12 ° N latitude, without any provincial boundaries.

15. None of the Schweinfurth maps marks the Kiir/Bahr el Arab correctly at its juncture with the Bahr el Ghazal and all thereafter incorrectly place the Kiir/Bahr el Arab terms of its longitude and its location with other rivers. In the subsequent notes of Lupton Bey, he commented that “I am badly off for maps of Central Africa...Mine are all the old ones, not worth anything. *Dr. Schweinfurth’s map of this province contains serious mistakes....*”<sup>2008</sup> The two additional Schweinfurth maps are at **Maps 74** and **Map 75**.

iv. *Ravenstein Map of Eastern Equatorial Africa, 1883*

16. The earliest map submitted by the GoS, in support of its argument that the course of the Kiir/Bahr el Arab was reasonably well known in the 19<sup>th</sup> century, is the Ravenstein map of 1883 (**GoS Map 1**), which the GoS describes as “a distillation of all information gained by Western explorers until that time.”<sup>2009</sup>

17. Ravenstein did map a “reasonable approximation of the lower course of the Bahr el Arab and a very good position for its confluence with the Bahr el Ghazal.”<sup>2010</sup> Nonetheless, his map simply carried forward the previous mistakes of others. In particular, Ravenstein appears to have the correct start for the Kiir/Bahr el Arab at its juncture with the Bahr el Ghazal, but as he goes west he places the river well to the south. He also shows several tributaries joining the river from the south so it appears he is conflating the Kiir/Bahr el Ghazal with the Lol in this more western section. This error is illustrated in the **Map 77a** overlay.

18. Although not mentioned by the Government, and like the earlier maps discussed above, the Ravenstein map does not include any provincial boundaries.

v. *Egyptian Sudan Map, 1883*

19. The British Intelligence Branch of the War Office prepared a map of Egyptian Sudan in 1883, included as **Map 30** in the SPLM/A Map Atlas.<sup>2011</sup> Although undoubtedly the most authoritative map of Egyptian Sudan, it is omitted from the GoS Map Atlas and not referred to in its Memorial.

20. The Kiir/Bahr el Arab is identified on the 1883 Egyptian Sudan Map as a separate river from the Lol (with its southern tributaries), although the location and layout of the point where the rivers merge into the Bahr el Ghazal is inaccurate. The 1883 Egyptian Sudan Map

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<sup>2007</sup> As discussed above, Schweinfurth’s explorations went nowhere close to the Bahr region.

<sup>2008</sup> Proceedings of the Royal Geographical Society and Monthly Record of Geography 252 (10 March 1884), **Exhibit-FE-17/4**.

<sup>2009</sup> Macdonald Report, at para. 2.2.

<sup>2010</sup> Macdonald Report, at para. 2.2.

<sup>2011</sup> SPLM/A Memorial, at para. 979-980.

includes an approximate southern boundary for the province of Kordofan which is well north of the Kiir/Bahr el Arab, curving in an arched line to the southeast, at Lake No. Neither the southern boundary between Kordofan and Bahr el Ghazal, nor the southern boundary of Darfur and Bahr el Ghazal, follow the Kiir/Bahr el Arab or any other major waterway that could be mistaken for the Kiir/Bahr el Arab. This is graphically illustrated at **Map 31**.

vi. *Lupton Bey Sketch Map, 1884*

21. The GoS relies on a Royal Geographic Society map of Eastern Equatorial Africa, upon which it has transposed a “sketch map” of Bahr el Ghazal by Lupton in 1884 (included as **GoS Map 2**).<sup>2012</sup> This is an unusual source of cartographic evidence (at best). Lupton himself warned:

“[t]he little map I send is only a part of the work I have done here. ... *I have no instruments or paper here with me, or would have sent you a map on a large scale, with all the small streams and villages, hills &c., marked on it. The one I have sent is only intended to give you some idea of the rivers here.*”<sup>2013</sup>

22. Lupton also noted “The latitudes of some places are by observation, others are by dead reckoning.”<sup>2014</sup> When reproduced by the Royal Geographic Society in London, the map was accompanied by the following caveat: “The map is a reproduction, with some improvements, of Mr. Lupton's *very rough original*. ... *The route ... is merely approximate.*”<sup>2015</sup> This is hardly surprising as Lupton himself appears not to have travelled north of Meshra el Rek.

23. Upon examination, it is clear that the 1883 Lupton Map does not significantly advance the knowledge of the Abyei region and, in particular, knowledge of the area above the Kiir/Bahr el Arab. Absent any exploration of the area of his own, Lupton's additional observations refer only to areas well south of the Kiir/Bahr al Arab. The map did, however, appear to have clarified that the Lol (with its southern tributaries) and the Kiir/Bahr el Arab did not in fact converge, as suggested on many earlier maps, including Schweinfurth's.

24. The Lupton 1883 Map shows no provincial boundaries (although the implication of the title of the map (“The Province of Bahr el Ghazal”) is that Bahr el Ghazal extends north to 11° N latitude). Nevertheless, the GoS Memorial cites remarks to the Royal Geographic Society in 1885 by Lupton's brother (not Lupton's son) which describe the province of Bahr el Ghazal as “that tract of country which lies between 6°30” and 9°30” N. latitude, and roughly speaking from 25° to 31° E longitude and as suggesting that the province is “bounded in the north by the Bahr-el-Arab.”<sup>2016</sup> Lupton himself is not recorded as saying anything of the sort and does not identify the Kiir/Bahr el Arab as a boundary on his sketch map. Even the reported comments of Lupton's brother are couched in the most general terms and do not purport to be official in any respect.

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<sup>2012</sup> GoS Memorial, at para. 292; GoS Map 2.

<sup>2013</sup> Proceedings of the Royal Geographical Society and Monthly Record of Geography, 251 (10 March 1884), **Exhibit-FE 17/4**.

<sup>2014</sup> Proceedings of the Royal Geographical Society and Monthly Record of Geography, 247 (10 March 1884), **Exhibit-FE 17/4**.

<sup>2015</sup> GoS Map 2 (The Province of Bahr el Ghazal 1884).

<sup>2016</sup> Proceedings of the Royal Geographical Society and Monthly Record of Geography, 246 (10 March 1884), **Exhibit-FE 17/4**.

vii. *Edward Stanford Map, 1898*

25. The GoS relies on an 1898 map by Stanford for the War Office of the Nile Valley, which is also referred to by Macdonald as a continuation of Lupton's depiction of the Bahr el Arab (**GoS Map 3**).<sup>2017</sup> The GoS rely on the Stanford map to suggest that the route of the Kiir/Bahr el Arab was well-known by the time of the Condominium.<sup>2018</sup> The map depicts no provincial boundaries in Sudan.

26. The cartographer of the 1898 Stanford map depicts both the Kiir/Bahr el Arab and Lol (called "Bahr el Homr") with dotted lines, indicating that they were uncertain and unexplored. The tentative depiction of the Kiir/Bahr el Arab in the 1898 Stanford map is more accurately reflected than in previous maps, but the river is still too far south (including its juncture with the Bahr el Ghazal) by about 15 minutes.

27. Additional confusion is introduced in the 1898 Stanford map at the junction between the Kiir/Bahr el Arab and Bahr el Ghazal, with a triangular pattern that appears for the first time (and is repeated in later maps). Judging by the 15 minute south discrepancy in the location in the juncture of the Kiir/Bahr el Arab and Bahr el Ghazal, the more northern dotted line in fact appears to be the Ngol/Ragaba ez Zarga, where it has its juncture with the Bahr el Ghazal. If so, it is erroneously marked as rejoining the Kiir/Bahr el Arab upstream. Moreover, the more southern Lol appears (again erroneously) to reconnect with the Bahr el Ghazal south of Lake Ambady, creating a further, and mistaken, depiction that is repeated in later maps.

viii. *Marchand Map, 1898*

28. The GoS relies on a map produced by Marchand in 1898 showing a trek through the south of Sudan (**GoS Map 4**).<sup>2019</sup> No provincial boundaries are depicted on the Marchand map. The Kiir/Bahr el Arab is correctly identified, although not accurately plotted by coordinates (and not identified in any way as a boundary).

29. The additional Marchand map, referred to at paragraph 1210 above and attached at **Map 79**, roughly plots the route of the Kiir/Bahr el Arab, correctly naming it in the process, but gives no indication of the existence of any provincial boundaries. The area of Kordofan is labelled, without boundaries, but almost at 12° N latitude.

ix. *Skelton Map of the Sudan, 1901*

30. The GoS Memorial relies on a 1901 Skeleton map of Sudan from the Intelligence Division of the War Office which depicts railways, telegraphs and routes (**GoS Map 6**). As expected given that this is a Skeleton Map "to illustrate railways, telegraph and Routes," no provincial boundaries are depicted on the map.

31. Macdonald describes this as a "general purpose "Skeleton Map" of 1901, published by the War Office," which he says "has a similar but simplified depiction, albeit

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<sup>2017</sup> Macdonald Report, at para. 2.4.

<sup>2018</sup> Macdonald Report, at para. 2.4.

<sup>2019</sup> **GoS Map 4** (The Anglo Egyptian Sudan, 1901/3)

with some changes to the junction of the Bahr el Arab with the Bahr el Ghazal” to the Lupton map and the 1898 Stanford map.<sup>2020</sup>

32. Macdonald is correct in his representation of the Skeleton map, as it indeed carries through the errors in the Lupton and Stanford maps, described at paragraphs 21 to 27 above. In particular, the Bahr el Arab is depicted on the map, but still as a dotted line indicating uncertainty and lack of exploration. The source of the Kiir/Bahr el Arab is not clearly depicted as being at Hofrat el Naha and in its eastern section (including its juncture with the Bahr el Ghazal) the river is shown is too far to the south by about 15 minutes. Also, the river’s juncture with the Bahr el Ghazal is much too close to Lake Ambady. The incorrect course of the Kiir/Bahr el Arab is shown at **Map 61**.

33. The Lol (labeled Bahr el Homr) connects correctly with the Bahr el Arab but incorrectly connects with Lake Ambady. The connection of the Lol/Bahr al Homr with Lake Ambady appears to be a consistent error in these maps, often resulting in a circular pattern of rivers at the juncture of the Bahr el Arab, Lol and Bahr el Ghazal near Lake Ambady.

x. *Mardon Map – 1901, 1903, 1905*

34. The GoS relies on the 1901 (revised in 1903) Mardon map, which among other things depicts various Sudanese provincial boundaries.<sup>2021</sup> Mardon subsequently reproduced his earlier maps in his 1906 text on *Geography of Egypt and the Anglo-Egyptian Sudan*.<sup>2022</sup>

35. All of the Mardon maps were simplistic and inaccurate. As the historical overlay of the Mardon Map at **Map 35** (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903) – Overlay) shows, the Kiir/Bahr el Arab is placed significantly south of the actual Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga is entirely missing.<sup>2023</sup> The Lol river is called the Bahr el Homr, located correctly below the Kiir/Bahr el Arab. Both of the depicted rivers are about five minutes south off their correct location.

36. The GoS Memorial claims that the 1901/1903 version of the Mardon map (which it includes as **GoS Map 5**) was used as “the main reference map in the second edition of Gleichen’s *Handbook of the Sudan* (1905).”<sup>2024</sup> The Government places emphasis on the 1901/1903 Mardon map because it includes representations of provincial boundaries, including depicting the Kordofan/Bahr el Ghazal boundary on the “Bahr el Arab.” The GoS also claims that the 1901/1903 map, with the provincial boundaries depicted, was “inserted as an end paper in the *Handbook*.”<sup>2025</sup>

37. The Government’s discussion of the Mardon maps is inaccurate. It is clear that none of the Mardon maps was an official map produced by or for the Sudan Government. Mardon was not assigned by, or responsible to, the Sudanese Government for defining or depicting the Sudanese provincial boundaries at any time. In fact, the Mardon textbook is referenced in the list of “Unofficial Publications” in the Bibliography to the 1905 Gleichen *Handbook*.

38. A version of the Mardon map is incorporated into Mardon’s geography text on *Geography of Egypt and the Anglo-Egyptian Sudan*, suggesting that this school textbook was

<sup>2020</sup> Macdonald Report, at para. 2.4.

<sup>2021</sup> GoS Memorial, at para. 23, Figure 4a and 304, Figure 9.

<sup>2022</sup> **Map 32** (*The Anglo-Egyptian Sudan*, Mardon, 1906.) See above at para. 308.

<sup>2023</sup> **Map 35** (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903) – Overlay.)

<sup>2024</sup> GoS Memorial, at para. 304.

<sup>2025</sup> GoS Memorial, at para. 304.

the provenance of the map.<sup>2026</sup> Mardon produced his textbook (and maps therein) “mainly to meet the needs of Egyptian schools,”<sup>2027</sup> and not with any official authorization or for any official purpose. Moreover, in his text on *Geography of Egypt and the Anglo-Egyptian Sudan*, Mardon noted that “[t]he exact limits of the provinces, especially those in the south, are not yet very definitely fixed.”<sup>2028</sup> The qualification applied *a fortiori* to Mardon’s 1901 and 1903 maps.

39. The GoS’s description of the use of the 1901/1903 Mardon map as the “main reference map” in the 1905 Gleichen *Handbook* is also incorrect. A Mardon map appears twice in the 1905 Gleichen *Handbook*, but never as the “main reference map.” The first time the map appears is with the table of contents as a guide to the chapters in the *Handbook* (reproduced at **GoS Map 8**). Notably, the boundaries marked on the 1901/1903 version of the Mardon Map produced as **GoS Map 5** do not appear on the chapter guide in the 1905 Gleichen *Handbook*.

40. A further version of the 1901/1903 Mardon map appears a second time at the back of Volume II of the 1905 *Handbook* behind a series of route notes, this time with the provincial boundaries included. That Mardon map is accorded no significance, much less official status, instead being included without explanation together with a number of other sources of raw information.

41. The Bibliography to the 1905 Gleichen *Handbook* describes the maps included in the *Handbook* at page 349. It states that “For general maps the following are recommended: The Anglo-Egyptian Sudan. I.D.W.O., No. 1856, 1904. 1:4,000,000 (Latest and most up-to-date general map).” Several other maps are also mentioned. *No mention is made of the Mardon map in the Bibliography* to the Gleichen *Handbook*. It is clear that the Government’s claim that the Mardon map was the “main reference map” is puffery; on the contrary, as one would expect, the “main reference map” was that produced by the Sudan Government the previous year (at **Map 36**).

42. The 1901 Mardon Map, which was created on the very small scale of 1:8,000,000, was included in Volume 2 simply to provide a superficial, at-a-glance overview of the Sudan. A comparison of Mardon’s 1901 map with a contemporary image of the Abyei Area also illustrates the grossly simplistic and inaccurate nature of Mardon’s work. An historic overlay map at **Map 35** illustrates graphically how inaccurate the river courses, and in particular the Bahr el Arab and bahr el Ghazal, are, and how much detail is missing.

43. In fact, the map that is the “main reference map” in the 1905 Gleichen *Handbook* is the Anglo-Egyptian Sudan map prepared by the Intelligence Office of the War Office in 1904 (and discussed immediately below at **Map 36**). This map is at the back of Volume I of the *Handbook*, identified in the SPLM/A Memorial as the 1905 Gleichen Map.

*xi. Official Gleichen Map - 1905 Handbook*

44. The 1905 Gleichen *Handbook* contains a detailed Map of “The Anglo-Egyptian Sudan, compiled in the Intelligence Office, Khartoum, May 1904” (the “1905 Gleichen

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<sup>2026</sup> **Map 32** (*The Anglo-Egyptian Sudan*, Mardon, 1906.) See above at para. 308.

<sup>2027</sup> H. Mardon, *A Geography of Egypt and the Anglo-Egyptian Sudan* 174 (1906), **Exhibit-FE 2/20**.

<sup>2028</sup> H. Mardon, *A Geography of Egypt and the Anglo-Egyptian Sudan* 174 (1906), **Exhibit-FE 2/20**. In the prefatory note, the author indicated that “[t]his little text-book has been prepared mainly to meet the needs of Egyptian schools.” *Ibid* at 3.

Map”), referred to above.<sup>2029</sup> The 1905 Gleichen Map contains no boundary between Kordofan and Bahr el Ghazal, whether along the Kiir/Bahr el Arab or otherwise.<sup>2030</sup> That is true notwithstanding the fact that other boundaries are shown on the 1905 Gleichen Map (for example, of Darfur).

45. As the historic overlay at **Map 37** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905), – Overlay) shows, the Kiir/Bahr el Arab is confusingly identified on the 1905 Gleichen Map as the “R. Kiir *or* El GnoI” and the river’s fork with the Bahr el Ghazal is again mapped significantly south of the actual fork.<sup>2031</sup> The Ngol/Ragaba ez Zarga is incorporated, but erroneously named the Bahr el Arab. Neither river is correctly placed, even taking into account the name confusion.

*xii. Comyn Map, 1907*

46. The Government Memorial relies on a 1907 sketch map prepared by Lieutenant Comyn (**GoS Map 9**). The Comyn Map is described on its face as a “Sketch Map” and contains no official description or sanction. The provenance of the map is unclear. Comyn appears to have used an existing base map and superimposed his own information onto that. However, the resulting map is highly inaccurate.

47. As discussed above, the Comyn Map locates Sultan Rob’s village south of the Lol, which is wildly inaccurate.<sup>2032</sup> Given this, Macdonald’s suggestion that “by [the time of Comyn’s map,] it was clear that the river which rose near Hofrat en Nahas, flowed down past Sultan Rob’s village and reached the Bahr el Ghazal where the latter river changed direction, was the Bahr el Arab” clearly does not survive scrutiny.<sup>2033</sup> The river depicted in Comyn’s map as the “Bahr el Arab” does not go anywhere near Sultan Rob’s. Quite clearly, the map contains fundamental errors, in addition to those existing errors already present in official maps of the period.

48. The Comyn map also depicts no boundary between Kordofan and Bahr el Ghazal. It does name Kordofan generally, but the label is placed well north of 10° N latitude.

*xv. Northern Bahr el Ghazal Map, 1907*

49. The GoS Memorial relies on the 1907 Northern Bahr el Ghazal Map as “showing with reasonable accuracy the actual course of the river [the Kiir/Bahr el Arab],”<sup>2034</sup> after which it asserts that there “was no confusion about depiction of the course of the Bahr el Arab.”<sup>2035</sup>

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<sup>2029</sup> **Map 36** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905)); **Map 36a** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905) – Detail.)

<sup>2030</sup> By contrast, the official map in the 1922 Gleichen Handbook does have provincial boundaries, including a boundary between Kordofan and Bahr el Ghazal.

<sup>2031</sup> **Map 37** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905) – Overlay).

<sup>2032</sup> See above at paras. 1213-1214.

<sup>2033</sup> Macdonald Report, at para. 4.3.

<sup>2034</sup> GoS Memorial, at para. 321.

<sup>2035</sup> GoS Memorial, at para. 322 (quoting Macdonald Report, at para. 4.4).

The authors of the 1907 Northern Bahr el Ghazal Map were much less categorical about their product than the Government Memorial is. The map contains the caveat “[t]here are practically no astronomically fixed positions on the sheet. The topography of the North East corner and the South portion of the map are probably approximately correct. The remainder however has been compiled from sketches which there is no means of checking and which must not be relied on.” By contrast, the Map of Southern Bahr el Ghazal from the same series has a more reassuring legend: “Most of the principal places on this sheet have been astronomically fixed. The courses of the rivers are not accurately known, and some of the roads, notably those from Wau to Tembura’s, and Yambios to Rikita, may be shown wrong. But within the Sudan Boundary the distances between the principal places are probably fairly correct.”



This is incorrect, as illustrated by the historic overlay of this map at **Map 41**. Quite clearly, the route of the Kiir/Bahr el Arab is wildly off course and at some points more than 30 minutes south of its true location.

50. Moreover, the Northern Bahr el Ghazal map shows no boundaries other than an approximate provincial boundary between Darfur and Kordofan.

51. In any event, the relevant point for determining whether or not there was any determinate or definite boundary between Kordofan and Bahr el Ghazal was 1905, not 1907; the fact that the identity of the “Bahr el Arab” might have been clarified and that the course of the Kiir/Bahr el Arab might have been clarified in 1907 has nothing to do with the confusion that existed regarding both matters in 1905. The important conclusion for this proceeding is that in 1905, when the “Bahr el Arab” was putatively the Kordofan/Bahr el Ghazal boundary, the understanding provided by the 1907 Northern Bahr el Ghazal Map had not been reached.

*xvii. Anglo Egyptian 1/250,000 Series – 1909 to 1938*

52. The representation of the approximate provincial boundary between Kordofan and Bahr el Ghazal provinces in the 1:250,000 Series (and in particular the southern sheets of 65-K and 65-L) from 1910 is instructive. The lack of information and clarity by the Condominium administration concerning both the provincial boundary and the entire area, as explained at paragraphs 1437 to 1465 above, is apparent in the confusion concerning the depiction of the boundary from 1914 to 1936. Revised versions of these maps were issued successively in 1910, 1914, 1916, 1922, 1925 and 1936.

*xix. Anglo-Egyptian 1:250,000 Series – 1910 Hasoba Map (Sheet 65-L)*

53. The earliest available 1:250,000 map for the Abyei area is the 1910 Hasoba Map (Sheet 65-L). This is in the SPLM/A Map Atlas at **Map 46**. It is neither submitted nor referred to by the GoS, (although the 1914 and 1922 versions are at GoS Maps 13 and 19). Unlike the 1914, 1922, 1925 and 1936 versions of Sheet 65 L, which were submitted and relied heavily upon by the GoS, the 1910 version identifies no provincial boundaries.

*xviii. Kordofan Lloyd Map, 1910*

54. The 1910 Kordofan Lloyd Map, at SPLM/A **Map 44** and **GoS Map 11** is an unofficial map published by the Geographical Journal in 1910. This map purports to depict Lloyd’s then view of the provincial boundary between Bahr el Ghazal and Kordofan, marked as “*Approximate Boundary*.”

55. Even by this time, the course of the Kiir/Bahr el Arab remained uncertain (as shown by **Map 45**). The purported boundary barely skims beneath Arop Biong’s villages to the south of the Kiir/Bahr el Arab, without including any Twic Dinka territory (which continued to the more southern Lol). A copy of this approximate boundary is at **Map 60** (as well as the GoS’s Figure 14). Lloyd’s “approximate boundary” is at huge variance with the first Sudan Government map containing an approximate boundary, which was produced three years later (as discussed below).

*xviii. Kordofan Map, 1913*

56. The 1913 Kordofan Map, mislabelled by the Government as a 1910 map, was compiled by the Sudan Survey Office in February 1913 (**GoS Map 11** and see also SPLM/A **Map 48**). The 1913 Kordofan Map is the first effort by a Sudan Government map to identify a post-1905 provincial boundary between Kordofan and Bahr el Ghazal.

57. As depicted in the GoS's Figure 14, and at **Map 49**, (from the east to west) the approximate boundary is placed north of the until 29° E longitude and then runs along the Kiir/Bahr el Arab (labelled the "Lol") for a stretch, and then arches south of the Kiir/Bahr el Arab for another stretch. The GoS Figure 14 obscures the peculiarities of the boundary, in particular by not depicting the area in which the boundary is to the north of the Kiir/Bahr el Arab to the east of 29° E longitude.

58. The 1913 Kordofan Map contains multiple inaccuracies. It labels the Ngol/Ragaba ez Zarga as the "Bahr el Homr." The Nyamora/Ragaba Umm Biairo appears to be depicted, but is described later along its course as the "Bahr el Arab." It also appears that the Kiir/Bahr el Arab is erroneously described as the "Lol" for at least part of its middle course. The inaccuracy of the course of the Kiir/Bahr el Arab is depicted in **Map 49**.

*xix. Map of Anglo-Egyptian Sudan - 1914*

59. The GoS also relies on the 1914 Anglo-Egyptian Sudan Map, produced by the Geographical Section of the War Office (**GoS Map 14**). This map identifies the southern provincial boundary of Kordofan with Bahr el Ghazal (from east to west) as running north of the Kiir/Bahr el Arab until about longitude 29° E, and then arching south-west to beneath the Kiir/Bahr el Arab and running beneath that river until the Darfur frontier. As discussed below, this boundary continued to change on repeated occasions over the next two decades.

*xix. Anglo-Egyptian 1:250,000 Series – 1914 Ghabat el Arab (Sheet 65-L)*

60. The Government relies on the 1914 Ghabat el Arab Map (and subsequent versions) for the proposition that the Kiir/Bahr el Arab, Ngol/Ragaba ez Zarga and other watercourses in the Abyei region were understood and depicted with reasonable accuracy.<sup>2036</sup> This is an inaccurate summary of the knowledge of the area, for the reasons explained at paragraphs 1441 to 1449 above. The inaccuracies that continued to affect depiction of the Kiir/Bahr el Arab and other rivers in the region is illustrated at **Map 47** of the SPLM/A Map Atlas. Such of the Kiir/Bahr el Arab as is depicted in this Sheet 65-L is grossly off course and considerably south of its true position. The same inaccuracy is illustrated in **Map 81**.

*xix. Anglo-Egyptian 1:250,000 Series – 1916 Achwang (Sheet 65-K)*

61. The earliest available 1:250,000 map for Sheet 65-K, to the west of 65 L, is the 1916 Achwang Map, at **GoS Map 15** and SPLM/A **Map 50**.<sup>2037</sup> A further and illegible extract from a version of this map (although not the full map) is reproduced by the GoS at paragraph 6 of its Memorial, Figure 3. The GoS describes this as "[t]he first mapping instruction to

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<sup>2036</sup> GoS Memorial, at para. 327(c).

<sup>2037</sup> **Map 50** (*Achwang: Sheet 65-K*, Survey Office Khartoum, 1916); **Map 50a** (*Achwang: Sheet 65-K*, Survey Office Khartoum, 1916 – Detail); **Map 51** (*Achwang: Sheet 65-K*, Survey Office Khartoum, 1916 – Overlay); GoS Map 15.

insert the name “Abyei” as a township was given in the Sudan Survey Department in about 1916: the instruction, given in red ink, is shown on **Figure 3**, on page 4.”

62. The 1916 Achwang Map indicates the “*Approx. Province Bdy.*” with a dotted curved line sweeping to the south of the Kiir/Bahr el Arab. It is notable that eleven years after the 1905 transfer, the cartography continues to refer to the provincial boundary as approximate and to depict it in an abstract and provisional manner.

xx. *Geographical Section Darfur Map - 1916*

63. The GoS relies on a 1916 map of Darfur prepared by Geographical Section of the War Office (**GoS Map 16**). The Government fails to mention, however, that this map also shows the boundary between Kordofan and Bahr el Ghazal as running north of the Kiir/Bahr el Arab until approximately 24°30’ E longitude, then swinging south to run beneath the Kiir/Bahr el Arab and then arch northwest to the Darfur frontier. This line is depicted at **Map 60**.

xx. *Anglo-Egyptian 1:250,000 Series – 1918 Nyamell (Sheet 65-K)*

64. The 1918 Nyamell Map is likely a misnamed map in the Achwang (and later Abyei) Sheet 65-K Series. A copy of this map is at **Map 83**. The approximate provincial boundary depicted in the 1918 Nyamell Map is identical to that in the 1916 Achwang map, apparently undoing the variation introduced by the 1916 Darfur Map. This line is depicted at **Map 60**.

xx. *1920 Revision of Anglo-Egyptian Sudan Map*

65. The Government relies on a 1920 revision of a 1914 map of Anglo-Egyptian Sudan produced by the Geographical Section of the War Office (**GoS Map 17**). This retains the 1914 boundary line, failing to take into account any changes in the ensuing years. This line is also depicted at **Map 60**.

xx. *Anglo-Egyptian 1:250,000 Series – 1922 Abyor (Sheet 65-K)*

66. The 1922 Abyor Map, derived from the name of the Paramount Chief lineage, again depicts an approximate provision boundary on the Sheet 65-K Series. A copy of this map is at **Map 86**. Again, that boundary differs starkly from earlier versions of the same boundary in earlier editions of the same map (apparently from the same sources). This time, without apparent explanation, the line moves considerable to the west toward Darfur.

xx. *Anglo-Egyptian 1:250,000 Series – 1922 Ghabat el Arab (Sheet 65-L)*

67. The 1922 Ghabat el Arab Map (Sheet 65-L) and its attribution are identical to the 1914 version of the same map. A copy of this map is at **Map 88**. The boundaries are also identical, but still marked as “*Approx. Province Bdy.*”

xx. *Anglo-Egyptian 1:250,000 Series – 1925 Twij Dinka (Sheet 65-K)*

68. The GoS makes much of the 1925 Twij Dinka Map (a continuation of Sheet 65-K) being the map in which a “straight-line boundary of the transferred area was substituted for

the “approximate” curved-line boundary of earlier maps.”<sup>2038</sup> This is nonsense. The line on the 1925 map is just as clearly marked “*Approx: Prov Bdy*”. There is nothing to suggest that the straight-line is any less approximate than when it was curved. The GoS points to nothing that might any importance to the “substitution” of a straight line for a curved line (or otherwise). A copy of this map is at **Map 91**.

xx. *Anglo-Egyptian 1:250,000 Series – 1931 Abyei Map  
(Sheet 65-K)*

69. The 1931 Abyei Map is the first Sheet 65-K in the series that is called “*Abyei*.” A copy of this map is at **Map 94**. As can be seen from **Map 60**, the “straight line” boundary adopted in 1925 is, without explanation, substantially expanded to the west in 1931. The boundary remains approximate.

\* \* \* \*

70. In sum, during the late 19<sup>th</sup> and early 20<sup>th</sup> century, no Kordofan/Bahr el Ghazal provincial boundary was depicted on any official map (other than an 1883 Egyptian Sudan map (**Map 31** in the SPLM/A Map Atlas) placing the boundary far to the north of the Kiir/Bahr el Arab). The first Sudan Government map that attempted to depict such a boundary was produced in 1913. Before this date, including in 1905, no official Anglo-Egyptian map depicted any Kordofan/Bahr el Ghazal boundary (whether on the Kiir/Bahr el Arab or elsewhere).

71. The only unofficial maps that identified a Kordofan/Bahr el Ghazal provincial boundary were by Mardon (in 1901/1903) (**GoS Map 5**). This map had no official sanction or status, and Mardon acknowledged that the southern boundaries were indefinite and provisional. Aside from this, no other map, whether official or unofficial, attempted to identify any Kordofan/Bahr el Ghazal boundary prior to the transfer of the Ngok Dinka in 1905.

72. Even after the transfer of the Ngok Dinka in 1905, no official map depicted any Kordofan/Bahr el Ghazal boundary until the 1913 Kordofan Map (**Map 48** (also GoS Map 11 misdated 1910)). Moreover, from 1913 until at least 1930, all maps showing a Kordofan/Bahr el Ghazal boundary labelled it as approximate. At the same time, the cartographic representation of the provincial boundary shifted repeatedly and apparently randomly over 20 years during Condominium rule, from 1914 until the 1930s at the earliest. These shifts are depicted on **Map 60**.

73. Even the GoS concedes that the southern provincial boundary of Kordofan was only “defined by 1931.”<sup>2039</sup> In reality, even 1931 seems optimistically early. In any case, what is abundantly clear is that as at the time of the transfer in 1905, any provincial boundary between Kordofan and Bahr el Ghazal was simply not determinate.

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<sup>2038</sup> GoS Memorial, at para. 381(2).

<sup>2039</sup> GoS Memorial, at para. 383(6).

## APPENDIX “C”



**FIGURE 1:** Kiir / Bahr el Arab, Abyei, January 2009



**FIGURE 2:** Ngol / Ragaba es Zarga, Makuac, January 2009





**FIGURE 3:** Comparison picture of White Nile, Juba, January 2009



**FIGURE 4:** Comparison picture of White Nile, Juba, January 2009



**FIGURE 5:** Ngok Dinka Internally displaced persons leaving Abyei violence, December 2008



**FIGURE 6:** Ngok Dinka Internally displaced persons leaving Abyei violence, December 2008



**1. KUOL AROP BIONG ALOR, PARAMOUNT CHIEF**

**2. JIPUUR ALOR AJING AJUONG, DEPUTY " "**

**SECTIONAL CHIEFS (SHEIKHS)**

**I. ABIOR**

- 1. Biong Mijak Kuol.....Milang
- 2. Juoc de Dimbil.....Abaek

**II. ACAAK**

- 1. Ayuel Kuot Kuur.....Yinka
- 2. Chol Dhieu ~~Qui~~.....Baekhot

**III. ACUAENG**

- 1. Matual Bilu.....Nyioor
- 2. Aguer Baar.....Duur

**IV. ALEI**

- 1. Deng Chol Lual.....Amarr
- 2. Dau Yak.....Guil

**V. ANYIEL**

- 1. Tiel Deng Ajuong.....Jongyom
- 2. Mabil Biong Daa.....Anyieldit

**VI. BANGO**

- 1. Kuol Daa.....Kuac
- 2. Majok Nyal.....Adhaar

**3. Paguot Deng Maater.....Awet**

**4. Chol Dut Acuul.....Yom**

**VII. DIIL**

- 1. Tinglooth Chan Angueek.....Marrendiil
- 2. Piok Piok Ngor.....Jiglei
- 3. Deng Chol-jook.....Adur

**VIII. MANNYUAAAR**

- 1. Lual Deng-Adol..... Miyaar
- 2. Deng Mijok Deng.....Malual
- 3. Bagat Alor Ajing.....Mithiang

**IX. MARRENG**

- 1. Deng Akonon.....Marrendit
- 2. Mayot Ajing Diing.....Minyang



Sultan Kuol Arop Biong Alor, Paramount Chief of Ngok Dinka



Jipuur Alor Ajing Ajuong, Deputy Paramount Chief of Ngok Dinka