

**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
MEMORIAL**

18 DECEMBER 2008

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I. SUMMARY OF ARGUMENT

1. This arbitration presents issues of vital importance to the Sudanese people and the broader international community. These issues concern the rule of law in contemporary affairs and the Ngok Dinka people's right to their historic homeland of the Abyei Area.

2. First, this arbitration concerns the finality of decisions made by the Abyei Boundaries Commission ("ABC") – a hand-picked body of pre-eminent experts in Sudanese and African history, culture, law and politics. After implementing a specifically tailored fact finding and dispute resolution procedure, collaboratively developed by the parties themselves, the Commission's Experts rendered a unanimous and carefully reasoned Report. Despite its undertakings that the Commission's Report would be "final and binding" and entitled to "immediate effect," the GoS has subsequently refused to comply with the ABC's decision.

3. As detailed in this Memorial, there is no conceivable justification for the GoS's actions, which are fundamentally inconsistent with the rule of law. The ABC Report addressed precisely the matters that the parties submitted to the Commission following procedures conducted exactly as the parties agreed. The GoS's refusal to honor its commitments contradicts basic principles of *pacta sunt servanda* and *res judicata*, fundamental to the rule of law, while undermining the broader terms of the Comprehensive Peace Agreement. At bottom, the GoS's actions are an opportunistic effort to relitigate issues that have already been decided; that effort is unjustifiable and this Tribunal should not countenance it.

4. Second, and in any event, the ABC Report correctly concluded that the Ngok Dinka have occupied and used the Abyei Area since well before the turn of the 20th century. A wide range of documentary, cartographic, oral and physical evidence demonstrates beyond any serious doubt that the Ngok Dinka have occupied the Bahr river basin centered on the Ngol/Rageba ez Zarga and Kiir/Bahr el Arab river systems for generations. Even if this Tribunal were to reconsider the issues addressed by the ABC, the Commission's definition of the Abyei Area and the Ngok Dinka people's historic homeland was correct in almost all respects. The only necessary or appropriate adjustment to the ABC's decision would be the northward extension of the boundary of the Abyei Area to latitude 10°35'N.

A. *The Comprehensive Peace Agreement and Abyei Protocol*

5. The Comprehensive Peace Agreement, signed by the SPLM/A and GoS in December 2004, provided for the negotiated resolution of nearly 50 years of civil war in Sudan. Central to the conclusion of the Comprehensive Peace Agreement was resolution of the status of the Abyei Area, lying on the border between northern and southern Sudan and constituting the historic homeland of the Ngok Dinka people. Both the SPLM/A and GoS recognized that, until their disputes over the Abyei Area were resolved, no broader peace could be achieved.

6. The parties' agreements on resolving their disputes over the Abyei Area were negotiated over a 10 month period. During this period, the SPLM/A and GoS worked together to establish a collaborative basis for resolving their dispute. As finally negotiated, the Abyei Protocol and Abyei Annex set forth both an agreement on the definition of the Abyei Area and a procedure for implementing that agreement.

7. Substantively, Article 1.1.2 of the Abyei Protocol defined the Abyei Area in the following terms: “*The territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.*”

8. Procedurally, the Abyei Protocol established a remarkable dispute resolution mechanism that the parties carefully tailored to suit their specific needs: it provided for the constitution of an Abyei Boundaries Commission, to be composed of distinguished experts from Africa and elsewhere, with a range of complementary expertises in Sudanese history, culture, law and politics. The parties also jointly developed a unique set of adjudicatory procedures for the Commission to apply, which entailed extensive local meetings with the residents of the Abyei Area and surrounding regions, to hear live witness testimony, as well as provisions for a series of site inspections and for archival research.

9. Central to the Abyei Protocol and the parties’ related agreements were commitments that the decision of the ABC Experts would be “*final and binding*” and entitled to “*immediate effect.*” These provisions were essential, because both parties recognized that implementation of the broader Comprehensive Peace Agreement and an end to the long-standing conflict in the area depended on a prompt and conclusive definition of the Abyei Area, in order that future arrangements regarding an Abyei referendum, interim governance and wealth-sharing could be implemented.

B. The ABC Experts

10. The ABC was constituted in accordance with the parties’ agreements, with the SPLM/A and the GoS jointly collaborating with the Inter-Governmental Authority on Development (“IGAD”), the United Kingdom and the United States in choosing the ABC Experts; there were no objections by either party to the composition of the Commission. Once constituted, the ABC included five of the world’s leading experts on Sudanese and African affairs, with nearly 150 years of complementary experiences in the region’s history, culture, law and politics.

11. Working closely with the parties, the ABC then elaborated upon the procedural provisions applicable to its future proceedings; again, there were no objections by either party to these provisions. Instead, the parties referred to their procedural collaboration as a “*partnership*” and repeatedly expressed their approval of the Commission’s conduct. Like the parties’ original agreements regarding the ABC, their subsequent procedural agreements were a remarkable example of constructive cooperation to resolve previously intractable disputes.

12. The ABC thereafter conscientiously implemented the procedural mechanisms that it had jointly designed with the parties, including provisions for hearing extensive witness testimony, conducting site inspections and carrying out archival research. In total, the Commission heard more than 100 live witnesses at nearly a dozen locations in and around the Abyei Area, while conducting a number of site inspections. The ABC completed its fact finding mission in the face of daunting logistical and other constraints, traveling extensively through a recent war zone to meet with groups of local residents.

13. The ABC’s fact finding was, in the annals of international procedural innovation, both ambitious and distinctive. This process brought the ABC’s members face to face, in person, with the residents of the Abyei Area, able to assess both individual and group credibility.

Despite formidable logistical obstacles, the parties ensured that the Commission obtained a uniquely detailed and intensive view of the parties and their evidence.

14. The ABC also heard detailed presentations from both parties' representatives, again in accordance with the parties' mutually agreed procedures. Once more, there were no objections by either party to any of the Commission's procedural actions; on the contrary, both parties continued actively to assist in highly constructive cooperation with one another and the ABC.

15. During the proceedings before the Commission, the GoS's representatives repeatedly reaffirmed, in the clearest terms, the Government's commitment to respect the ABC Experts' decision. The GoS's final presentation to the Commission declared:

“the fact that the ABC decision is final and binding was in fact, emphasized very, very much by us ... [W]e want them to be very clear about that fact. And that once the decision is reached, we have to accept it and welcome it. ... [Your decision] will be final and binding and everybody shall accept it. ... When a decision is agreed and accepted beforehand it has to be final and binding ... And, it's unmanly of any person not to accept that decision and respect it.”

16. At the conclusion of its work, and again as the parties' agreements provided, the ABC Experts prepared an extensive, thoroughly researched and carefully reasoned Report, setting forth the Experts' unanimous decision on the definition of the Abyei Area. The Report was a substantial document, consisting of a main text (45 pages long), together with five Appendices (another 206 pages) and several maps. The Report was signed by all five ABC Experts and included detailed reasons, explaining the evidence and providing careful analysis for the Report's introductions. There were neither concurring nor dissenting opinions.

17. After the Commission delivered its decision, and despite its commitments that the ABC's decision was “*final and binding*” and would be given “*immediate effect*,” the GoS reversed course and refused to implement the ABC Report. The GoS did so on the putative grounds that the ABC Experts had exceeded their mandate – an objection that the GoS did not once raise during the course of the Commission's work and has yet fully to articulate. The GoS's refusal to implement the ABC Report not only flouted its solemn commitments but also gravely threatened the parties' agreements regarding Abyei and their broader commitments to peace under the CPA. The destabilizing consequences of the GoS's actions were reflected in: renewed fighting in the Abyei Area in May 2008, which resulted in numerous casualties, the burning of Abyei town and mass displacement; and further violence in December 2008 resulting in the death of two policemen, the injury of several others and further displacement.

C. *The ABC Experts Did Not Exceed Their Mandate*

18. This Tribunal is presented, under Articles 2(a) and 2(b) of the Abyei Arbitration Agreement, with a straightforward issue. Article 2(a) of the Arbitration Agreement provides that the only ground for challenging the ABC Report is if “the ABC experts ... 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.’” That is the *sole* basis for contesting the ABC Report: only if the GoS is able to demonstrate that the ABC Experts exceeded their mandate within the meaning of Article 2(a) may the ABC Report be set aside.

19. The Abyei Arbitration Agreement provides no other ground for disregarding the Report. Rather, Article 2(b) of the Agreement provides that, “if the Tribunal determines ... that the ABC experts did not exceed their mandate, ***it shall make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report.***”

20. Preliminarily, although neither the GoS nor its counsel has yet articulated its position, there appears to be no claim that the Abyei Protocol was invalid, null and void or ineffective, or that the parties did not validly submit their dispute regarding the Abyei Area to the ABC. The Abyei Protocol was an integral part of the Comprehensive Peace Agreement, obviously and indisputably binding on both parties. The same is true of the provisions of the parties’ agreements relating to the ABC.

21. The basis for disregarding the ABC Report specified in Articles 2(a) and 2(b) of the Arbitration Agreement is narrowly limited to an excess of the ABC Expert’s mandate. All other grounds for alleging nullity of, or refusing to comply with, the ABC Report are excluded by the Agreement – including, for example, alleged errors of law or fact by the ABC Experts, objections to the ABC Experts’ procedures or the composition of the ABC, and other grounds sometimes suggested historically as bases for findings of nullity of adjudicative decisions.

22. A claim that the ABC Experts’ decision was an “excess of mandate” requires the GoS to demonstrate that the decision was *ultra petita* – that it decided matters that were outside the scope of the disputes submitted to the ABC by the parties. Simply stated, an excess of mandate under Article 2(a) may only be claimed if the ABC Experts “***decid[ed] 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 “***delimit[ed], in whole or in part, a boundary in areas not covered by the terms of reference and thus exceed[ed] the territorial scope of [their] jurisdictional powers***” (K. Kaikobad, *The Quality of Justice: ‘Excès de Pouvoir’ in the Adjudication and Arbitration or Territorial and Boundary Disputes*).

23. Applying Article 2(a), there is no conceivable basis for suggesting that the ABC Experts exceeded their mandate. As outlined above, the ABC Report addressed – in exhaustive (251 pages in total) and meticulous detail – the definition of the geographic boundaries of the Abyei Area as that area was specified in Article 1.1.2 of the Abyei Protocol. This was exactly what the ABC Experts had been mandated to do by Article 5.1 of the Abyei Protocol.

24. In particular, the ABC Report specifically referred to Article 1.1.2 of the Abyei Protocol, as well as to the ABC’s mandate under Article 5.1 of the Protocol “to define and demarcate the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.” The Report next observed that the ABC Experts defined the Abyei Area as constituting “***the area of the nine Ngok Dinka chiefdoms as it was in 1905.***” And the Report then explained, in comprehensive and impressively documented detail, what the historical and other evidence established concerning the 1905 territory of the Ngok Dinka.

25. Based on this analysis, the ABC Report concluded with the ABC Experts’ “***Final and Binding Decision,***” which set forth specific latitudinal and longitudinal lines defining the Abyei Area’s geographic boundaries. Attached to the ABC Report was a series of Maps and Appendices. Of most importance was “Map 1,” entitled “***The Abyei Area Boundaries,***” on

which the ABC Experts delimited their definition of the Abyei Area – the precise issue the ABC Experts were mandated to decide.

26. In the circumstances, any suggestion that the ABC Experts somehow exceeded their mandate is wholly specious. Instead, what the GoS and its counsel seek to do in this arbitration is to relitigate, in a new forum, the issues that the ABC Experts already considered and unanimously resolved. That is no doubt why the GoS did not raise (and instead disclaimed) any excess of mandate objection during the ABC's proceedings and did not articulate any comprehensible basis for its purported excess of mandate claim in July 2005 or, so far as the SPLM/A is aware, at any time subsequent to that date.

D. The GoS's Claim that the ABC Experts Exceeded Their Mandate Contradicts Well-Settled Principles of Finality and is Subject to the Most Demanding Standards of Proof

27. The foregoing discussion is a complete answer to the decisive issue before this Tribunal. The ABC Experts did not exceed their mandate within the meaning of Articles 2(a) and 2(b) of the Abyei Arbitration Agreement; on the contrary, they produced an expertly reasoned Report that fell squarely within the ABC's mandate. That is a simple end to what should be a simple matter.

28. There are nonetheless further considerations which warrant discussion. These considerations underscore the vital public and international importance of this Tribunal upholding the ABC Report. The same considerations also underscore the exceptional character of the GoS's claims regarding the Report and subject those claims to the most demanding standards of proof.

29. Long-standing principles recognized in both international and national legal systems hold that arbitral awards and similar adjudicatory decisions are presumptively final and entitled to *res judicata* effect. International decisions and commentary also uniformly affirm the acute importance of this principle of presumptive finality with regard to boundary determinations, where considerations of national and international stability apply with special force.

30. These policies – to wit, the presumptive finality of adjudicative decisions and the peculiar importance of such policies in the context of boundary determinations – lie at the foundation of the rule of law in contemporary legal regimes. Disregard of these principles would contradict basic concepts of legal order and would reward parties that flouted negotiated dispute resolution mechanisms and adjudicated boundary determinations. It is in the light of these deeply-rooted policies that the GoS's attempt to relitigate the ABC Experts' decision regarding the Abyei Area's boundaries must be seen – with the grave disfavor and deep skepticism that such efforts have consistently been regarded in all legal systems.

31. Additionally, the GoS's effort to challenge the ABC Report must be seen in the context of a series of generally applicable rules for addressing issues of excess of mandate and related questions. These rules constitute well-settled, general principles of law fully applicable in these proceedings:

- a. First, 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.” (*Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* (Weeramantry, J., dissenting))

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

c. Third, it is clear that errors of law, treaty interpretation or fact finding are not grounds for holding that a tribunal has exceeded its mandate. These are errors of substance, and not an excess of the decision-maker’s mandate: “*An excess of power must not be confused with an essential error.*” (D. Guermanoff, *L’excès de pouvoir de l’arbitre* 63 (1929))

32. As already discussed, the present case is sufficiently clear-cut that there is no need for this Tribunal to rely on allocations of burdens of proof or requirements that an excess of mandate be “glaring” or “manifest.” Nonetheless, the existence and applicability of these rules further demonstrate the fundamental lack of substance to the GoS’s legal position in these proceedings.

33. There is no serious basis for concluding that the GoS can demonstrate any excess of mandate by the ABC Experts, much less an excess of mandate that is “manifest” or “flagrant.” Rather, the position of the GoS in these proceedings is nothing more than a cynical, after-the-fact effort to relitigate the substance of the ABC’s decision, in contradiction to basic precepts of developed international and national legal regimes.

E. The GoS has Excluded or Waived Any Rights to Claim that the ABC Experts Exceeded Their Mandate

34. There is a final, equally important reason why the GoS is not entitled to have the ABC Report set aside by this Tribunal. Even if one assumed (contrary to fact) that the GoS might have had some non-frivolous basis for an “excess of mandate” claim, it has excluded or waived the possibility of asserting any such claim. The GoS has done so both by agreeing to the terms of the Comprehensive Peace Agreement, including the Abyei Protocol and Abyei Appendix, and by its subsequent conduct during the ABC proceedings.

35. First, the GoS and SPLM/A agreed 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 right to claim that the ABC Experts exceeded their mandate.

36. Second, it is well-settled under all developed international and national legal systems that jurisdictional objections must be raised at the outset of adjudicative proceedings. A party is not permitted to play “Heads, I win, but Tails, you lose” games with its counterparty (and the decision-maker), and instead must assert claims of an excess of mandate at the earliest opportunity.

37. Here, the GoS raised no jurisdictional (or other) objection at any time during the ABC's work – in which the GoS actively participated. Instead, as described above, the GoS repeatedly and explicitly affirmed that the Commission's decision would be final and binding "***[Your decision] will be final and binding and everybody shall accept it.***" It bears emphasis that the GoS made these affirmations at the end of the ABC proceedings, after the Commission had repeatedly expressed its understanding of the parties' definition of the Abyei Area (in Article 1.1.2 of the Abyei Protocol). In these circumstances, the GoS has either waived or is estopped from asserting excess of mandate claims in these proceedings.

F. If the Tribunal Were to Conclude that the ABC Experts Exceeded Their Mandate, then the "Area of the Nine Ngok Dinka Chiefdoms Transferred to Kordofan in 1905" Encompasses the Territory Extending North from the Current Bahr el Ghazal/Kordofan Boundary to Latitude 10°35'N

38. For the reasons set out above, the ABC Experts did not exceed their mandate and the definition of the Abyei Area in the ABC Report is therefore entitled to final and binding effect. If, however, this Tribunal were to conclude otherwise, then it should go on to define the Abyei Area to encompass all of the territory occupied and used by the Ngok Dinka in 1905, including of the northernmost part of that territory which the ABC Experts excluded from their definition of the Abyei Area.

39. This Tribunal is presented, under Article 2(c) of the Abyei Arbitration Agreement, with the following question: "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 a map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the parties." Of course, if the Tribunal concludes that the ABC Experts did not exceed their mandate – as the SPLM/A submits it clearly must do – then no consideration of the foregoing issue is necessary or permitted.

40. If the Tribunal were to consider the issue that Article 2(c) presents, the evidence would demonstrate that the Abyei Area as defined in Article 1.1.2 of the Abyei Protocol encompasses all of the territory that the Ngok Dinka occupied and used in 1905. Specifically, the Abyei Area would include all of the territory marked on **Map 13** (Ngok Dinka Chiefdoms, 1905), extending north from the current Kordofan/Bahr el Ghazal boundary to a line marking the approximate northern border of the *goz* (a largely uninhabited woodland in the north/west of the Abyei region) and across at latitude 10°35'N. This area is bounded on the west by the current Kordofan/Darfur border, and on the east near the Ngok settlements of Miding [Arabic: Heglig] and Mardhok.

41. The foregoing definition was, in most respects, the finding of the various experts on the ABC and it is confirmed by a host of documentary and other evidence. In particular, the foregoing delimitation is confirmed by:

- a. contemporaneous historical documentation from 1905 and the years immediately surrounding 1905, prepared by multiple sources before the current dispute arose, often based on first-hand observation;
- b. subsequent 20th century documentation, again from multiple sources and based on first-hand observation, reflecting a continuity of occupation and use of the Abyei region by the Ngok Dinka;

- c. oral traditions consistently recounted by multiple sources, again before the current dispute arose;
- d. cartographic evidence from numerous sources over a lengthy period of time;
- e. detailed testimony by 26 Ngok Dinka witnesses in these proceedings and nearly 70 witnesses during the ABC proceedings; and
- f. environmental, climatic and physical evidence regarding the Abyei Area and evidence regarding the cultural and other practices of the Ngok Dinka and the Misseriya.

42. The evidentiary materials begin with oral traditions of both the Ngok Dinka and the Misseriya, reported over a number of years by different sources (Henderson, Santandrea, Mohammed Azim Abu Sabah, Deng and a wide range of Ngok Dinka witnesses), but all consistently describing the Ngok living for almost three centuries (as of December 2008) in the Bahr river basin centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems.

43. These oral traditions are precisely consistent with a number of reports by the early Sudan Government administrators in the first decade of the 20th century, uniformly placing the Ngok Dinka in the Abyei region, centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems, and extending north to the latitude of the *goz*. Although the early administrators' exploration of the Bahr river basin and Ngok lands was limited, they nonetheless provided unequivocal and detailed reports, over a number of years (1902, 1903, 1904, 1905 and subsequently) by a number of separate observers (Mahon, Wilkinson, Watkiss Lloyd and Gleichen). These reports were consistent with one another, and with both the previous oral traditions and subsequent documentary and oral evidence.

44. Documentary records from after the first decade of the 20th century corroborate and elaborate on the pre-1905 Sudan Government reports and oral traditions. Written over a period of several decades (1910 to 1960), by a number of different authors (Henderson, Court Treatt, Tibbs, Robertson, Howell, Cunnison, Santandrea and Sudan Ministry of Agriculture and Harvard Development Project), these reports uniformly located the Ngok Dinka throughout the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems, extending north to the latitude of the *goz*. The same materials describe the Misseriya as nomads, whose "headquarters" was in the Muglad region, to the north of the *goz*.

45. Cartographic evidence corroborates the documentary record and oral traditions. Maps produced before and after 1905 consistently refer to the Ngok Dinka occupying the Abyei Area, while providing no comparable reference to permanent occupation by the Misseriya in or south of the *goz*.

46. The witness testimony of the Ngok Dinka themselves (including 26 witnesses in these proceedings and nearly 70 witnesses during the ABC proceedings) corroborate and expand on the documentary and other evidence. This witness testimony, from numerous different independent sources, containing extensive and authentic detail, confirms the extent of the Ngok Dinka occupation of the Abyei Area. This evidence consistently describes the Ngok Dinka having lived for generations in permanent settlements with associated agricultural lands throughout the Abyei Area, including:

- a. to the north west of Abyei town, inhabiting permanent settlements in the areas between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems up to the border with Darfur;
- b. further to the north-west, inhabiting permanent settlements at Rumthil [Arabic: Antilla], Dhony Dhoul and Wun Deng Awak, with their border at Tebeldiya;
- c. due north from Abyei town, inhabiting permanent settlements between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems, and further north to Thuba, Nyama and Thur [Arabic: Turda];
- d. to the east and beyond the Ngol/Ragaba ez Zarga, inhabiting permanent settlements in the upper Ngol region such as Pariang and Ajaj, extending to Miding [Arabic: Heglig]; and
- e. north of Miding, inhabiting permanent settlements at Nyadak Ayueng, Michoor and Niag.

47. Environmental and climatic evidence further corroborate the documentary and oral evidence discussed above. These materials demonstrate that the particular agro-pastoral lifestyle of the Ngok was well-adapted to the specific environmental conditions of the Abyei region, with their staple crop (*rab/sorghum* [Arabic: *dura*]) being ideally suited to the region's fertile clay soil and climatic conditions) and their cattle being adapted to the region's climate and terrain. At the same time, the Misseriya's lifestyle was equally well-adapted to the drier climate to the north (in Muglad), while being ill-suited to the Abyei region's less arid conditions.

48. All of this evidence demonstrates that the Ngok Dinka occupied permanent villages, with substantial agricultural cultivation, throughout the region centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems, extending north up to a latitude of 10°35'N. For the most part, this is what the ABC Experts found, after extensive, expert scientific and historical analysis and research. These conclusions are plainly correct and are fully entitled to be given immediate effect.

49. The principal aspect of the ABC Report where the evidence before this Tribunal would call for a different conclusion than that of the ABC Experts concerns the northern boundary of the Abyei Area. The ABC Experts concluded that the Abyei Area's northern boundary fell midway between latitudes 10°10'N and 10°35'N, generally comprising the *goz*, reasoning that the Ngok Dinka shared secondary rights of usage of the area with the Misseriya. In fact, the evidence demonstrates Ngok Dinka usage and permanent occupation of this area; under Article 1.1.2 of the Abyei Protocol, this area therefore constitutes Ngok Dinka territory (albeit subject to the Misseriya's seasonal rights of usage).

G. *The "Area of the Nine Ngok Dinka Chiefdoms Transferred to Kordofan in 1905" Encompasses All of the Territory Occupied and Used by the Ngok Dinka in 1905*

50. The "area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905," as set forth in Article 1.1.2 of the Abyei Protocol, encompasses all of the territory occupied and used by the Ngok Dinka in 1905. This definition does not encompass *some* of the territory of the Ngok Dinka in 1905, or *some* of the Ngok Dinka Chiefdoms 1905, but *all* of that territory

and *all* of those Chiefdoms. That is evident from the language of the parties' agreements (including particularly the Abyei Protocol and Abyei Annex) and the obvious purposes of those agreements.

51. 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. It would be no less irrational than defining the Abyei Area to exclude Abyei town itself.

52. Moreover, the central purpose of the definition of the Abyei Area in the Abyei Protocol was to specify that region within which the 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 on the question whether they would be included in the South or the North, simultaneously with the imminent Southern Sudan referendum in 2011.

53. 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 basic 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.

54. 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 arguably suggested on occasion by the GoS during the ABC proceedings). 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. Such an outcome would be akin to defining France to exclude Paris or Austria to exclude Vienna.

55. 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). 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 *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.

56. 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 Dinkas' Paramount Chief, or to a transfer of the territory or country of the Ngok Dinka's Paramount Chief, not to some portion thereof.

57. 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)

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)

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)

58. 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.

59. 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.

60. The meaning of Article 1.1.2 is also clearly explained by both the SPLM/A representatives involved in negotiating the Abyei Protocol (Minister Deng Alor) and the representatives of the IGAD (Lieutenant General Lazaro Sumbeiywo) and the United States (Mr. Jeffrey Millington), who were critical to the Protocol's terms. All of these witnesses testify clearly and unequivocally that Article 1.1.2 was drafted to ensure that the Abyei Area encompassed the entire historic homeland of the nine Ngok Dinka Chiefdoms as it existed in 1905.

61. In sum, for all of these reasons, the plain language and obvious purposes of Article 1.1.2 and the other provisions of the Abyei Protocol and Abyei Annex require defining the Abyei Area to include all of the territory of the nine Ngok Dinka Chiefdoms in 1905. Indeed, it would contradict the most fundamental objectives of the Protocol (and Comprehensive Peace Agreement) to limit the Abyei Area to only a truncated portion of the Ngok Dinkas' historic territory or to only some of the nine Ngok Dinka Chiefdoms.

H. *Alternatively, an Excess of Mandate by the ABC Experts Does Not Preclude this Tribunal from Relying Upon the Commission's Determinations*

62. Alternatively, if the Tribunal were to consider the issue that Article 2(c) of the Abyei Arbitration Agreement presents, but not to accept the foregoing position, then any excess of mandate by the ABC would not prevent the Tribunal from giving effect to the ABC Experts' determinations. Rather, depending on the nature of the excess of mandate claimed (as to which the GoS has never articulated its position), there would be many instances in which it would be both appropriate and necessary for the Tribunal to defer to the expertise, first hand experience and superior access to information of the Commission. The SPLM/A reserves its position in this regard until the GoS articulates a comprehensible rationale for its putative excess of mandate claim.

* * * * *

63. All international and national 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 aside their arms and collaborated to agree upon and implement 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 after an extensive fact-finding process.

64. The five ABC Experts did not "exceed their mandate": they did precisely what they were asked to do. The Government's refusal to honor the ABC Experts' decision is a cynical, opportunistic effort to relitigate the Abyei dispute in a new forum, which brings discredit on the GoS and imperils the entire Comprehensive Peace Agreement. In these circumstances, as the GoS previously put it: "***once the decision is reached, we have to accept it and welcome it. ... [Your decision] will be final and binding and everybody shall accept it.***"

II. THE ABYEI REGION AND THE NGOK DINKA

65. This arbitration concerns the ancestral homeland of the Ngok Dinka in the Abyei region. The Ngok Dinka and the Abyei region are best understood in the context of their geographic, ecological and historical settings. This Part therefore describes: (A) the geography, ecology and climate of Sudan, and particularly that of the Abyei region and neighboring areas of Sudan; (B) the origins, culture, economy, chiefdoms and history of the Ngok Dinka in the Abyei region; and (C) the origins, culture and history of the Misseriya Arabs and other peoples neighboring the Abyei region.

66. The Abyei region is the traditional homeland of the nine Ngok Dinka Chiefdoms. As detailed below, the Abyei region is located in one of Sudan's more remote and inaccessible areas. The region covers some 12,000 square miles centered on the Bahr river basin of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga.

67. Within the distinctive ecology and climate of the Abyei region, the Ngok adapted an equally distinctive agro-pastoral culture. That culture was tailored to the exigencies of their environment and was based on the unique institutions of a centralized Paramount Chief under which there are nine Chiefdoms and a high degree of social cohesion. Shielded by their location and environment, the Ngok preserved this culture through the turmoil of the Turkiyya slave-raids, the Mahdiyya's chaos and subsequent decades of northern exploitation.

68. The Ngok co-existed with a number of neighboring tribes, including the nomadic Misseriya Arabs, the Twic Dinka and the Rueng Dinka. All of these tribes made use of parts of the lands of the Abyei region during different times of the years, generally without intruding upon the permanent villages and agricultural settlements of the Ngok. Rather, the tribes of the region participated jointly in a complex set of seasonal grazing patterns that permitted the Misseriya (and others) to make use of the Ngok's lands for limited parts of each year.

A. *Sudan and the Abyei Region: Geography, Ecology and Climate*

1. Sudan – Generally

69. The Republic of Sudan is the largest country in Africa and the 10th largest state in the world.¹ Sudan covers some 967,500 square miles (2,510,000 square kilometers), situated between latitudes 3°53'N and 21°55'N and longitudes 21°54' E and 37°30E,² with an area of more than eight percent of the African continent and nearly two percent of the world's total land area.³ Sudan borders Egypt (to the north), Chad, Libya and the Central African Republic (to the west), Congo, Uganda and Kenya (to the south) and Ethiopia and Eritrea (to the east). Sudan and its neighbors are depicted in **Map 1** (Sudan).⁴

70. Sudan is sparsely populated. A 1905 British text noted that "Sudan is extremely thinly peopled, there being not more than two persons per square mile for the whole

¹ UCLA African Studies Centre website, as at 9 December 2008 available at www.international.ucla.edu/africa/countries/article.asp?parentid=96981, **Exhibit-FE 16/15**; Embassy of the Republic of Sudan website, as at 17 November 2008, available at www.sudan-embassy.co.uk/en/content/blogcategory/31, **Exhibit-FE 16/15**.

² Andrews in J. Tothill (ed.), *A Handbook of Agriculture as Practised in the Anglo-Egyptian Sudan* 32 (1948), **Exhibit-FE 3/19**; D. Akol Ruay, *The Politics of Two Sudans* 11 (1974), **Exhibit-FE 8/10**.

³ D. Wai, *The Southern Sudan: The Problem of National Integration* 7 (1993), **Exhibit-FE 5/8**.

⁴ **Map 1** (Sudan).

country.”⁵ A century later, although Khartoum is now home to six million inhabitants, this description of a vast, thinly-populated territory is only a little changed. A population study in July 2008 estimated that Sudan has some 40 million inhabitants with an average population density of approximately 14 persons per square kilometer.⁶

71. Sudan stretches from Saharan desert (in the north) to equatorial climate and vegetation (in the south), as depicted in **Map 2** (Sudan: Vegetation and Landcover).⁷ Although Sudan lies within the tropics, the climate ranges from arid in the north to tropical wet-and-dry in the southwest.⁸ Temperatures do not vary greatly with the season at any location; the most significant climatic variables are rainfall and the length of the dry season.⁹

72. Despite its sparse population, the Sudanese include 19 major ethnic groups and almost 600 subgroups, who speak more than 100 languages and dialects.¹⁰ In the first and only census to record ethnicity (1956), Arabs constituted 39 percent, and Africans 61 percent of the population, of whom Dinka were the largest single Southern Sudanese group at 12 percent of the total population.¹¹ The Sudanese population is also religiously diverse, with approximately 70 percent of the population (mostly in the North) reportedly professing Islam and the remainder reportedly divided among Christianity (five percent) and a diversity of local faiths (roughly 25 percent).¹²

73. There are fundamental differences between the north and the south of Sudan. A text from 1905 divides the inhabitants and climate of Sudan into two categories:

“as regards the people of the Sudan: (a) The regions of heavy rainfall [i.e., the Southern portions] are the home of the negro peoples. (b) The regions of moderate or little rainfall [i.e., the Northern portions] are the home of the Arab peoples...”¹³

Map 2 (Sudan: Vegetation and Landcover) depicts the stark differences vegetation between the north and the south of Sudan, owing to climate and in particular rainfall. The satellite images at **Map 3** (Abyei Area: Wet Season Satellite Image) and **Map 4** (Abyei Area: Dry Season Satellite Image) also illustrate the disparity in rainfall in Sudan across regions and seasons. **Map 9** (Sudan: Rainfall) shows the area by average rainfall.

74. A British explorer, writing in 1907, described the transition from north to south as follows: “In the north the soil is reddish sand, interspersed with tracts of sand and clay mixed, forming a soil called ‘*gerdud*.’ This gradually increases further south until the red sand disappears, and black soil commences. South of latitude 10°30’N black soil predominates.

⁵ H. Mardon, *Geography of Egypt and the Anglo-Egyptian Sudan* 204 (1906), **Exhibit-FE 2/20**. This compares with population densities of 393 in Netherlands, 137 in China and 249 in the United Kingdom. *UN Demographic Yearbook 2006* 58-69 (2006), **Exhibit-FE 15/7**.

⁶ CIA, World Fact Book - Sudan, available at www.cia.gov/library/publications/the-world-factbook/print/su.html, **Exhibit-FE 16/16**; United Nations Office of the High Representative for the Least Developed Countries website - Sudan, available at www.unohrrls.org/en/orphan/138/, **Exhibit-FE 16/11**.

⁷ **Map 2** (Sudan: Vegetation and Landcover).

⁸ H. Chapin Metz (ed.), *Sudan: A Country Study*. Washington: GPO for the Library of Congress 67 (1991), **Exhibit-FE 7/18**.

⁹ H. Chapin Metz (ed.), *Sudan: A Country Study*. Washington: GPO for the Library of Congress 67 (1991), **Exhibit-FE 7/18**.

¹⁰ Human Rights Watch Report, *Sudan, Oil and Human Rights*, 2003, at p. 43, **Exhibit-FE 11/2**.

¹¹ Human Rights Watch Report, *Sudan, Oil and Human Rights*, 2003, at p. 44, **Exhibit-FE 11/2**.

¹² CIA, World Fact Book - Sudan, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/su.htm>, **Exhibit-FE 16/16**.

¹³ H. Mardon, *Geography of Egypt and the Anglo-Egyptian Sudan* 183 (1906), **Exhibit-FE 2/20**.

When dry it becomes full of shrinkage-cracks, and is locally called ‘*shgantoi*.’¹⁴ This transition in soil types is depicted on **Map 6** (Sudan: Soils).

a) Southern Sudan

75. Southern portions of Sudan are “fertile and green all the year round” with six months of rainfall each year.¹⁵ The area is comprised of a vast swampy plain, crossed by a number of major river systems, whose twisting water-courses are all but impossible to survey, “canopied with tall grass” and dense tropical evergreen forests” along streams.¹⁶

76. Annual rainfall in southern Sudan increases from north to south and from east to west, with up to 1,800 millimeter/year in the Greenbelt.¹⁷ Southern Sudan has extensive and diverse forest and woodland resources¹⁸ and is capable of supporting a wide range of crops, including cereals, vegetables and tree crops.¹⁹

77. The southern regions of Sudan have a population of an estimated 8.99 million (based on 2007 projections)²⁰ and a predominantly rural, subsistence economy. In political terms, the southern portions of Sudan comprise 10 “states” that formerly made up the provinces under the Anglo-Egyptian administration of Equatoria (Central Equatoria, Eastern Equatoria, and Western Equatoria), Bahr el Ghazal (Northern Bahr el Ghazal, Western Bahr el Ghazal, Lakes, and Warrap) and Upper Nile (Jonglei, Unity, and Upper Nile). These states are depicted on **Map 12** (Southern Sudan: Tribes).²¹ Together, these southern states comprise just under a quarter of Sudan’s total territory or 250,000 square miles or 640,000 kilometers² (as indicated on **Map 5** (Southern Sudan))²² and are home to approximately a quarter of Sudan’s estimated population.²³

78. The largest groups in the southern portions of Sudan are the Azande, Nuer and Dinka.²⁴ The overwhelming majority of the inhabitants of southern Sudan practice either Christianity or traditional local religions.²⁵ The most-widely spoken languages in southern Sudan are Dinka (Thuongjang), Juba Arabic, Nuer and English.²⁶

¹⁴ W. Lloyd, *Some Notes on Dar Homr*, The Geographical Journal, 29 (January to June), 1907, at p. 649, **Exhibit-FE 3/4**.

¹⁵ C. Eprile, *War and Peace in the Sudan, 1955-1972* 29 (1974), **Exhibit-FE 5/19**. See also **Map 2** (Sudan: Vegetation and Landcover).

¹⁶ D. Akol Ruay, *The Politics of Two Sudans* 11 (1994), **Exhibit-FE 8/10**; C. Eprile, *War and Peace in the Sudan, 1955-1972* 29 (1974), **Exhibit-FE 5/9**.

¹⁷ World Food Programme, Special Report: Fao/Wfp Crop And Food Security Assessment Mission to Southern Sudan, dated 21 January 2008, 14-15, **Exhibit-FE 16/1**. See also **Map 9** (Sudan: Rainfall).

¹⁸ USAID, Southern Sudan: Environmental Threats and Opportunities Assessment, Biodiversity and Tropical Forest Assessment, prepared by the International Resources Group, dated September 2007, **Exhibit-FE 15/10**. See also **Map 2** (Sudan: Vegetation and Landcover).

¹⁹ World Food Programme, Special Report: Fao/Wfp Crop And Food Security Assessment Mission to Southern Sudan, dated 21 January 2008, 21, 25, **Exhibit-FE 16/1**.

²⁰ This information is based on UN OCHA’s 2007 rural population cited in World Food Programme, Special Report: Fao/Wfp Crop And Food Security Assessment Mission to Southern Sudan, 21 January 2008, at p. 6, **Exhibit-FE 16/1**.

²¹ **Map 12** (Southern Sudan: Tribes).

²² World Food Programme, Special Report: Fao/Wfp Crop And Food Security Assessment Mission to Southern Sudan, 21 January 2008, **Exhibit-FE 16/1**.

²³ D. Wai, *The Southern Sudan: The Problem of National Integration* 7 (1993), **Exhibit-FE 5/18**.

²⁴ A. Lesch, *The Sudan – Contested National Identities* 17 (1998), **Exhibit-FE 8/16**.

²⁵ H. Chapin Metz (ed.), *Sudan: A Country Study*. Washington: GPO for the Library of Congress 67 (1991), **Exhibit-FE 7/1** (1991), at p 9, 10, 62. “Islam has only made a modest inroads among these followers of traditional religions and christianity” **Exhibit-FE 7/8**.

²⁶ Encyclopedia: Southern Sudan, available at www.Nationmaster.com, **Exhibit-FE 16/14**.

79. The Sudan Peoples' Liberation Movement ("SPLM") political party holds a substantial majority in the Southern Sudan Legislative Assembly, with more than four times the number of members of its closest rival (the National Congress Party ("NCP")).²⁷ There is representation from eight other parties.²⁸

80. The inhabitants of the southern parts of Sudan have historically been the target of slave-trading enterprises, organized and operated in particular by Arab tribes from the northern parts of the country.²⁹ These enterprises, and related forms of exploitation, have visited grievous suffering on many of the inhabitants of the region,³⁰ recent details of which are described below.³¹

b) Northern Sudan

81. Much of northern Sudan is a sand or gravel desert, with mesas of Nubian sandstone and steep granite hills. Northernmost Sudan, on the Egyptian border, is a desert region where northerly winds prevail for most of the year and rainfall is rare.³² The northern desert region supports permanent vegetation only near streams or rivers. Due to the lack of water in northern Sudan, half the population lives in just over 15 percent of the land, along the Nile and further south, on its many tributaries and annually flooded areas.³³

82. The northern parts of Sudan are extremely hot and arid.³⁴ In many areas (other than along the Nile) there is only limited arable land consisting of ridges of grey, sandy soil.³⁵ In southwestern Kordofan, the landscape is a "vast and almost level plain, covered with thick bush and a few scattered tebeldi trees," with insufficient water for extensive agriculture or irrigation.³⁶

83. The northern portions of Sudan constitute some three-quarters of the total area of Sudan and are inhabited by roughly three-quarters of Sudan's population, or approximately 31 million people.³⁷ The overwhelming majority of the inhabitants of northern Sudan are

²⁷ Government of Southern Sudan website, as at 24 November 2008, available at <http://www.sslagoss.org/parties.php>, **Exhibit-FE 16/20**.

²⁸ These include Sudan People's Liberation Movement, National Congress Party, Union of Sudan African Parties 1, United Democratic Sudan Forum, Southern Sudan Democratic Forum, Union of Sudan African Parties 2, United Democratic Front, Sudan African National Union, South Sudan Defense Force, Appointed Members.

²⁹ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 154-160 and 189 (2004), **Exhibit-FE 12/18**; J. Ewald, *Soldiers, Traders and Slaves* 96-97 (1991), **Exhibit-FE 8/1**; F. Deng, *War of Visions: Conflict of Identities in the Sudan* 73-77 (1995), **Exhibit-FE 8/13**; M. Daly, *Darfur's Sorrow* 36 (2007), **Exhibit-FE 15/15**.

³⁰ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 200-201 (2004), **Exhibit-FE 12/18**; F. Deng, *War of Visions: Conflict of Identities in the Sudan* 73-77 (1995), **Exhibit-FE 8/13**.

³¹ See below at paras. 967.

³² International Society for Horticultural Science, Horticulture Research International: Sudan, available at <http://www.hridir.org/countries/sudan/index.htm> ("The northerly air masses are extremely dry due to their continental origin and descent from higher altitudes as they move southwards ... The desert region, north of latitude 19° N, with daily maximum temperature of 24 °C in January and 49.5 °C in June. The rain fall is infrequent due to the prevailing dry northerly winds throughout the year."), **Exhibit-FE 16/22**. See also **Map 9** (Sudan: Rainfall).

³³ Human Rights Watch Report, *Sudan, Oil and Human Rights*, 2003, at p. 43, **Exhibit-FE 11/2**.

³⁴ The rainfall varies from 0 inches in the north to 60 inches in the south, producing country varying from barren desert to closed tall forests. See Andrews, in J. Tohill (ed.), *Agriculture in the Sudan* 32 (1948), **Exhibit-FE 3/19**. See also **Map 9** (Sudan: Rainfall).

³⁵ See also **Map 8** (Southern Sudan: Major River Systems).

³⁶ W. Lloyd, *Some Notes on Dar Homr*, *The Geographical Journal*, 29 (January to June), 1907, at p. 649, **Exhibit-FE 3/4**. See also **Map 2** (Sudan: Vegetation and Landcover).

³⁷ This is based on the data available for Southern Sudan and Sudan as a whole. See above at paras. 70, 77.

Muslim³⁸ and Arabic is the dominant language.³⁹ Of the many Arab Muslim tribes of northern Sudan some (including the Baggara) are nomads or semi-nomads; others, such as the Ja'aliyyin and Danagla, mainly sedentary farmers living along the Nile; the Muslim Nubians, Fur and Beja are among non-Arab peoples who have retained separate identities.⁴⁰

2. The Abyei Region

84. The Abyei region lies in southwestern Sudan, at the border between the northern and southern parts of Sudan, as depicted on **Map 7** (Abyei Area).⁴¹ That location is captured, graphically, in the first paragraph of Article 1 of the Abyei Protocol, in which the parties acknowledged that “*Abyei is a bridge between the north and the south, linking the people of Sudan.*”⁴²

a) Inhabitants of the Abyei Region

85. The Abyei region is the ancestral homeland of the Ngok Dinka people. Reflecting that, the Abyei Protocol defined the Abyei Area as “*the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.*”⁴³

86. As discussed in detail below, Ngok Dinka and Misseriya oral traditions recount that the Ngok Dinka migrated to the Abyei region in the early 18th century.⁴⁴ The Ngok remained there throughout the 19th and 20th centuries, centered on the area of the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems. By the end of the 19th century, the location of what is today Abyei town had become the hub of Ngok political and commercial affairs: since “the time of Arop Biong[Abyei town] has been the home of the Paramount Chief of the Ngok Dinka.”⁴⁵

87. Parts of the Abyei region have also been used for decades for seasonal grazing by the Misseriya, a nomadic, Arabic speaking tribe living to the north of the Ngok Dinka.⁴⁶ Reflecting that, the Abyei Protocol provided that, notwithstanding the Ngok Dinka’s ancestral rights to the Abyei Area, “[t]he Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.”⁴⁷ As discussed in detail below, documentary evidence and oral traditions confirm the Misseriya’s seasonal use of portions of the Abyei region.⁴⁸

³⁸ *Sudan: A Country Study of Sudan, Library of Congress* 10 (4th ed. 1992), **Exhibit-FE 7/18**.

³⁹ *Sudan: A Country Study of Sudan, Library of Congress* 9 (4th ed. 1992), **Exhibit-FE 7/18**.

⁴⁰ *Sudan: A Country Study of Sudan, Library of Congress* 9-10 (4th ed. 1992), **Exhibit-FE 7/18**; D. Akol Ruay, *The Politics of Two Sudans* 15 (1994), **Exhibit-FE 8/10**.

⁴¹ See also **Map 4** (Abyei Area: Dry Season Satellite Image); **Map 3** (Abyei Area: Wet Season Satellite Image).

⁴² Abyei Protocol, Art. 1.1.1, **Appendix C**.

⁴³ Abyei Protocol, Art. 1.1.2, **Appendix C**. Similarly, the Abyei Annex (to the Abyei Protocol) referred to the Abyei Area as follows: “the Area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, referred to herein as Abyei Area.” Abyei Annex, Art. 1, **Appendix D**.

⁴⁴ See below at paras. 119-127, 883-896.

⁴⁵ Witness Statement of Mijak Biong Jienu (Bongo elder and sub-chief), at p. 3, ¶8. See also **Figures 1 to 19**, inclusive (historic photographs of Ngok Dinka in and around Abyei town), **Appendix H**.

⁴⁶ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶35.

⁴⁷ Abyei Protocol, Art. 1.1.3, **Appendix C**.

⁴⁸ See below at paras. 238-248, 968-977, 1077-1081.

88. In addition to the Ngok Dinka and the Misseriya, a few other tribes also use limited parts of the Abyei region on a seasonal basis. As discussed below, these tribes include the Twic and Rueng Dinka.⁴⁹

b) Geography and Ecology of the Abyei Region

89. A number of major rivers and their tributaries wind through the Abyei region and surrounding areas, referred to generally as the “Bahr” or the “Bahr river basin.”⁵⁰ These include the Kiir/Bahr el Arab, the Ngol/Ragaba ez Zarga the Nyamora/Umm Rebeiro, and the Nam/Bahr el Ghazal, forming a single sprawling watershed (or drainage basin). This watershed is one of the many sources of the Nile, flowing east to join the White Nile.

90. River systems in the Bahr are known by multiple names, often used interchangeably to describe a single river or entire system, which has historically been a cause of confusion in geographic references.⁵¹ In general, no standardized naming system was adopted for rivers (or other locations) in the region.

91. Thus, the Ngok Dinka refer to the Bahr el Arab as the Kiir, while other references (including by Arabic speakers) identified the same river as “the Bar el Jange” or the “Bahr ed Deynka.”⁵² Similarly, the Ngol has been described as the Bahr el Homr or Ragaba ez Zarga.⁵³ Maps and reports during the Condominium era often used Arabic names, in part because the British typically traveled with Arabic speaking soldiers and employed Arabic speaking servants, who rarely spoke Dinka or other local tribal languages.

92. The area encompassed by the Bahr river system resembles a large basin that gently slopes eastward in the direction of the White Nile. Lake Keilak and Lake Abyad are in the north and the Kiir/Bahr El Arab in the south. The Bahr river systems are depicted on **Map 8** (Southern Sudan: Major River Systems), presenting a complex and oftenchanging series of channels that water the entire region.⁵⁴

93. More generally, historian Collins describes the Bahr watershed as follows:

⁴⁹ In 1978, the Sudanese Ministry of Agriculture summarized the Abyei region’s habitation as follows: “Ngok Dinka live in this area the year round; Missiriya Humr during the dry season. Bahr El-Ghazal and Upper Nile Dinka come during the rainy season.” A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 9-10 (1978), **Exhibit-FE 6/5**.

⁵⁰ ‘Bahr’ means river or river system in Arabic. The Dinka name word for river is ‘Kol.’

⁵¹ Some of these confusions are discussed below. See below at paras. 337-345, 924.

⁵² Reports by His Majesty’s Agent and Consul-General on the Finances, Administration, and Condition of Egypt and the Soudan in 1904, at p. 114, **Exhibit-FE 1/12**. Where reference is made to the Report by His or Her Majesty’s Agent and General on the Finances, Administration, and Condition of Egypt and the Soudan for any given year, it is referred to as “Annual Report on Egypt and the Soudan.” E. Wilkinson, *El Obeid to Dar El Jange* (1902) in E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. II, 156 (1905) (“the Kir, or Bahr El Jange”), **Exhibit-FE 2/15**.

⁵³ See for example **Map 31** (*The Egyptian Sudan*, Intelligence Branch, War Office, 1883-Overlay), **Map 35** (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903) - Overlay) and **Map 37** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905) – Overlay). There are also references in maps to the more southern Lol as the Bahr el Homr, see for example **Map 33** (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903)).

⁵⁴ The Abyei region is also rich in underground water since it lies on the Umm Ruwaba series, one of the largest aquifers in southern Sudan. A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 9 (1978), **Exhibit-FE 6/5**; Al-Awad, Mohammed & El-Tayeb, *The Impact of Improved Rural Water Supplies on the Environment: The Case of East Kordofan District*, Natural Resources and Rural Development in Arid Lands: Case Studies from Sudan, at p. 4 (1985), **Exhibit-FE 7/13**; Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3, ¶¶16-17.

“an undulating plateau upon which the south Atlantic monsoon drops its rains from May to October, there to sustain lush parklands and rivers that cut ravines through which their waters tumble over rocks and rapids. These waters are hidden from the sun by the triumphal arches of the forests towering above the luxuriant growth of reed and bamboo by the torrents below. Farther downstream the rivers, red with the laterite of the ironstone plateau meander through the great Nilotic plain, where the gallery forests of the watershed become parklands that turn to savanna whose grasslands stretch to the horizon, broken only by clumps of small heglig tree, *Balantis aegyptiaca*.”⁵⁵

94. Anthropologist, Professor Ian Cunnison called the Bahr the “Regeba Repeating Pattern,” describing it as “a land of meandering watercourses, tall forests, Acacia, seyal- and meadows...”⁵⁶

95. The Bahr river basin and Abyei region remained uncharted and unexplored until well into the 20th century.⁵⁷ Reporting on the Kiir/Bahr el Arab in 1889, Schirmer wrote:

*“Almost a century has passed since Browne marked [the Bahr el Arab] vaguely on the map, and our knowledge of it is even now hardly more definite. No European has explored the whole course of the stream... The Arabs even have not much to say about it... It therefore follows that nothing definite has resulted from these diverse observations.”*⁵⁸

96. The Bahr river basin is anchored immediately to the south by the Sudd, “one of the world’s largest swamps.”⁵⁹ The Sudd has been described as an “elusive geologic formation that leaves no markers from its past. It is an ever-shifting maze consisting of millions of aquatic plants that combine, break up and recombine, forming a vast swamp that expands and contracts with the Nile flow.”⁶⁰ The Sudd was largely impenetrable for centuries, particularly in the rainy season.⁶¹ The Sudd and its surrounding areas are depicted on **Map 2** (Sudan: Vegetation and Landcover).

97. The watercourses and climatic conditions of the Bahr river basin in the Abyei region create a richly fertile clay soil, to which the permanent villages and agriculture of the Ngok Dinka were well-adapted (discussed below).⁶² Cunnison described the region as being characterized “*by dark, deeply cracking clays and numerous winding watercourses* all connected eventually to the Bahr el Arab, a tributary of the White Nile.”⁶³ Similarly, in 1905, Gleichen wrote of a “*rich black clayey loam*”⁶⁴ and observed that the fertile clay soil of the

⁵⁵ R. Collins, *The Nile* 63 (2002), **Exhibit-FE 10/6**.

⁵⁶ Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 10 (1960), **Exhibit-FE 4/8**

⁵⁷ See below at paras. 331-343.

⁵⁸ E. Gleichen, *Supplement to the Handbook of the Sudan* 188-189 (1899), **Exhibit-FE 1/11** (emphasis added).

⁵⁹ M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 18 (1983), **Exhibit-FE 7/1**.

⁶⁰ R. Collins, *The Nile* 50 (2002), **Exhibit-FE 10/6**. The Sudd is a “formidable expanse of lakes, lagoons, and aquatic plants, whose area in high flood waters exceeds 30,000 square kilometres, approximately the size of Belgium.”, **Exhibit-FE 10/6**; H. Chapin Metz (ed.), *Sudan: A Country Study*. Washington: GPO for the Library of Congress 64 (1991), **Exhibit-FE 7/8**.

⁶¹ See below at paras. 100-105.

⁶² I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 18 (1966), **Exhibit-FE 4/16**.

⁶³ I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 18 (1966), **Exhibit-FE 4/16** (emphasis added).

⁶⁴ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. I, 153 (1905), **Exhibit-FE 2/14**.

Abyei region was “very suitable for cultivation.”⁶⁵ Other sources describe the soil in Abyei as “dark and clay-like and extremely fertile,”⁶⁶ and observe that “as a result of the river system and the rains, the land in the Abyei Area is very fertile.”⁶⁷

98. The clay plain of the Abyei region is covered in many areas by thick forest, bushes and vegetation,⁶⁸ and an abundance of plants and fruits traditionally grew throughout the region.⁶⁹ The vegetation is mostly tropical woodland savanna including various grasses, acacia trees, gum trees and rubber trees.⁷⁰

99. The region’s lush vegetation and abundant wildlife were described by Court Treatt (who visited the Ngok Paramount Chief Kuol Arop in Abyei town in the late 1920s). Kuol Arop’s settlement was described as being:

“bordered by ‘gallery’ forest of large trees through which [was] glimpsed the broad and rapid glittering water that widened out into a great pool a quarter of a mile broad where birds of every kind dipped and wheeled to the music of strange cries. Storks and waders picked their dignified way along the river-banks while flocks of pelicans drifted in symmetrical arabesques like aeroplanes in formation flying.”⁷¹

Court Treatt found the water in the Abyei region “no less busy with animal life than the air. Silvery fish ... leaped out of the water – sometimes over the boat, sometimes into it ... Crocodiles were numerous ... huge flocks of pelicans float[ed] lazily on the water and in the bordering clumps of stately palms hundreds of herons had their nests, twenty to thirty of them occupying each palm-top.”⁷²

c) Climate and Seasonal Change in the Abyei Region

100. The Abyei region has a distinctive and extreme climate. That climate has contributed to the region’s fertility (discussed above), while also constituting the area’s historic inaccessibility and isolation.

101. A defining characteristic of the Abyei region’s climate is a dramatic swing between extreme dry and rainy seasons. For half the year, between October and April, the Abyei region is a “hot and parched semi-desert.”⁷³ The other half of the year, between May and November, the region is marked by torrential rains and flooding.⁷⁴ The early rains in the Abyei region come in the form of “awesome crashing downpours,” with the transition from the dry to wet seasons being described as being as “violent as it is welcome.”⁷⁵ This climatic

⁶⁵ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. I, 153 (1905), **Exhibit-FE 2/14**; see also D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 24 (1997) (Abyei is “heart” of traditional farming), **Exhibit-FE 8/14**.

⁶⁶ Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3, ¶16.

⁶⁷ Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 3, ¶10.

⁶⁸ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province 2* (1978), **Exhibit-FE 6/5**.

⁶⁹ Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3, ¶16 (these included fruits such as “a reddish brown berry called *lang* and other fruit that “drops from a tree called *malad* and *thou*”).

⁷⁰ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province 4-5* (1978), **Exhibit-FE 6/5**.

⁷¹ C. Treatt, *Out of the Beaten Track, A Narrative of Travel in Little Known Africa* 57 (1931), **Exhibit-FE 3/13**.

⁷² C. Treatt, *Out of the Beaten Track, A Narrative of Travel in Little Known Africa* 58-59 (1931), **Exhibit-FE 3/13**.

⁷³ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 90 (1997), **Exhibit-FE 8/14**.

⁷⁴ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 90 (1997), **Exhibit-FE 8/14**.

⁷⁵ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 93 (1997), **Exhibit-FE 8/14**.

contrast is depicted in **Map 9** (Sudan: Rainfall) and in the photographs at **Map 3** (Abyei Area: Wet Season Satellite Image) and **Map 4** (Abyei Area: Dry Season Satellite Image).

102. During the dry season, “temperatures increase to a mean of 106° F, water holes and rivers dry up, and the pastures become parched and brown.”⁷⁶ Water for drinking and watering the livestock becomes extremely scarce or entirely absent from many parts of the Abyei region during the dry season.

103. The rainy season starts in late May in the Abyei region and ends at the beginning of November. Records collected by the Abyei Development Project in the 1970s report that the average rainfall during the rainy season in Abyei ranges between 129 and 138 millimeters per month.⁷⁷ In contrast, there is often no rain for months during the dry season.⁷⁸

104. The seasonal rains, combined with the area’s geography, result in the Abyei region being “quickly transformed with the onset of the rains into an *isolated and muddy tropical swamp*.”⁷⁹ Similarly, Court Treatt observed in the 1920s that the soil of the Abyei region “*becomes impassable bog during the rains*.”⁸⁰

105. Another commentator explained that “[d]uring the rains [the region’s soil] indiscriminately sucks the African porter, official, and traveler into its viscous mud. In the dry season its concrete serrated surface slashes their feet and shreds their boots.”⁸¹ An environmental report from a U.S. development agency provides a similar description, explaining that the soils of the floodplains “crack deep and wide when dried out” and “seal off when wetted, making the surface impermeable, so that flooding occurs during the rainy season” rendering, “vehicles and other machinery” “unable to pass” and making them “become mired” in the soil.⁸²

d) Interim Administration of Abyei Area

106. As discussed in greater detail below, the Abyei Protocol includes provisions regarding the interim administration of the Abyei Area.⁸³ These provisions confirm the Abyei Area’s “special administrative status,”⁸⁴ and establish a local Executive Council (elected by the residents of the Abyei Area),⁸⁵ a Chief Administrator⁸⁶ and an Abyei Area Council.⁸⁷ The Abyei Protocol also provides that “[i]n view of the special status of Abyei Area, the

⁷⁶ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 90 (1997), **Exhibit-FE 8/14**. In the dry season, despite a respite from the water-logged earth, the “relatively cool” start of the season around Abyei has a “mean high daily temperature of 93°F,” with an increase to a “mean of 106°F” as “the season progresses.” D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 90 (1997), **Exhibit-FE 8/14**.

⁷⁷ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 3 (1978), **Exhibit-FE 6/5**.

⁷⁸ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 3 (1978), **Exhibit-FE 6/5**.

⁷⁹ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 90 (1997), **Exhibit-FE 8/14**.

⁸⁰ C. Treatt, *Out of the Beaten Track, A Narrative of Travel in Little Known Africa* 54 (1931), **Exhibit-FE 3/13** (emphasis added).

⁸¹ R. Collins, *The Nile* 64 (2002), **Exhibit-FE 10/6**.

⁸² USAID, Southern Sudan: Environmental Threats and Opportunities Assessment, Biodiversity and Tropical Forest Assessment, prepared by the International Resources Group, dated September 2007, at p. 8, **Exhibit-FE 15/10**.

⁸³ See below at paras. 562-571. See also Abyei Protocol, Arts. 1.2-1.4, 2-4, **Appendix C**.

⁸⁴ Abyei Protocol, Art. 2.1, **Appendix C**.

⁸⁵ Abyei Protocol, Art. 2.2, **Appendix C**.

⁸⁶ Abyei Protocol, Art. 2.4, **Appendix C**.

⁸⁷ Abyei Protocol, Art. 4.1, **Appendix C**.

Presidency shall apply to the Judiciary to establish courts for Abyei Area as deemed appropriate.”⁸⁸

107. In July 2005, as discussed in detail below, the ABC Report defined the boundaries of the Abyei Area pursuant to the Abyei Protocol and Abyei Annex.⁸⁹ The ABC Report provides that the:

“the northern boundary [of the Abyei Area is defined by] 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.”⁹⁰

The Abyei Area as defined by the ABC is as depicted on **Map 10** (*Abyei Area Boundaries: Map I*, Abyei Boundaries Commission, 2005). The ABC’s boundaries of the Area encompassed a territory of approximately 9,750 square miles (or 25,300 square kilometers).⁹¹

108. On 8 June 2008, the GoS and SPLM/A agreed that provisional boundaries of the Abyei Area would be adopted for interim purposes of administration pending final determination of the boundaries of the Area in the present arbitration.⁹² Those boundaries, which were without prejudice to the outcome of this arbitration, encompassed an area of approximately 4,255 square miles (or 11,000 square kilometers).⁹³

e) Oil Resources

109. Sudan possesses significant oil reserves.⁹⁴ The main area of oil exploration and production in Sudan to date, the Muglad Basin, stretches southeast from Muglad through Bentiu and Western Upper Nile, to Juba on the White Nile and Eastern Equatoria.⁹⁵

110. The Abyei Area, as determined by the ABC, includes three major oilfields: Heglig, Diffra and Bamboo Complex, whose 2005 to 2007 revenues were in the region of US\$1.8 billion.⁹⁶ These fields are shown on **Map 11** (Sudan: Oil Sector).⁹⁷ By 2003, more than a quarter of Sudan’s oil production originated from the Abyei region.⁹⁸

⁸⁸ Abyei Protocol, Art. 2.7, **Appendix C**.

⁸⁹ See below at paras. 520-530.

⁹⁰ ABC Report, Part I, at p. 22, **Appendix B**.

⁹¹ **Map 10** (*Abyei Area Boundaries: Map I*, Abyei Boundaries Commission, 2005); see also **Map 58** (Abyei Area: Area Calculations).

⁹² The Road Map for Return of IDPs and implementation of Abyei Protocol Khartoum, dated 8 June 2008.

⁹³ **Map 10** (*Abyei Area Boundaries: Map I*, Abyei Boundaries Commission, 2005); see also **Map 58** (Abyei Area: Area Calculations).

⁹⁴ Human Rights Watch Report, *Sudan, Oil and Human Rights*, 2003, at p. 45, **Exhibit-FE 11/2**.

⁹⁵ There is also a less developed area in the Melut Basin (including Blocks 3 and 7), running north and south of Malakal, west to the Muglad Basin, and east to the Ethiopian border.

⁹⁶ International Crisis Group, “Sudan: Breaking the Abyei Deadlock”, Africa Briefing No. 47, 12 October 2007, at p. 7, **Exhibit-FE 15/11**. Oil exploration the Abyei region began in the mid-1970s by Chevron, a U.S.-based company that acquired and explored concessions in Sudan starting in 1974. International Crisis Group, “Sudan: Breaking the Abyei Deadlock”, Africa Briefing No. 47, 12 October 2007, at p. 7, **Exhibit-FE 15/11**. Chevron drilled several successful wells in the Abyei region in the early 1980s, beginning with Taiyib 1 in 1981. *Ibid*.

⁹⁷ **Map 11** (Sudan: Oil Sector).

⁹⁸ International Crisis Group, “Sudan: Breaking the Abyei Deadlock”, Africa Briefing No. 47, 12 October 2007, at p. 8 (that figure includes 10% production from South Toma), **Exhibit-FE 15/11**.

B. *The Ngok Dinka*

111. The Ngok Dinka are a sub-group of the Dinka people (one of the largest population groups in southern Sudan), whose historic homeland was and remains the Abyei region. The Ngok Dinka are a highly cohesive tribal unit of an estimated 300,000 people, with a well-defined, centralized political structure (the Paramount Chiefdom), uniformly-shared cultural and religious practices and a high degree of social unity.

112. The Ngok have been divided into nine Chiefdoms, under a single Paramount Chief, for almost two centuries. Since the mid 19th century, the political, religious, cultural and commercial center of the Ngok Dinka has been the location known as modern-day Abyei town, located north of the Kiir/Bahr el Arab River, in the heart of the Abyei Area as defined by the ABC Report.⁹⁹

113. The Ngok are an agro-pastoral people, inhabiting permanent villages and residential dwellings that are constructed from local materials and well-adapted to resist the climatic extremes of the Bahr river basin. The Ngok agriculture and cattle-herding practices are equally well-adapted to and intertwined with the geography, ecology and climate of the region. Likewise, the Ngok religion and culture is imbued with the ecology, climate and geography of the Bahr river basin, whose land plays an important role in Ngok religious life.

1. The Dinka and the Ngok Dinka

114. The Ngok Dinka are a Nilotic people (having originated from the Nile Valley). The Ngok parent group, the Dinka people, are one of the largest population groups in Southern Sudan, estimated at over two million people.¹⁰⁰ The Dinka comprise more than 10 percent of the total Sudanese population and approximately 40 percent of the population of southern Sudan.¹⁰¹

115. Within the Dinka group, there are 25 tribes (10 major tribes and some 15 smaller tribes),¹⁰² with populations ranging from just a few thousand to a few hundred thousand. The major Dinka tribes include the Ngok, as well as the Aliab, Bor, Ciec, Agar, Rueng, Rek, Twic and Malual.¹⁰³ The approximate homelands of the various Dinka tribes are depicted on **Map 12** (Southern Sudan: Tribes).

116. The Ngok Dinka, also occasionally referred to as the “Western Ngok,” are one of the largest Dinka tribes, with a population of approximately 300,000.¹⁰⁴ The “Western Ngok” are distinguished from another tribal group of Ngok Dinka, residing to the east of the Abyei region in Upper Nile.¹⁰⁵ The Ngok Dinka of the Abyei region are divided into nine sub-tribes

⁹⁹ ABC Report, Part I, at p. 44, **Appendix B**.

¹⁰⁰ M. Yakan, *Almanac of African Peoples & Nations* 282 (1999), **Exhibit-FE 8/18**.

¹⁰¹ Encyclopedia of the Nations, as at 9 December 2008, available at www.nationsencyclopedia.com/Africa/Sudan.html, **Exhibit-FE 16/23**. The Dinka are the largest sub-group of the Sudanese Nilotic people (followed by the Nuer and the Shilluk). See US Department of State Bureau of African Affairs Background Note July 2008, as at 17 November 2008, available at www.state.gov/r/pa/ei/bgn/5424.htm at p. 3, **Exhibit-FE 16/3**.

¹⁰² F. Deng, *Dinka and their Songs* 6 (1973), **Exhibit-FE 5/7**.

¹⁰³ Gurtong Trust Peace Project website, available at as at 9 December 2008

www.gurtong.org/ResourceCenter/people/profile_tribe.asp?TribeID=94, **Exhibit-FE 16/7**.

¹⁰⁴ SPLM website, available at splmtoday.com/index.php?option=com_content&task=view&id=96&Itemid=50; **Exhibit-FE 16/9**;

¹⁰⁵ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 46-47, 51-53 (2004), **Exhibit-FE 12/18**.

or Chiefdoms.¹⁰⁶ The territory of the nine Ngok Dinka Chiefdoms is set out on **Map 13** (Ngok Dinka Chiefdoms, 1905) and of each of the nine Ngok Dinka Chiefdoms on **Maps 14 to 22**, inclusive.¹⁰⁷

117. The Ngok Dinka are recognizable by a number of distinctive physical similarities. They have been described as a “tall, slender, and fine featured Nilotic people,”¹⁰⁸ and “blacker than the West African,” with “narrower” skulls and “beautiful hands and chiselled faces.”¹⁰⁹

118. The name “Ngok” is derived from the name of a local catfish that is found in the White Nile with three bony spines, one standing vertically and the other two pointing outward and sideways – “like that of an aeroplane.”¹¹⁰ The ngok fish’s shape prevents it from being swallowed by larger predators, leading the Ngok to draw parallels with their own position in Sudan: they use their natural attributes to defend against predators.¹¹¹

2. The Migration of the Ngok Dinka to the Abyei Region

119. There is very limited documentary evidence regarding the Ngok Dinka or neighboring tribes prior to the 20th century. As a consequence, reliance must instead be placed on oral traditions of the Ngok people. In the case of the Ngok Dinka, this reliance is particularly appropriate, because oral tradition plays a significant role in tribal culture. Among other things, accounts of the Ngok Paramount Chiefs (an institution discussed in detail below¹¹²) figure large in the tribe’s oral histories.

120. The oral traditions of the Ngok Dinka and neighboring tribes describe the Ngok Dinka people as migrating to the Abyei region in the early 18th century from the east. The Ngok established themselves in the Bahr river basin, centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems, including in the area of what is now Abyei town.

121. The Ngok Dinka, together with other groups of the ancestral Padang Dinka, are descendants of peoples who “lived in the east but were forced to move because grazing was poor and their country was subject to floods.”¹¹³ The Ngok Dinka began their migration to the Abyei region together with other Dinka tribes, in particular the “Rueng” and “Twij [Twic Dinka].”¹¹⁴

122. According to Henderson, the “Dinka migration split at Bor, and the main body (Reik, Malwal, etc) moved north west, while the remainder followed the Nile and split again at Malakal, one party following the east bank to Renk and the other moving west of the Shilluk

¹⁰⁶ Howell, “Notes on the Ngork Dinka of West Kordofan,” 32(2) SNR 249-254, (1951), **Exhibit-FE 4/3**; see also F. Deng, *Tradition and Modernization* 4 (1971), **Exhibit-FE 5/2**.

¹⁰⁷ **Map 13** (Ngok Dinka Chiefdoms, 1905), and **Maps 14 to 22** (and all of the maps produced by the SPLM/A (aside from the maps of historical record)) only seek to locate a representative sample of the permanent settlements of the nine Ngok Dinka chiefdoms. The maps are not, and are not intended to be, an exhaustive mapping of all Ngok Dinka settlements.

¹⁰⁸ F. Deng, *Dinka and their Songs* 1 (1973), **Exhibit-FE 5/7**.

¹⁰⁹ K. Henderson, *Sudan Republic* 18, 19 (1965), **Exhibit-FE 4/13**; see also **Figures 8 and 9** (Photographs of Dinka ceremonies), **Appendix H**.

¹¹⁰ A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 3 (1978), **Exhibit-FE 6/7**.

¹¹¹ A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 3 (1978), **Exhibit-FE 6/7**.

¹¹² See below at paras. 136-139; see also P. Howell, *Genealogy of Ngork Chiefs*, U.N. Doc 768/1/9 (1945), **Exhibit-FE 3/16**.

¹¹³ Howell, “Notes on the Ngork Dinka of West Kordofan,” 32(2) SNR 239, 242 (1951), **Exhibit-FE 4/3**.

¹¹⁴ Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 49, 57 (1939), **Exhibit-FE 3/15**.

through Wonkai (Ghabat El Erab).¹¹⁵ Santandrea reports Ngok oral traditions which recount that the founder of the Ngok, Paramount Chief Jok of the Abyior, lived at a location “east of the Nile at Ngok-luel-yat” [Ngok-luel-yak] or “Old Ngella” as it was known to the Ngok.¹¹⁶ The same account is also reported by Howell, who noted oral traditions that “[t]he Ngork [sic] say that they were led to their present country by Jok and his son Awiel de Jok.”¹¹⁷

123. Santandrea records that the first of the Ngok Dinka to “cross the Nile was Kuol [Kuol Dongbek (or Kwoldit)],” leading the Ngok “under the pressure of Nuer advance, but also in search of wider grazing areas for their increasing number of cattle.”¹¹⁸

124. Ngok oral traditions recount that the Ngok Dinka migrated through Bruna, Inywak, Malouth, Shargar, Abilang, Areng and Jau [Lake Abyad] until they arrived at the “Ngol, called in Arabic ‘Ragaba ez Zarka’ (= non perennial water course of the cotton soil)” in the Abyei region.¹¹⁹ Ngok oral traditions also report that when the Ngok “moved up to the present Ngowl” or Ngol/Ragaba ez Zarga River under Paramount Chief Kuol Dongbek (or Kwoldit), the land “became the Ngok’s permanent home.”¹²⁰ The Ngok migration to the area of the Ngol/Ragaba ez Zarga River is depicted on **Map 23** (Ngok Dinka Migration to Abyei Area).¹²¹

125. Both Paramount Chief Kuol Dongbek (or Kwoldit) and his son, Monydhang Kuol, “died and were buried” in the region of “Demboloia,”¹²² northeast of Abyei town on the Ngok/Ragaba ez Zarga, which is known by the Dinka name, Dakjur [Arabic: Dembaloya] and is depicted on **Map 23** (Ngok Dinka Migration to Abyei Area).¹²³ This is consistent with the testimony of the current Ngok Paramount Chief who describes Ngok historical traditions to the same effect.¹²⁴

¹¹⁵ Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 49, 57 (1939), **Exhibit-FE 3/15**.

¹¹⁶ S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**. Santandrea describes that the “first three chiefs [Jok, Bulabek and Dongbek] lived and died east of the Nile, in the bend formed by the Nile between Malakal and Lake No: a place called by the Ngok of Abyei ‘Ngok-lual-yat [Ngok-lual-yak].” S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**. This is also recounted by the oral history of Omda Achwiil, a member of the Pajok lineage and cousin to the former Paramount Chief Deng Majok, who stated that the area occupied by the Ngok in the past: “lies east to the White Nile near a place called Ngella, ‘Old Ngella.’” A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province 4* (1978), **Exhibit-FE 6/7**.

¹¹⁷ P. Howell, “Notes on the Ngork Dinka of West Kordofan,” 32/2 SNR 239, 242 (1951), **Exhibit-FE 4/3**.

¹¹⁸ S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**.

¹¹⁹ A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province 4* (1978), **Exhibit-FE 6/7**; S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**. See also D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 58 (1997) (“Ngok migrated to Abyei long ago from the east, from the Upper Nile area.”), **Exhibit-FE 8/14**.

¹²⁰ A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province 4* (1978), **Exhibit-FE 6/7**.

According to oral accounts collected by Henderson, Kuol Dongbek (or Kwoldit) drove a collection of indigenous tribes away from the Abyei region and claimed the land from “Tebusayya” to “Hugnet Abu Urf” as their home, west along the “Gnol”, “one generation before the Baggara came south to Turda.” Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 49, 58 (1939), **Exhibit-FE 3/15**. Santandrea’s account provides that “when the Ngok arrived at Abyei the Bahr el Ghazal Shatt (or Shatt-Thuri) had already left the country” but such departure “cannot have taken place a very long time before.” S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**.

¹²¹ **Map 23** (Ngok Dinka Migration to Abyei Area) also depicts the separate migration route of the Abyei sub-tribe of the nine Ngok Dinka.

¹²² S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**.

¹²³ S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**.

¹²⁴ Witness Statement of Kuol Deng Kuol Arop, at p. 6, ¶27. The burial locations in the Witness Statement provide that Kuol Dongbek (or Kwoldit) was buried at Pakur and Monydhang Kuol was buried at Pachol. Both are in the region of Dakjur [Arabic: Dembaloya].

126. Santandrea recounts that, in subsequent generations, Monydhang Kuol's son "Alor pushed further on, invading the territory of the Begi or Girma, and arrived as far as Abyei."¹²⁵ Based on the Ngok migration path and the dates of the significant events involving the Paramount Chiefs, the Ngok settlements in Abyei were established by the early 19th century.

127. Subsequently, although the Ngok Dinka remained in the Abyei region, there was further Ngok expansion. Santandrea recounts oral traditions that Paramount Chief Alor Monydhang's son "Biong [Alor], settled south of Abyei, on the Kir, in a place called Wunewei [Wunchuei, which is a few kilometres southwest of the location of Abyei town], where he died and was buried."¹²⁶ Similarly, Sabah reports that, by the early 19th century, Paramount Chief Kuol Dongbek (or Kwoldit)'s great-grandson, Paramount Chief Biong [Alor], had "moved to Majak near Abyei town."¹²⁷

3. The Ngok Dinka and the Mahdiyya

128. The events of the 19th century did nothing to displace the Ngok Dinka from the lands of the Abyei region to which they had migrated. On the contrary, circumstantial evidence indicates that the rise and fall of the Mahdist regime during the final decades of the 19th century had the indirect effect of enhancing the Ngok position in the area.

129. During the period of the Turkiyya (1821 to 1881), the Turco-Egyptian occupation exacerbated a north-south divide in Sudan, with increased slave-raiding in the south.¹²⁸ The Turco-Egyptian authorities and private traders undertook slave raids on a considerable scale,¹²⁹ with Khartoum and Sinnar garrisons in particular launching armed expeditions (*ghazawat*) and slave-raids against the tribes of southern Sudan.¹³⁰

130. The Turco-Egyptian regime in Sudan was overthrown by Mahdist forces during the 1880s, leading to nearly two decades of conflict and accompanying chaos, referred to as the Mahdiyya (1881 to 1898). For its first two years, the Mahdist revolt was largely "confined to the southern fringe of the Arab provinces, centering in Kordofan, the conquest of which was the first major achievement of the Mahdi's followers."¹³¹ By 1885, the Mahdist forces had expanded their reach to much of Sudan and overthrown the Turco-Egyptian government.¹³²

131. The eventual success of the Mahdi saw the extension of his rule to the whole of Sudan, with grave consequences for the country and its people. Theobald, writing in the 1940s, described the Mahdiyya as 18 years in which "Sudan had been almost constantly at war, [with] her people, decimated by battle, famine, disease and oppression."¹³³

132. Despite the general state of Sudan, the Ngok were for the most part unaffected by the Mahdiyya. As discussed below, they were protected by inaccessibility and climatic

¹²⁵ S. Santandrea, *The Luo of the Bahr El Ghazal* 196 (1968), **Exhibit-FE 4/18**.

¹²⁶ S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**; see also Witness Statement of Kuol Deng Kuol Arop, at p. 6, ¶27.

¹²⁷ A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 5 (1978), **Exhibit-FE 6/7**. Ngok oral traditions recount that the Baggara attempted to raid the Ngok for cattle and slaves during Paramount Chief Biong's reign, but were repulsed with deaths on both sides. *Ibid*.

¹²⁸ D. Johnson, *The Root Causes Of Sudan's Civil Wars* 5 (2003), **Exhibit-FE 11/6**.

¹²⁹ M. Salih, *The Ideology of the Dinka and the Sudan People's Liberation Movement* in K. Fukuki & J. Markakis *Ethnicity & Conflict in the Horn of Africa* 193 (1994), **Exhibit-FE 8/11**.

¹³⁰ PRO, FO, 84/540, Barnett to Earl of Aberdeen, 19 March 1844 cited in J. Ewald, *Soldiers, Traders and Slaves* 96 (1991), **Exhibit-FE 1/2**.

¹³¹ P. Holt, *A Modern History of the Sudan* 75 (1961), **Exhibit-FE 4/10**.

¹³² P. Holt, *A Modern History of the Sudan*, 75 (1961), **Exhibit-FE 4/10**.

¹³³ A. Theobald, *The Mahdiya* 257 (1967), **Exhibit-FE 4/17**.

conditions of the Abyei region, as well as by their non-involvement in either the Mahdist uprising or the subsequent Anglo-Egyptian reconquest.¹³⁴

4. Ngok Dinka Tribal and Social Structure

133. The Ngok Dinka have evolved a highly-developed and cohesive social and tribal structure, which is in many respects unique among the Dinka and neighboring tribes. This tribal structure rests on the institution of the Chiefdom, and particularly the centralized Paramount Chiefdom, with individual Ngok Dinka tribal members exhibiting a high degree of cultural uniformity and tribal and clan loyalty. These social and tribal structures are closely intertwined with the central roles of cattle, seasonal grazing patterns and agriculture in Ngok Dinka culture, in each case adapted to the distinctive geography and ecology of the Abyei region.

134. The structure of Ngok Dinka society is based principally on two systems of identification. One system of identification is based on the Ngok Chiefdoms, and the Paramount Chiefdom, which are territorial in nature. The other is based on the Ngok Dinka clans or lineages, which are descent-based and not necessarily territorial. Both systems of identification are highly important in Ngok society, producing an unusually high level of social commitment among the Ngok, with individuals demonstrating close obedience to tribal norms, paying tribute to chiefs and attending to the safety and welfare of his tribe, section, clan and family.¹³⁵

a) Origin of the Ngok Dinka Chiefdoms

135. The Ngok are unique among Dinka tribes in having developed a single centralized chiefdom, the Paramount Chief.¹³⁶ In most Dinka tribes, leadership is diffused widely among a variety of spiritual and other leaders. In Ngok culture, however, the hereditary Paramount Chief is both the central spiritual leader of the people and the central political authority of the Ngok people, with the Chiefs of the nine individual Ngok sub-chiefdoms being subject to the ultimate authority of the Paramount Chief (*Bany/Beny Dit*, literally big chief or senior chief).¹³⁷

136. Ngok oral traditions accord substantial prominence to the institution of the Paramount Chiefdom and to the individual Paramount Chiefs. Ngok traditions record the lineage of the Paramount Chief, with Ngok Paramount Chiefs and their birthdates and burial places, being recorded as set out below:¹³⁸

¹³⁴ See below at paras. 228-232, 897-903; Expert Report of Professor Martin Daly, dated 16 December 2008 (“Daly Expert Report”), at pp. 23-26; Francis Deng writes that the Ngok Dinka were spared the worst of the Mahdist period, which is described as a “relatively peaceful period” for them. F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 47 n. 20 (1986), **Exhibit-FE 7/4**.

¹³⁵ D. Akol Ruay, *The Politics of Two Sudans* 20 (1994), **Exhibit-FE 8/10**; F. Deng, *Tradition and Modernization* 27-29 (1971), **Exhibit-FE 5/2**; A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 11, 13-14 (1978), **Exhibit-FE 6/7**.

¹³⁶ F. Deng, *Tradition and Modernization* 12 (1971), **Exhibit-FE 5/2**; D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 58 (1997), **Exhibit-FE 8/14**; Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 7, ¶31; F. Deng, *Tradition and Modernization* 12-13 (1971) **Exhibit-FE 5/2**; A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 9 (1978), **Exhibit-FE 6/7**.

¹³⁷ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 58 (1997), **Exhibit-FE 8/14**; Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 7, ¶31; F. Deng, *Tradition and Modernization* 12-13 (1971); A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 9 (1978), **Exhibit-FE 6/7**.

¹³⁸ The burial places of the Paramount Chiefs at the nine Ngok Dinka Chiefdoms are depicted on **Map 23** (Ngok Dinka Migration to Abyei Area).

Paramount Chief	Approximate Dates	Place of Burial ¹³⁹
Jok Athur Kuk	Late 16 th century - early 17 th century	Pariang in Unity State, north of Bentiu
Bulabek Jok	Early-mid 17 th century	Pariang in Unity State, north of Bentiu
Dongbek Bulabek	Mid -late 17 th century	Pariang in Unity State, north of Bentiu
Kuol Dongbek (Kwoldit)	Late 17 th century-early 18 th century ¹⁴⁰	Pakur (between Miding [Arabic: Heglig] and Dakjur [Arabic: Dembaloya])
Monydhang Kuol	Early-mid 18 th century ¹⁴¹	Pachol (near Dakjur [Arabic: Demboloia])
Alor Monydhang	Mid-late 18 th century ¹⁴²	Majok Alor (near Abyei town)
Biong Alor	Late 18 th -early 19 th century ¹⁴³	Wunchuei (southwest of Abyei town, just north of the Kiir/Bahr el Arab)
Arop Biong (Sultan Rob)	b. early 1800s ¹⁴⁴ d. 1905 ¹⁴⁵	Gol Gol (near Abyei town)
Kuol Arop ¹⁴⁶	b. 1865 ¹⁴⁷ d. 1942 ¹⁴⁸	Abyei town (at Mitrok)

¹³⁹ Locations of burial sites are taken from Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 6, ¶27.

¹⁴⁰ Since Monydhang Kuol's Paramount Chieftancy was mid-century, it follows that Kuol Dongbek (or Kuol Dongbek (or Kwoldit)) must have served as Paramount Chief in the late 17th/early 18th century, since there is no suggestion that Kuol Dongbek (or Kwoldit) or Monydhang Kuol died young or became Paramount Chief very young. Where this has been the case, for example Kuol Arop, this has been indicated in the oral tradition. See, e.g., F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 47 (1986) ("In 1905, Kwol Arop, who had just succeeded his father at a very early age..."), **Exhibit-FE 7/4**.

¹⁴¹ Sabah notes that during the Paramount Chieftancy of "Maidang [Monydhang Kuol]" "peace was maintained except for individual and scattered disputes." A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4 (1978), **Exhibit-FE 6/7**. This indicates that Monydhang Kuol's rule must have predated the Nuer conflict of the late 18th century.

¹⁴² Sabah notes that during the Paramount Chieftancy of Alour [Alor] Maidang [Monydhang], "war broke out with the Nuer." A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4 (1978), **Exhibit-FE 6/7**; this dates his rule to the late 18th century based on the historical record. See R. Collins, *Civil Wars and Revolution in the Sudan* 111 (2005) ("this rivalry, [between the Dinka and Nuer] which began in the late eighteenth century..."), **Exhibit-FE 15/5a**.

¹⁴³ Biong Alor was Paramount Chief at the beginning of the Turkiyya (ca. 1820) and "personally led the resistance." See F. Deng, *War of Visions: Conflict of Identities in the Sudan* 255 (1995), **Exhibit-FE 8/13**.

¹⁴⁴ Arop Biong was Paramount Chief by mid-Turkiyya (mid 1800s to 1880) and Mahdiyya (1881 to 1898). See F. Deng, *War of Visions: Conflict of Identities in the Sudan* 255 (1995), **Exhibit-FE 8/13**.

¹⁴⁵ F. Deng, *War of Visions: Conflict of Identities in the Sudan* 267 (1995), **Exhibit-FE 8/13**. Deng refers to date Majok took over "Paramount Chief. Unusually this predated the death of Paramount Chief Kuol Arop by three years.

¹⁴⁶ See **Figures 10 to 13** (Kuol Arop at Abyei town), inclusive, **Appendix H**.

¹⁴⁷ Santandrea describes a story told by a Ngok elder (born around 1900) who stated that "his village, on the Kir, called Pamun, derives its named from an old Bego man who died there. His father was not born at Pamun, but had gone there before his 'initiation' (by having the traditional scars cut on his head), after the Begi had been driven away by the Dinka." Santandrea reasoned that by "placing the informant's birth around the year 1900, his father might have been born around the year 1870, thus going to Pamun in 1885-87" and so confirmed that "Kuol Arop was born in c. 1865." See S. Santandrea, *The Luo of the Bahr el Ghazal* 196 (1968), **Exhibit-FE 4/18**.

Paramount Chief	Approximate Dates	Place of Burial ¹³⁹
Deng Kuol (known as Deng Majok) ¹⁴⁹	b.1900 ¹⁵⁰ d. 1969 ¹⁵¹	Abyei town (at the house of Deng)
Monyyak (Abdullah) Deng	b. 1942 d. 1970 ¹⁵²	Abyei town (at the house of Deng)
Kuol Deng Kuol Arop	b.1952 ¹⁵³	

137. The institution of the Ngok Dinka hereditary chiefs is bound up with the religious beliefs of the Ngok people and their migration to the Abyei region. Ngok Chiefs are considered to have divine origins, with tribal divinities and ancestral spirits underpinning their spiritual and political authority.¹⁵⁴

138. Ngok Dinka oral tradition explains the origins of the Paramount Chief by reference to the Ngok migration to Abyei. The Ngok mythological account of the origin of Pajok leadership begins with Jok Athur Kuk, the “founding father” of the Pajok lineage, who “opened the Byre of Creation and enabled his people” “to exit into freedom.”¹⁵⁵

139. According to Ngok mythology, together with members of his tribe, Jok Athur Kuk confronted a river that could not be crossed. In order to save the tribe, Jok Athur Kuk led his daughter, Acai, into the river where she was “carried off by the Spirit of the Water and in return the latter caused the waters to part and the people to march across dry-shod.”¹⁵⁶ This act of sacrifice is seen as representing the Paramount Chief’s bond with his tribe, both reinforcing the Paramount Chief’s authority and demands that it be exercised selflessly for the good of the Ngok people.¹⁵⁷

b) Authority of Tribal Chiefs

140. The Paramount Chief’s centralized authority extends to all aspects of Ngok life, from resolving family disputes to managing crop failure. The Paramount Chief is responsible for all traditional functions of government: policy making, regulation of markets, tax collection (which traditionally consisted of grain and livestock but in modern times is paid in cash), justice and law and order. There is no separation of powers or system of checks and

¹⁴⁸ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* Preface xi (1986), (Deng Kuol (known as Majok) “assumed full control of the tribe in 1942”, which took place upon the death of the previous Paramount Chief), **Exhibit-FE 7/4**.

¹⁴⁹ See **Figure 14** (Deng Kuol (Deng Major)) grave in Abyei town.

¹⁵⁰ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* Preface xi (1986), **Exhibit-FE 7/4**.

¹⁵¹ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* Preface xi (1986), **Exhibit-FE 7/4**. (Deng Kuol (known as) Deng Majok “reigned until his death in 1969”), **Exhibit-FE 7/4**.

¹⁵² Monnyak Deng was assassinated by the SAF on 19 October 1970; see Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 2, ¶7.

¹⁵³ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 2, ¶5.

¹⁵⁴ F. Deng, *Tradition and Modernization* 13 (1971), **Exhibit-FE 5/2**; Howell, “Notes on the Ngork Dinka of West Kordofan,” 32(2) SNR 239, 263 (1951), **Exhibit-FE 4/3**.

¹⁵⁵ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 43 (1986), **Exhibit-FE 7/4**.

¹⁵⁶ Howell, “Notes on the Ngork Dinka of West Kordofan,” 32(2) SNR 239, 242 (1951) cited in F. Deng, *Tradition and Modernization* 15 (1971), **Exhibit-FE 5/2**.

¹⁵⁷ F. Deng, *Tradition and Modernization* 15, 47 (1971), **Exhibit-FE 5/2**.

balances: in effect, the Paramount Chief “legislates, adjudicates, administers and executes.”¹⁵⁸

141. Among other things, the Ngok Dinka Paramount Chief acts as a judge in the tribal courts.¹⁵⁹ The Paramount Chief’s judicial role emphasizes the use of “persuasion rather than coercion” (with the Dinka word for court being *luk*, meaning “to persuade”).¹⁶⁰

142. Paramount Chief Kuol Deng Kuol Arop describes how during the Condominium his “father and grandfather successfully ruled the nine Ngok Dinka Chiefdoms, resolving any disputes between the Ngok chiefdoms or between them and their neighbors, with little or no interference from the British.”¹⁶¹ He explains that “[p]eace was maintained by means of customary traditions and methods of resolving disputes.”¹⁶²

143. Ngok hereditary Chiefs descend from two lineages (Dhiendior and Pajok), which are found in most of the Chiefdoms but are associated principally with the Abyior and Manyar Chiefdoms.¹⁶³ It is settled custom that the Paramount Chiefdom is consolidated in the Pajok lineage.¹⁶⁴

144. The jurisdiction of the Paramount Chief extends to those areas where the Ngok Dinka people traditionally occupied and used their lands, with the Paramount Chief historically traveling around the Ngok Dinka Chiefdoms “as a method of governing their lands and people.”¹⁶⁵ The current Paramount Chief has undertaken annual visits during his tenure including to Awol Nam in the Anyiel Chiefdom, Miding Achueng in the Achueng Chiefdom and Nom-ngok in the Bongo Chiefdom.¹⁶⁶

145. The Paramount Chief’s status has traditionally been reinforced by marriages within his tribe; as a consequence, the Paramount Chief is the man with the most wives.¹⁶⁷ This has the dual function of creating strong political alliances across tribes and powerful families thereby perpetuating the chiefly lineage as well as creating a visible symbol of the Paramount Chief’s power.

146. The high degree of Ngok social cohesion and tribal loyalty permit the Paramount Chief to exercise substantial authority.¹⁶⁸ The Paramount Chief’s authority is buttressed by the Ngok belief that the Chief wields the “divine” power of “life and death,” and other forms of indulgence and deprivation.¹⁶⁹

147. The Ngok expectation is that the Paramount Chief will act selflessly, develop new practices and drive social change for the betterment of the Ngok people. This responsibility

¹⁵⁸ F. Deng, *Tradition and Modernization* 47 (1971), **Exhibit-FE 5/2**.

¹⁵⁹ F. Deng, *Tradition and Modernization* 13 (1971), **Exhibit-FE 5/2**; Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 3, ¶14.

¹⁶⁰ F. Deng, *Dinka and their Songs* 64 (1973), **Exhibit-FE 5/7**.

¹⁶¹ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 5, ¶22.

¹⁶² Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 5, ¶22.

¹⁶³ F. Deng, *War of Visions: Conflict of Identities in the Sudan* 252 (1995), **Exhibit-FE 8/13**; D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 78 (1997), **Exhibit-FE 8/14**; F. Deng, *Africans of Two Worlds* 92-93 (1978), **Exhibit-FE 6/6**; see also Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶37.

¹⁶⁴ F. Deng, *Africans of Two Worlds* 94 (1978), **Exhibit-FE 6/6**.

¹⁶⁵ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 6, ¶30.

¹⁶⁶ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 6, ¶30.

¹⁶⁷ F. Deng, *Tradition and Modernization* 46 (1971), **Exhibit-FE 5/2**.

¹⁶⁸ F. Deng, *Tradition and Modernization* 26-27 (1971), **Exhibit-FE 5/2**.

¹⁶⁹ F. Deng, *Dinka and their Songs* 64 (1973), **Exhibit-FE 5/7**.

is reflected in the lines of a song in praise of former Paramount Chief Kuol Arop: “O Kwol, keep the people of your father; And lead them to the people of the world.”¹⁷⁰

148. In addition to the Paramount Chief and his deputies, each of the nine Ngok Dinka Chiefdoms is led by its own chief. Although each Chief is ultimately responsible to the Paramount Chief, he retains broad day-to-day control over tribal governance, given the dispersion of the Ngok Chiefdoms over a wide area and their traditional rural way of life.¹⁷¹ Decision-making in respect of local issues is devolved to lower levels of governance within the tribe (i.e., sub-chiefdoms) so that the decisions are taken by the people most directly affected by them, subject to the ultimate authority of the Paramount Chief.¹⁷²

149. The Paramount Chief is assisted by two deputies, one of whom is from the Pajok lineage and one from the Dhendior lineage.¹⁷³ The role of the deputy Paramount Chiefs is to assist and potentially to replace the Paramount Chief, and serves as a formal recognition of the pre-eminence of the Dhendior lineage.¹⁷⁴ It is significant for the Ngok power-structure that the Paramount Chief acts “in Council and not arbitrarily or singly” and important for primogeniture not to create “too much security to guarantee good leadership, nor imposes leadership on the people.”¹⁷⁵

c) The Nine Ngok Dinka Chiefdoms

150. As noted elsewhere, there are nine Ngok Dinka Chiefdoms,¹⁷⁶ each headed by an hereditary chief. These nine Chiefdoms consist of the Abyior, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mareng and Manyuar.¹⁷⁷ (As noted above, there are also “Eastern Ngok Dinka,” living in the Upper Nile Province, and culturally related to the Ngok of the Abyei region.¹⁷⁸)

151. Each of the nine Ngok Dinka Chiefdoms was established at a different point in time. During the course of the 19th century, however, the nine Ngok Dinka Chiefdoms, some of which had developed from age sets of existing Chiefdoms, were in place under the Paramount Chief.¹⁷⁹

152. Each of the nine Ngok Chiefdoms has both an area of permanent habitation and seasonal grazing areas. The areas of permanent settlement include individual settlements tended by families or groups of families, large shared crop areas within easy walking distance of the home and common grazing areas for local grazing, water and food gathering, fishing and hunting.¹⁸⁰

¹⁷⁰ F. Deng, *Tradition and Modernization* 48 (1971), **Exhibit-FE 5/2**.

¹⁷¹ F. Deng, *Dinka and their Songs* 58 (1973) (“Traditionally, Dinka power structure was ... segmented in such a way that each descent and territorial unit ... was autonomous”), **Exhibit-FE 5/7**.

¹⁷² F. Deng, *Tradition and Modernization* 7 (1971) (The nom-gol (clan head) “[i]n collaboration with the elders and the heads of component lineages, he constitutes the decision-making machinery.”), **Exhibit-FE 5/2**.

¹⁷³ F. Deng, *Tradition and Modernization* 12 (1971), **Exhibit-FE 5/2**.

¹⁷⁴ F. Deng, *Africans of Two Worlds* 85 (1978), **Exhibit-FE 6/6**.

¹⁷⁵ F. Deng, *Dinka and their Songs* 60 (1973), **Exhibit-FE 5/7**.

¹⁷⁶ Abyior (the Chiefdom of the Pajok lineage, which provides the Paramount Chief), Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mareng, Manyuar (the sub-tribe of the Dhiendior lineage, which occupies the second position).

¹⁷⁷ See below at paras. 1022-1034.

¹⁷⁸ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 154-160 and 189 (2004) at pp. 46-47, **Exhibit-FE 12/18**

¹⁷⁹ See Howell, “Notes on the Ngork Dinka of West Kordofan,” 32(2) SNR 239, 249-254 (1951), **Exhibit-FE 4/3**.

¹⁸⁰ Howell, “Notes on the Ngork Dinka of West Kordofan,” 32(2) SNR 239, 255 (1951), **Exhibit-FE 4/3**.

153. As discussed below, the Ngok also seasonally graze their cattle away from their permanent settlements, both during the dry season to obtain water and pasture for their cattle, and during the rainy season to escape flooding, mud and insects.¹⁸¹ As with their permanent settlements, each of the Ngok Chiefdoms has its own areas of common land used during seasonal grazing cycles.¹⁸²

154. The current leadership of the nine Ngok Dinka Chiefdoms is as follows:

CHIEFDOM	CHIEF
PARAMOUNT CHIEF (ABYIOR)	Kuol Deng Kuol Arop
ABYIOR	Kuol Alor Makuac Biong
ACHAAK	Chol Pur Chol Executive Chief Ring Makuac Dhel Yak
ACHUENG	Ajak Malual Beliu
ALEI	Belbel Chol Akuei Deng
ANYIEL	Akonon Ajuong Deng Tiel
BONGO	Nyol Paguot Deng Ayei
DIIL	Arop Kuol Kwon
MANYUAR	Bagat Makuac
MARENG	Mijak Kuol Lual Deng

155. The nine Ngok Dinka Chiefdoms are further sub-divided into 23 “sections” in total (two or three per Chiefdom), each headed by a sectional chief. There may also be junior chiefs, depending on the size and number of sections within the Chiefdom.¹⁸³

d) Descent Groups

156. Within each section of the nine Ngok Dinka Chiefdoms, the smaller, functional social units are based on descent, as distinguished from territorial boundaries. Descent comprises clans, sub-clans (or lineages), kin groups, families and “houses” (larger families with multiple wives and children). The Ngok Dinka place substantial weight on individual descent

¹⁸¹ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 126 (1997), **Exhibit-FE 8/14**.

¹⁸² D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 128 (1997), **Exhibit-FE 8/14**.

¹⁸³ F. Deng, *Tradition and Modernization* 13 (1971), **Exhibit-FE 5/2**.

as conferring social status and permitting political authority.¹⁸⁴ Particularly as to Chiefs and Paramount Chiefs, ancestral lineage can be traced many generations into the past (15 or more).

157. Clans share a common ancestor, although the exact link may not be easily traceable. At the sub-clan level, also called *dhien* or *gol*, the genetic link is more directly traceable. Day-to-day decision making will be carried out by the clan head (*nom gol*), together with the leaders and heads of the various lineages.¹⁸⁵ Clans and sub-clans also provide means for airing grievances and dispute resolution, in some instances religiously-based.¹⁸⁶

e) Age Sets

158. An important and distinctive aspect of the Ngok Dinka social structure is its “age-set” system.¹⁸⁷ An age set is a “recognised and sometimes organised group consisting of persons (often male persons only) who are of the same age ... normally formed of all those males who are initiated at one time Once a person enters a given age-set, whether at birth or by initiation, he remains a member of the same age-set for the remainder of his life.”¹⁸⁸

159. Formal initiation amongst the Ngok into an age set takes place between the ages of 16 and 18.¹⁸⁹ The Ngok Dinka do not initiate females, although women of an age similar to the various age sets often participate with their corresponding male groups in activities.¹⁹⁰

160. The age set system cuts across the other aspects of social organization (e.g., clans) and allows for interaction and cohesion among Ngok of similar ages, but with different geographic or descent based identifications.¹⁹¹ An elder of the Ngok describes the age set as being important “to build the community and solidarity with each other.”¹⁹²

161. In most Ngok Dinka Chiefdoms, the ceremony of initiation into an age set traditionally involved marking scars on the forehead (*gar*).¹⁹³ The initiation allowed a young Ngok Dinka male to graduate from status of boy or *dhool* to that of *adheng* or adult and creates a system of military regimentation to train young warriors. Some Chiefdoms, including the Abyior, use other formalities for age setting including instructions in social behavior, military training and rituals to mark the symbolic promotion into adulthood.¹⁹⁴ The age set initiation

¹⁸⁴ F. Deng, *Tradition and Modernization* 13 (1971) (“The authority of traditional Dinka chiefs is interlinked with the religious beliefs of the people... Since chiefs are believed to have divine origin, all the members of their clans are said to inherit this religious importance... The members of these lineages have the power to bless or curse a person... Their power is more than ritual; it is traceable to the origin of the tribe, and is inherent.”), **Exhibit-FE 5/2**.

¹⁸⁵ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 24 (1986), **Exhibit-FE 7/4**.

¹⁸⁶ F. Deng, *Tradition and Modernization* 29 (1971), **Exhibit-FE 5/2**.

¹⁸⁷ F. Deng, *Dinka and their Songs* 9-10 (1973), **Exhibit-FE 5/7**.

¹⁸⁸ Radcliffe-Brown, *Age Organization – Terminology*, *Man*, XXIX (1929), **Exhibit-FE 3/11**; M. L. Ritter, “The Conditions Favoring Age-Set Organization” 36(1) *J. of Anthropological Research* 87 (1980) at p. 87, **Exhibit-FE 6/8**.

¹⁸⁹ F. Deng, *Dinka and their Songs* 42 (1973), **Exhibit-FE 5/7**.

¹⁹⁰ F. Deng, *Dinka and their Songs* 46 (1973), **Exhibit-FE 5/7**.

¹⁹¹ In inter-sectional events, members of the same age-set unite. Sometimes territorial entities evolved when age sets broke away from older groups and founded their own settlements. F. Deng, *Tradition and Modernization* 19 (1971), **Exhibit-FE 5/2**.

¹⁹² Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 2, ¶6.

¹⁹³ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 24 (1986), **Exhibit-FE 7/4**.

¹⁹⁴ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 24 (1986), **Exhibit-FE 7/4**.

process plays a vital role in developing and preserving the distinctive Ngok social cohesion and in inculcating and transmitting tribal customs, values and history.¹⁹⁵

162. The current Chief of the Bongo explains the age set initiation rites:

“The age set initiation is an important part of the Ngok oral tradition and most Ngok men are able to remember the ancestry of their age sets, both in terms of name and place. When Ngok Dinka men come together, they often tell each other about their age set. The Bongo, as with the other Ngok, would have a name for each age set. ... The sub-sections would initiate and mark their young men in different places – always where there was water, which is a source of strength, and trees which we believe hides them from any curses. After the sub-sections complete the marking, all of the sub-sections of the Bongo would come together as an age set of the chiefdom and complete the traditional ceremony, which includes singing and often dancing.”¹⁹⁶

163. The geographical location of age set initiations (“age set sites”) have cultural importance in Ngok society. Each age set is assigned a leader from the Chiefdom, who will “name the age set and place of initiation and take responsibility for those men in the group.”¹⁹⁷

5. Ngok Dinka Religion

164. One of the defining features of the Dinka, and particularly the Ngok Dinka, is their striking “cultural uniformity.”¹⁹⁸ One researcher wrote that their “*cultural and linguistic homogeneity is striking* ... [and] they may here be treated as single people”¹⁹⁹ Another described “their *widespread cultural and linguistic homogeneity*.”²⁰⁰

165. The Ngok have retained their distinctive cultural beliefs and practices, despite the past centuries of conflict in Sudan. Notwithstanding their close proximity to northern Sudanese, including the Misseryia Arabs, the Ngok are among the groups in southern Sudan least affected by either Islamic and Arabic influences or modernization.²⁰¹

166. Although many Ngok have embraced Christianity, traditional beliefs remain important. Traditionally, the Ngok Dinka shared a common belief in a “supreme being,” known as *Nhialic* (translated as Almighty God), and in a “complex system of spirits.”²⁰² In

¹⁹⁵ Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 2, ¶7 (“The age set initiation is an important part of the Ngok oral tradition and most Ngok men are able to remember the ancestry of their age sets, both in terms of name and place.”); Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 2, ¶¶6-7 (“The age set is important to build the community and solidarity with each other. It is also important because the age set organises the young men into strong groups to protect the community.”).

¹⁹⁶ Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 2, ¶¶6-7. *See also* Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 2, ¶7 (“The age set is important to build the community and solidarity with each other. It is also important because the age set organises the young men into strong groups to protect the community.”).

¹⁹⁷ Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 2, ¶6 (“Each age set group is given a leader, who is someone from the Chiefdom, who will name the age set and place of initiation and take responsibility for those men in the group.”).

¹⁹⁸ F. Deng, *Dinka and their Songs* 1 (1973), **Exhibit-FE 5/7**.

¹⁹⁹ G. Lienhardt, *Divinity and Experience, The Religion of the Dinka* 1 (2003), **Exhibit-FE 11/7** (emphasis added).

²⁰⁰ M. Nikkel, *Dinka Christianity* 23 (2001), **Exhibit-FE 9/5**.

²⁰¹ Howell, “*Notes on the Ngork Dinka of West Kordofan*,” 32/2 SNR 239, 248 (1951), **Exhibit-FE 4/3**.

²⁰² F. Deng, *Tradition and Modernization* 14 (1971), **Exhibit-FE 5/2**.

day to day life the “divinities and the dead” (often ancestors), continue to constitute an important part of Ngok society.²⁰³

167. Ritual is important in Ngok culture as illustrated by the tradition of offering food for ancestral spirits, before eating or drinking, especially within new settings on Ngok lands.²⁰⁴ Offerings are also made at burial sites of chiefs and other prominent individuals within the Ngok Dinka community. For example, at the burial site of Deng Koklek of the Abyior Chiefdom, “Ngok of all chiefdoms will stop and make an offering.”²⁰⁵

6. Ngok Dinka Land

168. Ngok land is associated with the tribe’s ancestors, who are believed to remain present in the tribe’s historic territories, and has deep religious significance for the tribe.²⁰⁶ Francis Deng wrote that the “land cannot be evaluated in material terms alone” and it “has strong religious significance, particularly in the link with ancestral spirits and clan divinities.”²⁰⁷

169. The Ngok bury their dead in their villages and homesteads, resulting in a continuing spiritual connection between the land and the tribe’s ancestors.²⁰⁸ Indeed, the Dinka term for grave (*tiop*) also means land, reflecting the link between Ngok territory and their spiritual and cultural lives.²⁰⁹

170. The religious significance of the Ngok Dinka land is also reflected in the mechanism for swearing an oath in Ngok culture. When called upon to establish his (or her) truthfulness, a Ngok Dinka will swear upon the Ngok land.²¹⁰ That reflects the oath-taker’s submission to the judgment of the ancestors, who are spiritually associated with the lands of the Ngok Dinka.²¹¹

171. The land of the Abyei region also has practical and economic importance to the Ngok Dinka. Thus, the Ngok herd cattle, gather edible fruits and plants, grow crops, gather herbs, collect reeds, wood and clay for building, basket-making and fuel, hunt, build homes and

²⁰³ F. Deng, *Tradition and Modernization* 14, 16 (1971), **Exhibit-FE 5/2**. The relationship between the Ngok and deceased relatives is extremely important as they prioritize the demands of the dead over the living. Every action on a daily basis must be considered in light of its possible effect on the divinities, thereby acting as a powerful influence on behaviour and inspiring rituals and sacrifice. F. Deng, *The Cow and the Thing Called 'What': Dinka Cultural Perspectives on Wealth and Poverty*, 52(1) J. Int’l Affairs 101, 106 (1998), **Exhibit-FE 8/15**.

²⁰⁴ F. Deng, *The Cow and the Thing Called 'What': Dinka Cultural Perspectives on Wealth and Poverty*, 52(1) J. Int’l Affairs 101, 104 (1998), **Exhibit-FE 8/15**.

²⁰⁵ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 6, ¶29.

²⁰⁶ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 6, ¶25 (“we as a people put great significance in the place of our homes (and settlements). This is where we live, but also where we bury our dead”).

²⁰⁷ F. Deng, *Property and Value Interplay among the Nilotes of the Southern Sudan*, 51(3) Iowa L. Rev. 541, 549 (1966), **Exhibit-FE 4/15**; see also F. Deng, *The Cow and the Thing Called 'What': Dinka Cultural Perspectives on Wealth and Poverty*, 52(1) J. Int’l Affairs 101, 104 (1998) (“these [religious] rituals, which are associated with the value of the ancestral land have a bearing on the rules favouring perpetuity in traditional land tenure.”), **Exhibit-FE 8/15**.

²⁰⁸ F. Deng, *The Cow and the Thing Called 'What': Dinka Cultural Perspectives on Wealth and Poverty*, 52(1) J. Int’l Affairs 101, 104 (1998), **Exhibit-FE 8/15**.

²⁰⁹ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at pp. 5, 6, ¶¶25-29; F. Deng, *Property and Value Interplay among the Nilotes of the Southern Sudan*, 51(3) Iowa L. Rev. 549 (1966), **Exhibit-FE 4/15**.

²¹⁰ F. Deng, *The Cow and the Thing Called 'What': Dinka Cultural Perspectives on Wealth and Poverty*, 52(1) J. Int’l Affairs 104 (1998), **Exhibit-FE 8/15**; F. Deng, *Tradition and Modernization* 244 (1971), **Exhibit-FE 5/2**.

²¹¹ F. Deng, *The Cow and the Thing Called 'What': Dinka Cultural Perspectives on Wealth and Poverty*, 52(1) J. Int’l Affairs 104 (1998), **Exhibit-FE 8/15**; F. Deng, *Tradition and Modernization* 244 (1971), **Exhibit-FE 5/2**.

bury their dead on their lands in the Abyei region.²¹² As discussed below, all of these aspects of Ngok culture are adapted to and intertwined with the Abyei region's distinctive ecology, geography and climate.²¹³

172. Ngok tribal custom and law grant individuals and families the exclusive right to use the land they possess (which does not amount to ownership of the land, which is held communally); this facilitates, and is a prerequisite for, organized cultivation of the sort practiced by the Ngok.²¹⁴ In family compounds, each house belongs to the co-wives who are affiliated with it, and who own certain fields that they may cultivate collectively.²¹⁵

173. Under Ngok Dinka law and custom, land cannot be sold. An individual can make a gift of his land to a member of the tribe, subject to permission being granted by the section chiefs and the Paramount Chief.²¹⁶ Ngok may pass the land which they (and their families) use from generation to generation and the right of the individual Ngok to his residential land is so well-recognized that even if he abandons it, it must be kept unoccupied unless he gives consent to a relative to take it over.²¹⁷

174. Among the Paramount Chief's and Chief's powers is the authority to grant or deny other tribes the right to use Ngok Dinka lands.²¹⁸ An elder of the Abyior explains that "[w]hen visitors passed through [the Abyior's] permanent settlements, they would seek permission from the chief to pass and to graze on the lands", including the "Dinka neighbours from the south" and the "Misseriya neighbours from Deinga."²¹⁹ Permission was not granted for all activities, with an Alei Chief recalling that "[t]he Misseriya did not have permission to hunt on Alei lands" and that sanctions would result if they were caught doing so.²²⁰

175. Permission to use Dinka territories involved performance of rituals. The Alei Chief recalled that no Misseriya "was permitted to fish in the [local] river until a Ngok ritual was performed," which involved "bringing a goat to the river, drowning it and releasing the dead animal into the river along with some sorghum."²²¹

7. Ngok Dinka Cultivation

²¹² M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 19 (1983), **Exhibit-FE 7/1**; A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province*, p. 7, 10-11, 21 and 25 (1978), **Exhibit-FE 6/5**; M. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 2-3, 4-5, 12 (1978), **Exhibit-FE 6/7**; M. Tibbs & A. Tibbs, *A Sudan Sunset* 133 (1999), **Exhibit-FE 8/17**; Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 3, ¶¶11-12.

²¹³ See below at paras. 176-189; 196-216.

²¹⁴ F. Deng, *Property and Value Interplay among the Nilotes of the Southern Sudan*, 51(3) Iowa L. Rev. 541, 548 (1966), **Exhibit-FE 4/15**.

²¹⁵ F. Deng, *Property and Value Interplay among the Nilotes of the Southern Sudan*, 51(3) Iowa L. Rev. 541, 548 (1966), **Exhibit-FE 4/15**.

²¹⁶ F. Deng, *Dinka of the Sudan* 107 (1972), **Exhibit-FE 5/5**.

²¹⁷ F. Deng, *Property and Value Interplay among the Nilotes of the Southern Sudan*, 51(3) Iowa L. Rev. 541, 549 (1966), **Exhibit-FE 4/15**.

²¹⁸ This can be done on a "one time only" or on a continuing basis, subject to conditions (for example an undertaking not to interfere with Ngok cultivation and crops). Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 4, ¶18; Witness Statement of Akonong Ajuong Deng Tiel (Chief of Abyior), at p. 4, ¶¶20-21.

²¹⁹ Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 4, ¶¶21, 23. Similarly, during the reign of Paramount Chief Deng Majok, a Misseriya tribesman asked permission to hunt in Abyei, although hunting had been prohibited. Deng Majok granted such permission but limited it to Akur, as that was the beginning of Twic Dinka territory. Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 7, ¶34. See also **Figures 22 to 24** (Ngok Dinka at Misseriya cattle camps in Abyei area), **Appendix H**.

²²⁰ Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 3, ¶16.

²²¹ Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 3, ¶15.

176. As noted above, and in contrast to their nomadic Misseriya neighbors to the north, the Ngok Dinka are avid cultivators. In one commentator's words, "if the Dinka has been mainly known to the outside world as a devoted owner of cattle," "*to be known as a cultivator, ... is a combination which is rare.*"²²² The Ngok Dinka are such a rarity.

177. Like other agro-pastoral Dinka, Ngok agricultural "land is for the most part clean and well cultivated" and shows a "*high degree of skill on the part of the cultivators.*"²²³ Ngok men and women both contribute to the field work during the planting and growing seasons for sorghum and other crops; at harvest, both men and women cut the sorghum heads.²²⁴ (As discussed below, visitors to the Abyei region during the early 20th century consistently remarked upon the prosperous and well-maintained character of Ngok Dinka agricultural plots and villages.²²⁵)

178. The Ngok agro-pastoral lifestyle is not coincidental, but is instead closely linked to the ecology, geography and climate of the Bahr river basin of the Abyei region. As discussed above, the black clay soil of the Bahr basin is among the most fertile in Sudan.²²⁶ The Ngok agricultural lands are centered on this region of fertile clay soil of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems, extending north to Nyama and Thur.²²⁷

179. In contrast, further north in the area of Muglad the black clay soil of the Bahr gives way to sandier, drier soils of the Kordofan desert regions which are ill-suited to agriculture.²²⁸ As discussed below, it is no coincidence that the Misseriya centered in this region are nomadic cattle herders for whom cultivation is incidental – for the simple reason that the Muglad region would not historically support it.²²⁹

180. Traditionally, the Ngok Dinka used a scapula of a giraffe or cow to cultivate the land.²³⁰ This is necessitated by the lack of iron or other metal in the area, but also reflects the adaptation of Ngok agricultural methods to the specific environment of the Abyei region (as well as the extreme remoteness of the entire area).²³¹

181. The Ngok cultivation methods have also adapted to suit the distinctive geography, ecology and climate of the Bahr region.²³² The crops which may be produced in the Abyei region include sorghum (*rab* [Arabic: *dura*]), a grain cultivated twice a year constituting the Ngok's main crop; zea maize; *ful sudani* (peanuts); sesame; a variety of gourds; beans; okra; and tobacco.²³³

²²² Stubbs & Morrison, "Land and Agriculture of the Western Dinka," 21 SNR 251 (1938), **Exhibit-FE 3/14**.

²²³ Stubbs & Morrison, "Land and Agriculture of the Western Dinka," 21 SNR 251, 258 (1938), **Exhibit-FE 3/14**.

²²⁴ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 12, 21 (1978), **Exhibit-FE 6/5**.

²²⁵ See below at paras. 206-216.

²²⁶ See above at paras. 97-98.

²²⁷ See below at paras. 1020-1033; Witness Statement of Mijok Bol Atem (Diil elder), at p. 3, ¶17.

²²⁸ See above at paras. 233-237.

²²⁹ See below at paras. 233-237.

²³⁰ See Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3, ¶15.

²³¹ See Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3, ¶15.

²³² D. Cole and R. Huntington, *Between a Swamp and a Hard Place* 153 (1997), **Exhibit-FE 8/14**.

²³³ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 22-23 (1978), **Exhibit-FE 6/5**; Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3, ¶12; Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 3, ¶17; Witness Statement of Mijok Bol Atem (Diil elder), at p. 3, ¶17; Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 2, ¶7; Witness Statement of Deng Chier Agoth (Abyior elder), at p. 2, ¶5.

182. The Ngok's staple crop sorghum (*rab/dura*) is ideally-suited to the Bahr region. Given the intensity and length of the rainy season (discussed above²³⁴), it is "***impossible to begin to cultivate the soil before the rains begin and the crop must be ready for harvest before the flood reaches its height.***"²³⁵ This means that any crop grown "must be something that reaches maturity quickly and whose whole growing period is not more than three months."²³⁶ Agricultural researchers explain that sorghum is ideally adapted to this environment, by virtue of being quick maturing and capable of being "***harvested 80 to 90 days after sowing.***"²³⁷

183. The Ngok Dinka's sorghum is also well-suited to the Abyei region for other reasons, including because it is "***drought resistant***"²³⁸ – a distinct advantage given climatic conditions. Indeed, earlier inhabitants of southern Sudan, including the Luo, are described as having been forced to relocate southwards, precisely because they did not possess sorghum.²³⁹

184. Similarly, the Ngok cultivate different types of sorghum, in a form of crop rotation adapted to the exigencies of the Abyei environment.²⁴⁰ The Ngok crop rotation minimizes the risk of local pests or diseases.²⁴¹ In particular a weed called *striga*, native to the Abyei region, devastates crop yields after a long period of seed dormancy.²⁴²

185. The adaptation of Ngok cultivation practices to the Abyei region are confirmed by contemporary scientific research. The Harvard Development Project conducted research in the Abyei region between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga rivers systems in the 1970s, with the objective of encouraging agriculture on "vast stretches of relatively open plains" which the Ngok had not cultivated.²⁴³ The Project discovered, instead, that the areas of "sandy ridges" in the Abyei region were "too high and dry in the rainy season to grow anything but grass" using conventional planting and tilling methods.²⁴⁴ The Project participants concluded that traditional Ngok methods were well suited to the land and preferable to various other technologies they experimented with.²⁴⁵

186. Traditional agriculture in the Abyei region is the system of "small-scale farms" based on the household structure and depends on nearby plots for cultivation and permanent

²³⁴ See above at paras. 103-105.

²³⁵ Stubbs & Morrison, "Land and Agriculture of the Western Dinka," 21 SNR 251, 258 (1938), **Exhibit-FE 3/14.**

²³⁶ Stubbs & Morrison, "Land and Agriculture of the Western Dinka," 21 SNR 251, 258 (1938), **Exhibit-FE 3/14.**

²³⁷ Stubbs & Morrison, "Land and Agriculture of the Western Dinka," 21 SNR 251, 258 (1938), **Exhibit-FE 3/14.**

²³⁸ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 92 (2004), **Exhibit-FE 12/18.**

²³⁹ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 92 (2004), **Exhibit-FE 12/18.**

²⁴⁰ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 117 (1997), **Exhibit-FE 8/14.**

²⁴¹ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 11 (1978), **Exhibit-FE 6/5.**

²⁴² D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 117 (1997), **Exhibit-FE 8/14.**

²⁴³ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 153 (1997), **Exhibit-FE 8/14.**

²⁴⁴ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 153 (1997), **Exhibit-FE 8/14.**

²⁴⁵ The Development Project team proposed the use of tractors for tilling, but tractor drawn implements could not penetrate the hard, clay soil prior to the rains and then could only work when the rains were not too heavy. Low lying areas filled with water so that tractors could not pass. After more than three years of attempting to improve upon the Ngok method of cultivation, the Project concluded that tractor tillage was "an inappropriate technology for sorghum production around Abyei" and the traditional Ngok method of cultivation by hand was preferable. D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 155 (1997), **Exhibit-FE 8/14.**

homesteads for crop-tending, harvesting and storage.²⁴⁶ The “arable land” is “found immediately round the house,” in small gardens, together with larger areas of approximately “1 ¾ acres.”²⁴⁷ The result is comparatively extensive cultivation: “the total extent of permanent cultivation may easily, in the case of the larger villages, amount to many hundreds of acres.”²⁴⁸ The cultivated areas are split between a small garden next to the homestead and cultivation is of “relatively large food crops a distance away from the settlement (usually about ½ to 1 kilometer).”²⁴⁹

187. Researchers studying Ngok agricultural methods have also concluded that the distinctive agricultural practices of the Ngok have been possible because of what one study termed the “*complete and absolute domestication of [the Ngok] cattle*.”²⁵⁰ Dinka cattle are tethered at night to a peg near the owners’ homes, so that garden soil near homesteads receive a steady supply of urine and dung, “to maintain the soil in a condition of adequate fertility.”²⁵¹

188. Traditionally, the Ngok would plant two crops each year: first in May or June, which would be harvested in September or October, and second, immediately following the harvest, which would be ready in December or January when the cattle returned home from the cattle camps in the north.²⁵² Again, these cycles were adapted to the particular climatic conditions of the Abyei region, as well as to the fast-maturing character of the sorghum crop.

189. Following harvest, sorghum is dried on the floors of family homes and then placed on a wooden structure (*Jong*), where it is stored in a container made from grass (*pik*) between December and February.²⁵³ Excess farm production was historically kept by the Ngok for trading with other tribes (or one another).²⁵⁴

8. Ngok Dinka Cattle

190. Ngok Dinka culture has long revolved around cattle, again adapted to the particular climate and environment of the Abyei region. Cattle are intertwined with almost every element of Ngok society and have a religious and cultural significance that transcends their practical value, not being used for agricultural purposes or beasts of burden.

a) Role and Significance of Cattle

²⁴⁶ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 11 (1978), **Exhibit-FE 6/5**.

²⁴⁷ Stubbs & Morrison, “*Land and Agriculture of the Western Dinka*,” 21 SNR 251, 258 (1938), **Exhibit-FE 3/14**.

²⁴⁸ Stubbs & Morrison, “*Land and Agriculture of the Western Dinka*,” 21 SNR 251, 258 (1938), **Exhibit-FE 3/14**.

²⁴⁹ Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 2, ¶7.

²⁵⁰ Stubbs & Morrison, “*Land and Agriculture of the Western Dinka*,” 21 SNR 251, 251-252 (1938), **Exhibit-FE 3/14**.

²⁵¹ Stubbs & Morrison, “*Land and Agriculture of the Western Dinka*,” 21 SNR 251, 252 (1938), **Exhibit-FE 3/14**.

Some Ngok Chiefdoms, including the Mareng, also employ “a method of burning grass” to clear the land and “leave it very fertile for planting.” Witness Statement of Malual Alei Deng, at p. 3, ¶10.

²⁵² Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 2, ¶8; Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyiel), at p. 4, ¶21; Witness Statement of Deng Chier Agoth (Abyior elder), at p. 2, ¶5.

²⁵³ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 21 (1978), **Exhibit-FE 6/5**; Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 3, ¶9.

²⁵⁴ Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 3, ¶13.

191. Cattle are at the center of the Dinka religion,²⁵⁵ both as objects of sacrifice in the “communion between man and God” and as symbols of “moral values and identity.”²⁵⁶ The Ngok Dinka regard cattle as sacred, and the life of a cow is approximated to that of a human.²⁵⁷ At an early age, every male Ngok is given an ox by his father, as well as a name derived from the animal’s color which he retains throughout his life.²⁵⁸

192. As with Ngok agricultural practices and crops, the Ngok cattle and cattle herding practices are well-adapted to the Bahr river basin of the Abyei region. Ngok Dinka cattle are Nilotic or Dinka which have “long massive horns and a relatively small hump.”²⁵⁹ Although they mature rapidly, Ngok cattle do not move well in sandy, desert terrain, but instead are well-adapted to damper terrain of the Abyei region (and much better in this environment than the long-legged, large-humped, short-horned zebu cattle of the Misseriya).²⁶⁰

193. Thus, Bennett, John and Hewison conclude that “the differences between northern and southern cattle are more than morphological, since *it is regularly observed that neither type thrives in the other’s environment; in fact a large proportion of Arab cattle will die if maintained in the south during the rains.*”²⁶¹ Likewise, Cunnison observed (citing Misseriya reports) that Dinka cattle can “*stand mud better*” than Misseriya cattle, which is an essential part of living in the Abyei region.²⁶² To the same effect, the ABC Report noted that the Ngok cattle were better adapted to the wetter conditions of the Abyei region than the Misseriya cattle.²⁶³

194. The Dinka regard their cattle as “God’s special gift to his chosen people, the Dinka, and therefore, the most noble form of wealth.”²⁶⁴ Dinka use their cattle principally as a source of milk, as opposed to meat,²⁶⁵ and do not use cattle for agricultural ploughing.²⁶⁶ Cattle also serve as a form of currency in Ngok culture,²⁶⁷ with Ngok males procuring wives and paying debts (including fines and taxes) with cattle.²⁶⁸

²⁵⁵ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 125 (1997), **Exhibit-FE 8/14**.

²⁵⁶ M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 5 (1983), **Exhibit-FE 7/1**.

²⁵⁷ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 30 (1986), **Exhibit-FE 7/4**.

²⁵⁸ F. Deng, *Tradition and Modernization* 274 (1971), **Exhibit-FE 5/2**.

²⁵⁹ Bennett, John & Hewison, in J. Tohill (ed.), *A Handbook of Agriculture as Practised in the Anglo-Egyptian Sudan* 635 (1948), **Exhibit-FE 3/19a**; see also I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 37 (1966), **Exhibit-FE 4/16**; D. Fahey, *The Political Economy of Livestock and Pastoralism in Sudan*, IGAD Livestock Policy Initiative, IGAD LPI Working Paper No. 06-08 (2007), at p. 36, **Exhibit-FE 15/16**. See **Figures 17 to 19**, inclusive (Dinka cattle), **Appendix H**.

²⁶⁰ I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 37 (1966), **Exhibit-FE 4/16**; see also D. Fahey, *The Political Economy of Livestock and Pastoralism in Sudan*, IGAD Livestock Policy Initiative, IGAD LPI Working Paper No. 06-08 (2007), at p. 36, **Exhibit-FE 15/16**. See **Figure 20** (Misseriya cattle), **Appendix H**.

²⁶¹ Bennett, John & Hewison, in J. Tohill (ed.), *A Handbook of Agriculture as Practised in the Sudan* 635 (1948), **Exhibit-FE 3/19a** (emphasis added).

²⁶² I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 37 (1966), **Exhibit-FE 4/16**.

²⁶³ ABC Report, Part I, at p. 27, **Appendix B**.

²⁶⁴ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 30 (1986), **Exhibit-FE 7/4**.

²⁶⁵ M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 6 (1983), **Exhibit-FE 7/1**.

²⁶⁶ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 19 (1978), **Exhibit-FE 6/5**. See also Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 2, ¶6.

²⁶⁷ 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. 108, **Exhibit-FE 4/11**; Deng, *Property and Value Interplay among the Nilotes of*

195. Cattle ownership is bound up with social and political status among the Ngok Dinka.²⁶⁹ To have rights in a herd of cattle is to have rights in a descent group, and through that in the political group in which that descent group belongs; without cattle, one has no place in mainstream Ngok society.²⁷⁰

b) Seasonal Grazing of Cattle Herds

196. Seasonal grazing of the tribal cattle herds play a central role in the culture of the Ngok Dinka. The activities of the Ngok rotate around herding (as well as farming) and can be divided into four seasons: (a) *Ker* (May to July) and (b) *Ruel* (July to October), which together form the rainy season, along with (c) *Rut* (November to February) and (d) *Moi* (January to May), which together form the dry season.²⁷¹

197. Again, the seasonal grazing of the cattle is well-adapted to the climate and ecology of the Bahr river basin of the Abyei region. For some Ngok Dinka Chiefdoms, the Ngok cattle herds spend much of the wet season in the northern parts of the Abyei region.²⁷² As one author explains, the heavy rains and flooding in the swampy areas of the settlements force the Ngok herders and cattle “to withdraw to the limited high ground.”²⁷³

198. During the early part of the wet season, cattle are kept at the family homesteads and are protected by the distinctive architecture of the Ngok cattle byres (*luak*). These structures are built on high ground on wooden piers which protect the cattle from the mud, flood waters and insects.²⁷⁴

199. At the beginning of July, the Ngok cattle are taken to “the high *gok* forest in charge of the young men and the unmarried girls, who are responsible for milking of the cows, while the married men and women remain behind on the villages [sic] to do the weeding and keep the cultivations clean.”²⁷⁵ As discussed in greater detail below, the Ngok cattle camps then move north – either towards the *goz* or Lake Keilak.²⁷⁶ After the harvests in September and December the returned cattle are permitted to graze on the “dura stalks on the very wet arable land during the day and at night are tethered in the communal *wuts*.”²⁷⁷

200. During the dry months of January to April, “as the home grazings become exhausted the cattle are taken further and further away, either to the Kiir/Bahr el Arab or to the Twic Dinka district, where they remain until the beginning of May when they return to their

the Southern Sudan 51(3) Iowa L. Rev. 541, 545 (1966), **Exhibit-FE 4/15**. See also Witness Statement of Arop Deng Kuol Arop (Abyei elder and Agriculturalist), at p. 2, ¶6.

²⁶⁸ For example, when a man is killed, even accidentally, his relatives are compensated with cattle. F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 30 (1986), **Exhibit-FE 7/4**.

²⁶⁹ 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. 110, **Exhibit-FE 4/11**.

²⁷⁰ G. Lienhardt, *Divinity and Experience, The Religion of the Dinka* 26 (2003), **Exhibit-FE 11/7**.

²⁷¹ Howell, “Notes on the Ngok Dinka of West Kordofan,” 32/2 SNR 239, 243-245 (1951), **Exhibit-FE 4/3**; F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 31 (1986), **Exhibit-FE 7/4**.

²⁷² D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 96 (1997), **Exhibit-FE 8/14**.

²⁷³ P. Howell, *Some Observations on the Baggara Messiria of Western Kordofan* 5 (1948), **Exhibit-FE 3/20**.

²⁷⁴ Ali El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province*, at p. 8, **Exhibit-FE 6/5**; F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 32 (1986), **Exhibit-FE 7/4**; Stubbs & Morrison, “Land and Agriculture of the Western Dinka,” 21 SNR 251, 264 (1938), **Exhibit-FE 3/14**.

²⁷⁵ Stubbs & Morrison, “Land and Agriculture of the Western Dinka,” 21 SNR 251, 264 (1938), **Exhibit-fe 3/14**.

²⁷⁶ **Map 25** (Abyei Area: Grazing Patterns in the Wet Season); **Map 13** (Ngok Dinka Chiefdoms, 1905). See also below at paras. 1064-1081.

²⁷⁷ Witness Statement of Arop Deng Kuol Arop (Abyei elder and Agriculturalist), at p. 2, ¶6.

villages and the serious work of manuring and cultivation begins.”²⁷⁸ Operating within the general seasonal grazing pattern described above, each Ngok Chiefdom has its own grazing routes and locations, based on its tribal lands (as discussed in greater detail below).²⁷⁹

201. By February, the pastures in settled areas cannot support large herds, and the Ngok cattle camps move southwards to empty areas south of the Kiir/Bahr el Arab.²⁸⁰ By the height of the dry season, the Abyior cattle herds, for example, move far to the southeast pushing against the borders of the Nuer territory.²⁸¹ The Alei take their cattle to move to the Kiir/Bahr el Arab and the swampy areas of the *tooc* further south.²⁸² The seasonal grazing patterns of the Ngok are discussed in greater detail below.²⁸³

202. The Ngok seasonal grazing patterns are part of a larger, multi-tribal system of seasonal pasture allocation. As described by the Abyei Development Project, the Ngok, Twic, Nuer and Misseryia tribes have “long choreographed their herd movements: south in the dry season, north in the wet season, swing to the east in drought years, slide toward the west in rainy years.”²⁸⁴ (The seasonal grazing of the Misseriya, which is one part of this multi-tribe system, is discussed in greater detail below.²⁸⁵)

203. These seasonal grazing patterns of the Ngok and other tribes are based upon custom, which involves permission being granted by authorities of the host territory for the grazing of other tribes.²⁸⁶ As described by the current Paramount Chief of the Ngok Dinka:

“It is a Ngok tradition to seek a blessing for the members of the cattle camps before their departure to the grazing lands by offering a sacrifice to ensure their protection on the journey. On the way to the grazing areas, a cattle camp will pass by sites of spiritual significance, such as in the highland grazing areas, or rivers or forests, where it is necessary to offer further sacrifices. When in the territory of another chiefdom, the *majong awut*, the leader of the cattle camp, must seek permission from the local chief, who is then responsible for conducting the ritual. Depending on the size of the gathering, a goat or a cow will be sacrificed and the cattle camp will join with the chiefdom’s hosts to feast before proceeding on their journey.”²⁸⁷

204. In the Ngok cattle camps, the basic organizational unit is the campfire, which is a group of four to five Ngok Dinka (usually) men caring for approximately 100 cattle; a camp may consist of as few as one campfire or as many as 25.²⁸⁸ The cattle camp is overseen by the *majong awut* (or cattle camp chief) who is chosen for his ability “to resolve disagreements between hearths within a camp” and for his “ability to represent the camp in negotiations

²⁷⁸ **Map 26** (Abyei Area: Grazing Patterns in the Dry Season); **Map 13** (Ngok Dinka Chiefdoms, 1905). Stubbs & Morrison, “*Land and Agriculture of the Western Dinka*,” 21 SNR 251, 264 (1938), **Exhibit-FE 3/14**; *see also* Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3, ¶11.

²⁷⁹ *See below* at paras. 1064-1081.

²⁸⁰ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 129 (1997), **Exhibit-FE 8/14**.

²⁸¹ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 92 (1997), **Exhibit-FE 8/14**.

²⁸² Witness Statement of Belbel Chol Akuei Deng, (Chief of Alei), at p. 3, ¶18.

²⁸³ **Map 25** (Abyei Area: Grazing Patterns in the Wet Season) and **Map 26** (Abyei Area: Grazing Patterns in the Dry Season); **Map 26** (Abyei Area: Grazing Patterns in the Dry Season); **Map 13** (Ngok Dinka Chiefdoms, 1905); *see below* at paras. 1064-1081.

²⁸⁴ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 56 (1997), **Exhibit-FE 8/14**.

²⁸⁵ *See below* at paras. 238-248.

²⁸⁶ F. Deng, *Dinka and their Songs* 37 (1973), **Exhibit-FE 5/7**; Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 3, ¶¶10-13.

²⁸⁷ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at pp. 8-9, ¶40.

²⁸⁸ M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 7 (1983), **Exhibit-FE 7/1**. Each hearth contains cattle associated with as many as ten different homesteads. *See Figure 21* (Dinka cattle camp), **Appendix H**.

with the other Dinka camps, settled peoples, or officials with whom the camp comes in contact.”²⁸⁹

205. Despite their cultural and practical importance, only a small number (roughly 5 percent) of Ngok Dinka tribesmen and women physically move with the cattle during their migrations.²⁹⁰ The Ngok Paramount Chief and other Chiefs will ordinarily not move with the cattle herds, and instead remain in the Chiefdom’s permanent villages.²⁹¹ In the words of members of the Abyei Development Project team: “most Ngok Dinka have toiled in their fields while dreaming and singing praises of their absent cattle.”²⁹² Although there may be a few elders at each cattle camp to maintain discipline, only young men and some teenage girls are tasked with looking after the cattle during the seasonal grazing.²⁹³

9. Ngok Dinka Homes and Villages

206. The design and composition of Ngok Dinka homes and villages reflect the people’s roots in the land they inhabit and, as with agricultural and cattle-herding practices, are well-adapted to the distinctive environment of the Abyei region. Ngok villages are permanent settlements, while their houses are equally permanent constructions, built entirely from local materials and adapted to the Ngok’s agricultural and other needs. The houses are aesthetic (and practical) masterworks and have long attracted the attention of visitors to the Abyei region, leading to the Ngok’s reputation as “*the master-builders of the tribes*.”²⁹⁴

207. Ngok villages are “always inhabited by the older men and women who remain there even when the younger people are away with the bulk of the cattle on the far off grazings.”²⁹⁵ Cunnison describes a Ngok Dinka “village” as “not only a group of people in *more or less permanent association, but it is also one which is tied to, and has specific rights in, an area of land*.”²⁹⁶ That reflects the agricultural character of the Ngok Dinka, whose life remains centered on their “villages,” which are “in every sense of the word *permanent*” homes and fields.²⁹⁷

²⁸⁹ M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 8 (1983), **Exhibit-FE 7/1**.

²⁹⁰ M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 5 (1983), **Exhibit-FE 7/1**.

²⁹¹ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶39 (“The pattern of seasonal grazing was for the young men of the cattle camps to take the cattle to the north in the rainy season ... and to the south in the dry season.”).

²⁹² M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 6 (1983), **Exhibit-FE 7/1**.

²⁹³ M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 7 (1983), **Exhibit-FE 7/1**; see also Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3, ¶8.

²⁹⁴ C. Treatt, *Out of the Beaten Track, A Narrative of Travel in Little Known Africa* 55 (1931), **Exhibit-FE 3/13**.

²⁹⁵ Stubbs & Morrison, “*Land and Agriculture of the Western Dinka*,” 21 SNR 251, 253 (1938), **Exhibit-FE 3/14**; see also Witness Statement of Deng Chier Agoth (Abyior elder), at p. 2, ¶7; Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 2, ¶6. Ngok Dinka families ordinarily leave members at home to protect grain and other possessions stored in the house. In periods of drought, the entire family may be forced temporarily to abandon their homes for the dry season as water for drinking and watering the livestock disappears entirely from many parts of the Abyei region. D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 90-91 (1997), **Exhibit-FE 8/14**.

²⁹⁶ 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. 113, **Exhibit-FE 4/11** (emphasis added).

²⁹⁷ F. Deng, *Property and Value Interplay among the Nilotes of the Southern Sudan*, 51(3) Iowa L. Rev. 546 (1966), **Exhibit-FE 4/15** (emphasis added); Stubbs & Morrison, “*Land and Agriculture of the Western Dinka*,” 21 SNR 251 (1938), **Exhibit-FE 3/14**.

208. The Ngok Dinka's houses (*tukuls*) are sturdy constructions, with circular, reinforced mud walls and conical thatched roofs.²⁹⁸ Grass used for thatching is the stiff variety found in swampy areas which is cut about three feet from the top.²⁹⁹ The cattle byre (*luak*) is a larger version of the same structure, sometimes two stories high.³⁰⁰ In some locations, the structures may be built on stilts, to protect them from flooding.³⁰¹ Ngok houses are repaired and expanded during the early dry season (when less agricultural work is required and when the reeds used for construction are dry but not brittle).³⁰²

209. As described by the Ngok Dinka Paramount Chief, a village's *tukuls* "are ***the centre of the village and community***,"³⁰³ with the Ngok "put[ting] great significance in the place of [their] homes (and settlements)."³⁰⁴ As noted above, relatives were traditionally buried inside or directly in front of the *tukul*,³⁰⁵ while "the chiefs are always buried at the front of the *luak*, signifying their importance in connection with the importance of cattle to the Ngok."³⁰⁶

210. Visitors to the Abyei region over the years have been struck by the design and construction of Ngok Dinka houses. Court Treatt, who traveled throughout Africa during the first part of the 20th century, wrote about the region surrounding Abyei town and the Ngok buildings as follows:

"As we drew nearer and obtained a clearer view of the village standing on rising ground, it seemed that we had stumbled on ***the master-builders of the tribes***; instead of the usual undersized, vermin infested native huts [common among other tribes, particularly to the north] we beheld ***large, clean looking dwellings about twenty-five feet in diameter, decorated with twisted grass work and magnificently thatched***."³⁰⁷

211. Cunnison emphasized the permanency of the Ngok houses and villages, and their links to the Ngok's conception of permanent land use rights (discussed above³⁰⁸). Thus, he described how "***the Dinka have permanent homes*** from which they move away for part of

²⁹⁸ See **Figure 7** (Dinka tukul, Abyei region), **Appendix H**.

²⁹⁹ Stubbs & Morrison, "Land and Agriculture of the Western Dinka," 21 SNR 251, 256 (1938), **Exhibit-FE 3/14**.

³⁰⁰ Stubbs & Morrison, "Land and Agriculture of the Western Dinka," 21 SNR 251, 254 & 256 (1938), **Exhibit-FE 3/14**.

³⁰¹ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at pp. 5-6, ¶26.

³⁰² D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 91 (1997), **Exhibit-FE 8/14**.

One writer comments that Ngok houses are constructed of "wattle and daub with conical thatched roofs, and a cattle byre of the same shape and materials." G. Lienhardt, *Divinity and Experience, The Religion of the Dinka* 3 (2003), **Exhibit-FE 11/7**. It is the responsibility of women to build all but the framework of the *tukuls*; the men dig the foundation, put up the framework and cover the walls with mud. Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 3, ¶14.

³⁰³ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at pp. 5-6, ¶26.

³⁰⁴ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 5, ¶25. See **Figures 5 and 6** (Abyei town), **Appendix H**.

³⁰⁵ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at pp. 5-6, ¶¶26, 27; see also Witness Statement of Peter Nyuat Agok Bol (Alel elder), at p. 3, ¶15.

³⁰⁶ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at pp. 5-6, ¶26.

³⁰⁷ C. Treatt, *Out of the Beaten Track, A Narrative of Travel in Little Known Africa* 55 (1931), **Exhibit-FE 3/13** (emphasis added).

³⁰⁸ See below at paras. 206-216.

the year,”³⁰⁹ contrasting them to the Misseriya who “have no permanent homes and move about, though within circumscribed tribal territories.”³¹⁰

212. In describing the Dinka people, a Sudan Government official noted in the 1904 Bahr el Ghazal Annual Report that “[h]ome, as understood by the Englishman, appeals to a great extent to the Dinka, and this is one of the best traits in his character.”³¹¹ Unlike their nomadic Misseriya neighbors, “Dinkas ... *only change their habitations according to the seasons in order to provide pasture for their cattle, rarely abandoning their homesteads permanently.*”³¹²

213. Likewise, in the 1902 Bahr el Ghazal Provincial Report, an official observed that the Ngok Dinka “villages are kept *exceedingly clean, there is plenty of space and the huts are never crowded*, but built in groups of twos and threes, each group surrounded by its own plot of cultivation.”³¹³ More recently, Cole described how the sustained and permanent communities of the Ngok Dinka from one year to the next were made possible by their traditional “squat round huts.”³¹⁴

214. The material necessities of the Ngok Dinka’s daily lives are drawn from their surroundings in the Abyei region, “made from grass, mud, and wood, with the addition of materials derived from wild and domestic animals.”³¹⁵ Ngok houses are constructed from and furnished with local materials, adapted to the climate and ecology of the Abyei region, which means grass, earth and wood since “stone is rare and natural iron is available only on the fringes of the country.”³¹⁶

215. During the course of the Abyei Development Project, the researchers observed how well suited the Ngok dwellings were to their environment, calling them a “refuge” during the rainy season, in stark contrast to the “rectangular government structures with their almost flat roofs” which became “wind tunnels with a maddeningly loud staccato of driving rain on metal,” from which sheets of corrugated iron on the roof could be peeled off “like cards from a deck.”³¹⁷

216. Ngok houses are clustered together in villages with a relatively small number of inhabitants, but spread over a comparatively broad territory with several miles between groupings of *tukuls* and *luaks*.³¹⁸ Each village accommodates only a few families whose homesteads (typically two or three circular houses) and agricultural lands are also well

³⁰⁹ 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. 112, **Exhibit-FE 4/11** (emphasis added).

³¹⁰ 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. 112, **Exhibit-FE 4/11**.

³¹¹ Reports on Finances, Administration, and Condition of the Sudan, 1904, Province of Bahr el Ghazal, at p. 4, **Exhibit-FE 2/4**. Where reference is made to the Reports on Finances, Administration, and Condition of the Sudan for any given year, it is referred to as “Annual Report on the Sudan.”

³¹² Annual Report on the Sudan, 1904, Province of Bahr el Ghazal, at pp. 4, **Exhibit-FE 2/4** (emphasis added).

³¹³ Annual Report on the Sudan, 1902, Province of Bahr el Ghazal, at p. 236-237, **Exhibit-FE 1/19** (emphasis added).

³¹⁴ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 94 (1997), **Exhibit-FE 8/14**.

³¹⁵ G. Lienhardt, *Divinity and Experience, The Religion of the Dinka* 2, (2003), **Exhibit-FE 11/7**. Pots are made of clay; grass baskets are used to store grains and cradle babies; tree branches are used to till the soil. *Ibid* at p. 4.

³¹⁶ G. Lienhardt, *Divinity and Experience, The Religion of the Dinka* 1, 3 (2003), **Exhibit-FE 11/7**.

³¹⁷ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 94 (1997), **Exhibit-FE 8/14**.

³¹⁸ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 23 (1986), **Exhibit-FE 7/4**.

separated.³¹⁹ Tibbs described the Ngok Dinka dwellings near Abyei town as similar to “thatched farms on the downs in England” from a distance; close up “they are a group of grey thatched round mud buildings, a large centre one and four or five little ones which are grain stores on legs.”³²⁰

C. Peoples Neighboring the Ngok Dinka

1. The Ngok’s Arab Neighbors – Misseriya

217. The most immediate neighbors to the north of the Ngok Dinka are the Misseriya, literally translated from the Arabic as “mobile people.”³²¹ The Misseriya are a nomadic tribe of Baggara Arabs, whose territories range across a vast expanse of much of western Sudan and into Chad. Although nomadic, the Misseriya are loosely headquartered in the region of Muglad (located to the north of the *goz*).³²²

218. As discussed below, the Misseriya are cattle-herders who neither cultivated to any significant degree nor had fixed homes, even in their headquarters at Muglad. Rather, their nomadic existence took them across a wide territory, ranging from the area around Muglad in the north, where they spent much of each year, to the Bahr river system of the Abyei region during parts of the dry season. As recorded in the Abyei Protocol, “[t]he Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.”³²³

2. The Baggara and the Misseriya

219. Among the Arab nomads of western Sudan are Baggara, which means “cow.”³²⁴ The Baggara neighboring the Ngok Dinka to the north include the Misseriya Zurug, Misseriya Humr and Hawazma, who form part of a block of Baggara in south-western Kordofan and southeastern Darfur.³²⁵

³¹⁹ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 23 (1986), **Exhibit-FE 7/4**. It is not entirely clear why the settlements are so dispersed and scattered but some commentators suggest that it is in part due to the pastoral nature of the Dinka combined with climactic changes whereby much of the area is flooded during the wet season. In other words, each family wants enough land to meet its needs including crop cultivation and cattle grazing. At the same time, the natural population increase and competitive spirit amongst the sub-tribes have led to partitioning, as groups are continually in search of drier and better land. There is also a strong cultural characteristic of “unity is disunity” amongst the Ngok Dinka; the emphasis is individualistic, despite a strong community solidarity and sense of communalism. F. Deng, *Tradition and Modernization* 21 (1971), **Exhibit-FE 5/2**.

³²⁰ M. Tibbs & A. Tibbs, *A Sudan Sunset* 133 (1999), **Exhibit-FE 8/17**.

³²¹ Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 4, ¶21.

³²² See **Figures 26 and 27** (Muglad Souq), **Appendix H, Figures 28 to 34** (Misseriya in and around Muglad), **Appendix H**.

³²³ Abyei Protocol, Art. 1.1.3, **Appendix C**; see also ABC Report, Part I, at p. 9 (“The experts therefore 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.”), **Appendix B**; ABC Report, Part I, at pp. 20-21 under the heading “Conclusions” (“Although the Misseriya have clear ‘secondary’ (seasonal) grazing rights to specific locations north and south of Abyei Town, their allegation that they have ‘dominant’ (permanent) rights to these places is not supported by documentary or material evidence.”), **Appendix B**; ABC Report, Part I, at p. 22 under the heading “Final and binding decision” (“The Ngok and Misseriya shall retain their established secondary rights to the use of land north and south of this boundary.”), **Appendix B**.

³²⁴ Note that Cunnison defined the term Baggara as “cattlemen.” I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 1 (1966), **Exhibit-FE 4/16**.

³²⁵ I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 7 (1966), **Exhibit-FE 4/16**.

220. The Baggara are nomadic, with a broad territorial range extending across much of western Sudan and into eastern Chad.³²⁶ Gleichen observed in his 1898 *Handbook of Sudan* that the Baggara “cultivate little, and have no trades, living principally on the produce of the herds. Their chief occupations are hunting and war; the latter they wage incessantly upon each other, and upon the mountain tribes.”³²⁷ He noted that “*as a rule, they live in camps, seldom in permanent villages; they wander about with their herds* according to the varying conditions of water and pasturage.”³²⁸

221. The Baggara are Muslims, descended from Arab tribes that began to migrate to Sudan centuries ago. As suggested by their name, the Baggara are cattle-herders who move seasonally between grazing lands in the wet season and river areas in the dry season.³²⁹ The Arab origins of the Misseriya in particular and the Baggara generally are reflected in a frequently-quoted observation by Henderson, who describes the Baggara as having “been forced by circumstances to live in a country which will support the cow but not the camel” leading him to “treat[] his bull just as he treated his camel, and so differ[ing] from other cattle-owning peoples in Africa.”³³⁰

222. The Misseriya consist of a conglomeration of two separate Baggara sub-groups, the Zurug and the Humr.³³¹ The population of the Misseriya is unclear. In 1966, Cunnison estimated the Humr population at 54,997 (as of 1955).³³² Statistics from the 1973 Sudan census put the total rural nomad population of Kordofan at 406,710 (not broken down into tribal divisions), suggesting that Cunnison’s estimate is broadly accurate. Reliable recent figures are not available due to ongoing civil strife.

a) Arrival of Misseriya in Muglad

223. There is no reliable evidence detailing the origins or arrival of the Misseriya in the Kordofan region. Although the record is not completely clear, it appears that the Misseriya migrated into Kordofan and the Muglad area no earlier than the mid-18th century, at least several decades after the Ngok Dinka arrived in the Bahr region.³³³

224. In recounting oral history, Henderson said that the “date of their [the Misseriya’s] entry” and “their original route” “remain doubtful,” and concluded that stories of Misseriya

³²⁶ I. Cunnison, *Baggara Arabs—Power and the Lineage in a Sudanese Nomad Tribe* 1 (1966), **Exhibit-FE 4/16**. See **Map 24** (Misseriya, 1905).

³²⁷ E. Gleichen, *Handbook of Sudan* 53 (1898), **Exhibit-FE 1/6**. MacMichael describes the Baggara as “the most warlike Arabs in the Sudan: they are also the most inveterate slave traders and raiders, and living as they do on the northern confines of the negro country they have indulged their predatory propensities *ad libitum* for so long as they have not been repressed by the firm hand of the Government.” H. MacMichael, *A History of the Arabs in the Sudan*, Vol. 1, 272 (1922), **Exhibit-FE 3/9**.

³²⁸ E. Gleichen, *Handbook of Sudan* 53 (1898), **Exhibit-FE 1/6** (emphasis added).

³²⁹ I. Cunnison, *Baggara Arabs—Power and the Lineage in a Sudanese Nomad Tribe* 19-22 (1966), **Exhibit-FE 4/16**.

³³⁰ Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 49 (1939), **Exhibit-FE 3/15**. See **Figures 32 and 33, Appendix H**.

Henderson also described the “Baggari” as having “hawk like features and a jutting beard.” K. Henderson, *Sudan Republic* 26 (1965), **Exhibit-FE 4/13**.

³³¹ D. Petterson, “*Abyei Unresolved: A Threat to the North-South Agreement*”, Conference Proceedings from the September 11th, 2006 Symposium entitled, Sudan’s Peace Settlement : Progress and Perils, at p. 1, **Exhibit-FE 15/6**. According to Baggara legend, the Arabs who first came to the Muglad were the descendants of “Atiya”, who became the present Hawazma and Rizeygat and the two sections of the Messiriya tribe, who descended from the tribe of the same name in French Equatorial Africa – the Humr and the Zurug. I. Cunnison, “*Humr and their Land*,” 35(2) SNR 50 (1954), **Exhibit-FE 4/5**; Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 49 (1939), **Exhibit-FE 3/15**.

³³² I. Cunnison, *Baggara Arabs - Power and Lineage in a Sudanese Nomad Tribe* 9 (1966), **Exhibit-FE 4/6**.

³³³ K. Henderson, *Sudan Republic* 26-27 (1965), **Exhibit-FE 4/13**.

migration are “rather muddled.”³³⁴ He nonetheless concluded that one could “not be far wrong in dating the Baggara arrival in Muglad to the decade of 1765-1775.”³³⁵

225. Watkiss Lloyd writes that the Misseriya entered Kordofan (i.e. in the Muglad area) during the first quarter of 1800s and, by 1907, had not been present in the area for “more than a hundred years.”³³⁶

226. To the extent that the nomadic Misseriya had a territorial capital, it was Muglad, which Henderson called “*the key to Dar Humr*”³³⁷ and referred to as the Misseriya’s “centre of dispersal” and “*headquarters*,”³³⁸ and which Tibbs termed “*the headquarters of the Messeriya Humr* and Lagawa of the Messeriya Zurug”³³⁹ The ABC Report similarly described Muglad as the headquarters of the Humr.³⁴⁰ A depiction of the Misseriya’s territory as at 1905 which was central on Muglad, is at **Map 24** (Misseriya, 1905).

227. As also discussed below, Muglad was the base for the Misseriya’s cattle-herding culture – the center of rainy season grazing, from which the Misseriya venture south into Ngok Dinka territory during the dry season.³⁴¹ Among other things, a large souk (market) was held in Muglad during the rainy season at which the nomadic Misseriya converged to trade.³⁴²

b) Misseriya and the Mahdiyya

228. As noted above, much of Sudan was at least nominally subject to Mahdist rule between the early 1880s and 1898. The era of Mahdist rule, and the associated Anglo-Egyptian reconquest, had important consequences for southern Sudan and particularly the Misseriya.³⁴³

229. Overall, the Mahdiyya had drastic effects on Sudan and its people. By 1900, Daly concludes that “Sudan was underpopulated” in no small part due to the “revolutionary wars, the famines and epidemics of the Mahdist period.”³⁴⁴ While exaggerated for British political purposes, the 1903 Annual Report on Egypt and Sudan estimated that 3,451,000 persons died of disease and 3,203,500 were killed in fighting, with the remaining population estimated at 1,870,500 persons.³⁴⁵

³³⁴ Henderson, “A Note on the History of the Homer Tribe of Western Kordofan” 660/11/1-244 SNR 1 (1930), **Exhibit-FE 3/12**.

³³⁵ Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 49, 61 (1939), **Exhibit-FE 3/15**.

³³⁶ Lloyd, “Some Notes on Dar Homr,” The Geographical Journal, 29 (January to June), 1907, at p. 651, **Exhibit-FE 3/4**.

³³⁷ Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 49 (1939), **Exhibit-FE 3/15**.

³³⁸ Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 49 (1939), **Exhibit-FE 3/15**.

³³⁹ Michael Tibbs Letter with attachment, dated 6 January 2004, **Exhibit-FE 11/9** (emphasis added).

³⁴⁰ ABC Report, Part I, at pp. 12 and 26, **Appendix B**. As the ABC Report also notes, P. Howell (a former District Commissioner) and Professor Cunnison also confirm that Muglad was effectively the “pivot” and “home” for the Humr. ABC Report, Part I, at p. 26, **Appendix B**.

³⁴¹ See below at paras. 969-970.

³⁴² See **Figures 26** and **27** (Muglad Souq).

³⁴³ See generally K. Henderson, *Sudan Republic* 40-46 (1965), **Exhibit-FE 4/13**; F. Nichol, *The Mahdi of Sudan, and the Death of General Gordon* 279-282 (2004), **Exhibit-FE 12/19**; R. Collins, *The Southern Sudan- A Struggle for Control 1883-1898* 22-54 (1962), **Exhibit-FE 4/12**.

³⁴⁴ M. Daly, *Empire on the Nile* 20, (2003) **Exhibit-FE 11/5**.

³⁴⁵ Annual Report on Egypt and the Soudan, 1903, at p. 79, **Exhibit-FE 1/12**.

230. The Mahdi's movement had its earliest support from the people of Kordofan, notably the Baggara Arabs.³⁴⁶ Many of the Misseriya were persuaded by the Mahdi's appeal "in simple and elementary terms: 'Kill the Turks and cease to pay taxes.'"³⁴⁷ As a consequence, most (although not all) of the Baggara joined the Mahdist forces at an early stage in the Mahdiyya and participated in early battles against Turkish/Egyptian forces.³⁴⁸

231. In turn, the Misseriya subsequently suffered severely in fighting against the Anglo-Egyptian forces.³⁴⁹ They incurred heavy casualties at the disastrous battle of Toski,³⁵⁰ in which General Grenfell and the Egyptian army "utterly annihilated the Mahdists,"³⁵¹ and in other fighting against Anglo-Egyptian troops.³⁵² Daly summarizes the impact of the Mahdiyya on the Misseriya as follows:

"There is little serious disagreement with the proposition that most of the Humr answered the Mahdi's call to jihad, and that *the tribe as a whole suffered severely during the Mahdiyya. Many of the men were killed in battle; some survivors were picked off during the long trek homewards after the fall of the Mahdist State; some who declined the Mahdi's and Khalifa's calls were killed when forces were sent to punish them.*"³⁵³

232. As a consequence, by the end of the 19th century, the Misseriya were left decimated, with their adult male populations severely reduced. At the same time, the Ngok were largely unscathed (as discussed above).³⁵⁴

c) Misseriya's Nomadic Culture

233. The Misseriya are principally nomadic cattle herders, with no permanent villages, homes or other habitations. Cunnison remarks that "[n]omadism is the only way of life to which they are attuned, and they are masters of it,"³⁵⁵ and that the Misseriya are a nomadic tribe with "no permanent homes and [who instead] move about, though within

³⁴⁶ P. Holt & M. Daly, *A History of Sudan* 78 (2000), **Exhibit-FE 4/10**. The Humr Arabs were among the earliest to rise to the Mahdi's call. P. Holt & M. Daly, *A Modern History of the Sudan* 78 (1961), **Exhibit-FE 4/10**; M. Salih, *Pastoralists and the War in Southern Sudan* in J. Markakis, *Conflict and the Decline of Pastoralism in the Horn of Africa* 19 (1993), **Exhibit-FE 8/5**.

³⁴⁷ P. Holt & M. Daly, *A History of Sudan* 78 (2000), **Exhibit-FE 4/10**.

³⁴⁸ P. Holt & M. Daly, *A History of Sudan* 78 (2000), **Exhibit-FE 4/10**.

³⁴⁹ Lloyd, *Some Notes on Dar Homr*, *The Geographical Journal*, 29 (January to June), 1907, at pp. 651-652, **Exhibit-FE 3/4**.

³⁵⁰ K. Henderson, "A Note on The Migration of the Messiria Tribe into South West Kordofan," 22 (1) SNR 49, 69 (1939), **Exhibit-FE 3/15**; R. Slatin Pasha, *Fire and Sword in the Sudan* 452 (1896), **Exhibit-FE 1/5**.

³⁵¹ R. Slatin Pasha, *Fire and Sword in the Sudan* 452 (1896), **Exhibit-FE 1/5**.

³⁵² F. Deng, *War of Visions: Conflict of Identities in the Sudan* 50 (1995), **Exhibit-FE 8/13**.

³⁵³ Daly Expert Report, at p. 48 (emphasis added).

³⁵⁴ See above at paras. 128-132; Daly Expert Report, at p. 25-26.

³⁵⁵ Cunnison, "Humr and their Land," 35(2) SNR 50, 55 (1954), **Exhibit-FE 4/5**.

circumscribed tribal territories.³⁵⁶ Another early 20th century observer wrote that the Misseriya were “[c]onstantly on the move in search of water or fresh grass.”³⁵⁷

234. Just as the Ngok Dinka land predisposed the Ngok to agriculture (as discussed above)³⁵⁸, the “*nature of the [Misseriya’s] land itself ... favours cattle rather than grain.*”³⁵⁹ Observers note that it is unlikely that the Misseriya population could survive with a mainly agricultural economy, because of the lack of suitable agricultural land near permanent water in the areas they inhabited.³⁶⁰ As discussed in detail above, this contrasts with the “traditional land of the Dinka” where it is possible to “cultivate during the rains.”³⁶¹

235. The Misseriya disdained agricultural work. Cunnison notes that “Humr share with many other cattle people *a dislike of manual work and particularly of cultivation.*”³⁶² Likewise, “[c]ultivation of any kind requires periods at the fields at sowing and harvest and these long periods in one place are inconsistent with the needs of [the Misseriya] cattle.”³⁶³ The Misseriya attitude towards agriculture in turn informed their views regarding land: unlike the Ngok, the Misseriya “*lack permanent local communities and the exclusive association of lineages with pieces of land.*”³⁶⁴

236. What farming the Misseriya undertook was both circumscribed in geographic scope (occurring in the Muglad region) and focused on crops unsuited to the Bahr river basin to the south of Muglad. In particular, Misseriya cultivation was limited to millet (rather than sorghum) which requires “a light sandy soil found in the *Gok [goz]* country but rare in the *toich* land.”³⁶⁵ Watkiss Lloyd noted in 1905-1906 that virtually the only crop grown by the Homr Arabs was millet and should “the supply be insufficient, grain is exchanged for sheep or cows with the Nubas or Dinkas.”³⁶⁶ The Misseriya’s cultivation of millet was chiefly in the

³⁵⁶ 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. 113, **Exhibit-FE 4/11** (emphasis added). Cunnison also wrote that, “[i]n order to accommodate the continuous movement Humr have many special arrangements and this is nowhere more evident than in the sphere of domestic life. The camp in which I lived for two years *moved to about sixty fresh sites in the course of each year, in stages varying from a few hundred yards to some twenty-two miles*; it never spent more than six weeks at one site and the average duration at one site was about six days.” 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. 105, **Exhibit-FE 4/11** (emphasis added).

³⁵⁷ Lloyd, “*Some Notes on Dar Homr*,” *The Geographical Journal*, 29 (January to June), 1907, at p. 652, **Exhibit-FE 3/4** (emphasis added).

³⁵⁸ See above at paras. 176-195.

³⁵⁹ I. Cunnison, *The Social Role of Cattle*, 1(1) *Sudan J. Veterinary Science and Animal Husbandry* 8, 10 (1960), **Exhibit-FE 4/8**.

³⁶⁰ Cunnison, *The Social Role of Cattle*, 1(1) *Sudan J. Veterinary Science and Animal Husbandry* 8, 10 (1960), **Exhibit-FE 4/8**.

³⁶¹ Cunnison, *The Social Role of Cattle*, 1(1) *Sudan J. Veterinary Science and Animal Husbandry* 8, 10 (1960), **Exhibit-FE 4/8**. See above at paras. 181-188.

³⁶² Cunnison, *The Social Role of Cattle*, 1(1) *Sudan J. Veterinary Science and Animal Husbandry* 8, 9 (1960), **Exhibit-FE 4/8** (emphasis added).

³⁶³ 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. 107, **Exhibit-FE 4/11**.

³⁶⁴ 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. 107, **Exhibit-FE 4/11**.

³⁶⁵ Stubbs & Morrison, “*Land and Agriculture of the Western Dinka*,” 21 *SNR* 251, 258 (1938), **Exhibit-FE 3/14**; see also Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3, ¶¶13-14.

³⁶⁶ Lloyd, “*Some Notes on Dar Homr*,” *The Geographical Journal*, 29 (January to June), 1907 at p. 652 and see also p. 654, **Exhibit-FE 3/4**.

sand ridges around Deinga/Muglad.³⁶⁷ (See **Map 6** (Sudan: Soils) and **Map 24** (Misseriya, 1905)).

237. Because of the limited (or non-existent) character of their cultivation, the Misseriya are often forced to “buy grain from the Dinka in summer; or alternatively live for long periods on milk.”³⁶⁸ Writing in 1907 about experiences between 1904 and 1906, it was observed that when the Misseriya grain supply was “insufficient,” grain was “exchanged for sheep or cows” with the “Dinkas.”³⁶⁹

d) Misseriya’s Seasonal Grazing

238. Cattle and cattle-herding are central to the Misseriya’s nomadic way of life. Unlike the Ngok and other southern tribes, the Misseriya use their cattle as beasts of burden and their nomadic lifestyle depends on cattle for “transport of tent, baggage and family.”³⁷⁰

239. Just as the Ngok’s cattle are adapted to the environment of the river basin of the Abyei Area, so the Misseriya cattle were well-suited to the drier lands around Muglad and to the Misseriya’s lifestyle. The Misseriya’s cattle are long-legged, short-horned zebu.³⁷¹ Given their nomadic lifestyle, the Misseriya value a different type of cattle, with different qualities, from those of the Ngoks’ short-legged Nilotic cattle: for the Misseriya, “[a] **good bull is one which is a good walker then a good carrier**. A good cow is one which is a good walker and then a good milker and calver.”³⁷²

240. The Misseriya’s nomadic lifestyle meant that their cattles’ speed was prized over all other qualities, “because unless a beast remains with the herd when out grazing or at the fast pace at which migrations are carried out, it will struggle and get lost in the forest.”³⁷³ In Cunnison’s words, the Misseriya choose cattle based on an “unproductive quality **demande**d by the nomadic existence.”³⁷⁴

³⁶⁷ I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 36 (1966), **Exhibit-FE 4/16**.

³⁶⁸ Cunnison, *The Social Role of Cattle*, 1(1) *Sudan J. Veterinary Science and Animal Husbandry* 8, 10 (1960), **Exhibit-FE 4/8**.

³⁶⁹ Lloyd, “*Some Notes on Dar Homr*,” *The Geographical Journal*, 29 (January to June), 1907, at p. 652, **Exhibit-FE 3/4**.

³⁷⁰ 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**; see also P. Howell, *Some Observations on the Baggara Messiria of Western Kordofan 768/5/5* and Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 4, ¶17.

³⁷¹ I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 36 (1966), **Exhibit-FE 4/16**.

³⁷² 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** (emphasis added).

³⁷³ 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**.

³⁷⁴ 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** (emphasis added). Cunnison also described the differing attitudes of the Misseriya and the Ngok Dinka towards their cattle as follows: “Dinka have a much less mercenary attitude to their animals than do Baggara and their cattle are used for more and different social purposes. . . . To take one example of the difference in attitude: Baggara like cattle in general, but Nuer and Dinka in addition like individual beasts. They like them for such extraneous reasons as, for example, the shape of their horns, which are of no interest whatsoever to Baggara. A Humrawi will have no difficulty in parting with a particular beast as long as he has others to do the work required of it. I have seen Dinka on the contrary offer very high prices in government auctions to regain favourite beasts of theirs which have been seized in tax

241. There is a seasonal pattern to the Misseriya grazing, which is driven by rainfall and the availability of pasture for the Misseriya cattle herds. MacMichael, describing the Baggara in the early 20th century, 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.”³⁷⁵

242. During the rainy season from July to mid-September, the Misseriya grazed their cattle in the Babanusa, a savannah north of Muglad (as noted above, the Misseriya “headquarters”).³⁷⁶ In October they return to the plain of non-cracking red clay intersected by numerous sand ridges described by Cunnison as the “Baggara Repeating Pattern” of Muglad where they remain until approximately mid-December.³⁷⁷

243. During the dry season, beginning in mid-December, the Misseriya moved with their cattle south of Muglad to the Bahr, described by Cunnison as the “land of *meandering water courses, talh forests – Acacia seyal – and meadows, where cattle spend the summer.*”³⁷⁸ Tibbs similarly wrote that the Misseriya’s “move south to the bahr would start in shita (December)” and take the Misseriya and their cattle “into the territory of the Southern Nilotic tribe, the Ngok Dinka.”³⁷⁹

244. The Misseriya reach the territory of the Ngok by traveling directly south from Muglad through the *goz*, a largely uninhabited woodland savannah that runs across the northwest part of the Abyei region. According to Cunnison, as the Misseriya cross the *goz*, their cattle may “dally for some time” because “the water in the watercourses may be too deep to allow grazing in them” further south, but “scarcity of water in the *Goz*” limits the amount of time that can be spent there.³⁸⁰

245. Likewise, Tibbs recounted the path of Misseriya seasonal grazing as crossing the *goz* which he described as the “large area between muglad [sic] and the bahr ” of “mostly consolidated sand, but with some clay, waterless, except with some pools left by the rain.”³⁸¹ As discussed elsewhere, the ABC Report similarly identified the *goz* as an uninhabited area, lying between the Ngok and the Misseriya territories, historically used by both tribes.³⁸²

246. By the height of the dry season, the Misseriya crossed the *goz*, and reached the Bahr, where they remained to water their cattle (historically far fewer in number than the Ngok cattle) at the numerous rivers and waterholes of the Abyei region. As described by the Sudanese Ministry of Agriculture and Natural Resources in the 1970s, “[b]esides the *Dinka*

default. This consideration of the different role of cattle in society is quite apart, of course, from technical considerations which might arise over differences in the physical environment of Nilotes.” Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 24 (1960), **Exhibit-FE 4/8**.

³⁷⁵ H. MacMichael, *A History of the Arabs in Sudan*, Vol. I, 272 (1922), **Exhibit-FE 3/9**.

³⁷⁶ Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 10, **Exhibit-FE 4/8**.

³⁷⁷ I. Cunnison, *Baggara Arabs—Power and the Lineage in a Sudanese Nomad Tribe* 21 (1966), **Exhibit-FE 4/16**.

³⁷⁸ Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 10 (1960), **Exhibit-FE 4/8** (emphasis added). Tibbs also described the seasonal Misseriya migration “into and through” Ngok Dinka territory.

³⁷⁹ M. Tibbs & A. Tibbs, *A Sudan Sunset* 57-58 (1999), **Exhibit-FE 8/17**.

³⁸⁰ I. Cunnison, *Baggara Arabs—Power and the Lineage in a Sudanese Nomad Tribe* 20 (1966), **Exhibit-FE 4/16**; see **Map 26** (Abyei Area: Grazing Patterns in the Dry Season).

³⁸¹ M. Tibbs & A. Tibbs, *A Sudan Sunset* 56 (1999), **Exhibit-FE 8/17**.

³⁸² ABC Report, Part I, at p. 43 (“There is general agreement from other sources, however, 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.”), **Appendix B**.

livestock [which are resident in the region], during the summer the Misiriyya Humr bring their livestock to the [Abyei] area. They usually spend the summer in this Bahr area where there is enough water and grass for their cattle.³⁸³ By March, the Misseriya begin to head north again, and by July, they return to the Babanusa, north of the Muglad area, where they stay until mid-September.³⁸⁴

247. Historically, relatively small Misseriya *ferigs* or groups of nomads would follow a seasonal grazing pattern into the Abyei region. The Misseriya traveled in identifiable sub-tribes who followed the same route each dry season and had established relations with the local Ngok Chief living on that route. Watkiss Lloyd recounted that “[e]ach tribe [of the Homr] has its own place for cultivation, its own ragabas, and its own line of migration, all of which change but little from year to year.”³⁸⁵ The Misseriya’s seasonal grazing patterns are depicted on **Map 25** (Abyei Area: Grazing Patterns in the Wet Season) and **Map 26** (Abyei Area: Grazing Patterns in the Dry Season.)

248. During their stay in Ngok Dinka territory in the Abyei region in more recent years, the Misseriya herding units have tended to be larger, in part for protection from attack. As members of the Abyei Development Project note: “*the Humr migratory herd is in unfriendly territory in the Abyei area.* The large fixed grouping causes the Humr serious problems in finding adequate pasture, but on the other hand it provides a degree of safety and protection from attack.”³⁸⁶

e) Misseriya Tents and *Ferig*

249. As discussed above, the Misseriya are almost exclusively nomadic. Cunnison concluded that it would be a “mistake to suppose that the Humr are moving about from some firmly established base: *they are continuously on the move and where they are is their home.*”³⁸⁷ Although Misseriya families generally had a “kind of centre” of activities, this would not be “*permanent for more than a few years at a time.*”³⁸⁸ Cunnison also notes that:

“the [Misseriya] people themselves are *not confined for residence, or grazing or cultivation to particular areas in which they and they alone have rights, and there is no great sentimental attachment, derived from long residence in it.*”³⁸⁹

250. The Misseriya lifestyle is reflected in their places and manner of habitation. According to one early 20th century observer, the nomadic Misseriya were “always on the move in search of water or fresh grass,” with the result that:

³⁸³ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 6 (1978), **Exhibit-FE 6/5** (emphasis added). See **Figure 35** (Misseriya passing through *goz*).

³⁸⁴ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 92 (1997), **Exhibit-FE 8/14**; I. Cunnison, *Baggara Arabs—Power and the Lineage in a Sudanese Nomad Tribe* 21 (1966), **Exhibit-FE 4/16**; **Map 26** (Abyei Area: Grazing Patterns in the Dry Season).

³⁸⁵ Lloyd, “*Some Notes on Dar Homr*,” *The Geographical Journal*, 29 (January to June), 1907, at p. 651, **Exhibit-FE 3/4**.

³⁸⁶ M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 12 (1983), **Exhibit-FE 7/1** (emphasis added).

³⁸⁷ 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. 105, **Exhibit-FE 4/11** (emphasis added).

³⁸⁸ 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. 105, **Exhibit-FE 4/11** (emphasis added).

³⁸⁹ 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. 113, **Exhibit-FE 4/11** (emphasis added).

“their camps are of the most primitive description. In the rains some live in small and badly built straw huts (*tukls*) of the pattern usual in the Sudan, but the majority content themselves, both in the dry and wet seasons, with a few sticks covered with a quantity of grass, the whole not more than 10 feet high.”³⁹⁰

251. The *ferig* is literally a camp with nothing more than movable houses with “a cattle enclosure and a shady tree.”³⁹¹ The tree is the “tree of company” where the men discuss affairs and eat and the bachelors of the *ferig* sleep at night.³⁹²

252. The tents of a *ferig* are constructed from a “framework of supple sticks” which are covered with shredded bark to make the tents windproof.³⁹³ All of the materials necessary for a *ferig*’s tents are collected locally, so that new tents can be erected easily in each new location: a “house” can be dismantled and bull packed within an hour, the erection of a new one takes about two hours.³⁹⁴ The Misseriya do not construct or use structures equivalent to the permanent Ngok *tukuls* and cattle *luaks*, because these more permanent and elaborate enclosures lack the “flexibility of movement” required by their nomadic lifestyle.³⁹⁵

253. During movement through barren and uninhabitable areas, like the *goz* on the route from Muglad to Tebeldia and Antilla, Misseriya women sleep overnight in even more temporary bivouac style structures.³⁹⁶ The bachelor men sleep outside.³⁹⁷

254. The Misseriya’s nomadic lifestyle is also reflected in their burial practices, which are tailored to that lifestyle. In contrast to the Ngok (who bury their dead in the permanent Ngok villages³⁹⁸), the Misseriya “bury their dead wherever they are moving when they die” and do not locate them at a “house or even around a cattle camp.”³⁹⁹

f) Misseriya Religion and Belief Systems

255. The Baggara Arabs, of whom the Misseriya form a part, are described as “devout Muslims.”⁴⁰⁰ Their practices most closely resemble that of the Sunni sect of Islam, although their belief system is also described as being “influenced by local customs.”⁴⁰¹

3. Other Dinka and Other Nilotic Tribes (Nuer and Shilluk)

256. The Ngok Dinka have a number of other neighbors adjacent to the Abyei region, in addition to the Misseriya. These neighbors include other Dinka tribes (the Rek (including Makhal), Rueng (including Panarun), Twic and the Nuer, a Nilotic tribe like the Dinka. The

³⁹⁰ Lloyd, “Some Notes on Dar Homr,” The Geographical Journal, 29 (January to June), 1907, at p. 652, **Exhibit-FE 3/4** (emphasis added).

³⁹¹ Cunnison, “Humr and their Land,” 35(2) SNR 50, 55 (1954), **Exhibit-FE 4/5**.

³⁹² See **Figure 36** (Men’s tree at Misseriya cattle camp), **Appendix H**.

³⁹³ Cunnison, “Humr and their Land,” 35(2) SNR 50, 55 (1954), **Exhibit-FE 4/5**. See **Figures 29 to 34, Appendix H**.

³⁹⁴ Cunnison, “Humr and their Land,” 35(2) SNR 50, 55 (1954), **Exhibit-FE 4/5**.

³⁹⁵ Cunnison, “Humr and their Land,” 35(2) SNR 50, 55 (1954), **Exhibit-FE 4/5**.

³⁹⁶ Cunnison, *Baggara Arabs - Power and the Lineage in a Sudanese Nomad Tribe*, 43 fn 43 (1966) (“Tents of different styles are made at different seasons.”), **Exhibit-FE 4/16**.

³⁹⁷ I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 64 (1966), **Exhibit-FE 4/16**.

³⁹⁸ See above at paras. 168-169.

³⁹⁹ Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 4, ¶18.

⁴⁰⁰ M. Yakan, *Almanac of African Peoples & Nations* 195 (1999), **Exhibit-FE 8/18**.

⁴⁰¹ M. Yakan, *Almanac of African Peoples & Nations* 195 (1999), **Exhibit-FE 8/18**.

approximate territories of these various tribal groups are depicted on **Map 12** (Southern Sudan: Tribes).

a) Other Dinka Tribes

257. The Dinka were likely the last of the Nilotes to migrate out of central Sudan into the southern portion of Sudan.⁴⁰² They brought with them hardier varieties of cattle and sorghum and were better able to adapt the land with its extreme climate and terrain.⁴⁰³

258. Each Dinka tribe has its own territorial lands, tribal divinities and traditions.⁴⁰⁴ There are nonetheless many similarities among the various Dinka tribes, all settled peoples who are agro-pastoralist with seasonal grazing patterns. This “choreographed” seasonal grazing pattern is discussed above⁴⁰⁵ and depicted on **Map 25** (Abyei Area: Grazing Patterns in the Wet Season) and **Map 26** (Abyei Area: Grazing Patterns in the Dry Season).

259. There is considerable inter-marriage among the Dinka tribes and regular interaction amongst neighbors due to the seasonal grazing patterns. In particular, the Rueng, Twic and Rek Dinka maintain close relations with the Ngok: with those three tribes, “the Ngok maintain relations similar to those amongst themselves.”⁴⁰⁶

260. The Rueng border the Ngok generally in the south-east.⁴⁰⁷ The Rueng have three major subdivisions, one of which is now considered an entirely separate tribe east of the Nile, known as the Paweng.⁴⁰⁸ The Rueng traditionally used Ngok land “when it was very wet,” in July or August.⁴⁰⁹

261. The Twic Dinka are neighbors of the Ngok to the south, with settlements on the *tooc* below the Kiir/Bahr el Arab River.⁴¹⁰ They are a large tribe, which is “two to three times the size of the Ngok Dinka.”⁴¹¹

262. The Twic Dinka historically “move[d] north during the rainy season” and “usually in about February they would cross the river Kir but would not proceed as far as the Gok.”⁴¹² According to an elder of the Abyior, the Twic had “permission to enter Ngok territory, because when the cattle herders came they would be under Ngok protection so they could advise which routes to take and where they could stay.”⁴¹³

⁴⁰² S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 2 (2004), **Exhibit-FE 12/18**.

⁴⁰³ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 92 (2004), **Exhibit-FE 12/18**.

⁴⁰⁴ F. Deng, *Tradition and Modernization* 4 (1991), **Exhibit-FE 5/2**; Deng, *Property and Value Interplay among the Nilotes of the Southern Sudan*, 51(3) Iowa L. Rev. 541, 543 (1966), **Exhibit-FE 4/15**.

⁴⁰⁵ See above at paras. 202-203.

⁴⁰⁶ M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 16 (1983), **Exhibit-FE 7/1**.

⁴⁰⁷ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 49 (2004), **Exhibit-FE 12/18**. Howell observed that the “Ngork claim close association and relationship with those Rueng.” Howell, “Notes on the Ngork Dinka of West Kordofan,” 32(2) SNR 239, 242 (1951), **Exhibit-FE 4/3**.

⁴⁰⁸ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 49 (2004), **Exhibit-FE 12/18**. The name of “Rueng” Dinka means “to remain by night” which is thought to have been associated with the tribe’s pastoral practices. S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 48-49 (2004), **Exhibit-FE 12/18**.

⁴⁰⁹ Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 4, ¶18.

⁴¹⁰ Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 4, ¶20.

⁴¹¹ Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 4, ¶27.

⁴¹² Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 5, ¶24.

⁴¹³ Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 5, ¶24.

263. The Rek Dinka are the most numerous of all Dinka groups in southern Sudan.⁴¹⁴ Much of the population inhabits towns from Tonj to western Gogriol, but Rek lands extend further north close to the Abyior as well.⁴¹⁵ The land of the Rek is less fertile than that of their other Dinka neighbors, forcing them to cultivate larger areas for the same return.⁴¹⁶

b) The Nuer

264. After the Dinka, the second largest population group in southern Sudan is the Nuer,⁴¹⁷ with a population of roughly 350,000.⁴¹⁸ The Nuer are concentrated “in the regions between the Sudd (Sadd) and the White Nile in Southern Sudan.”⁴¹⁹ They now dominate large parts of Upper Nile extending from the Zeraf river through Lou to Jikany areas on the Baro and Pibor rivers.⁴²⁰ The tribal lands of the Nuer are set out at **Map 12** (Southern Sudan: Tribes).

265. Culturally, the Nuer are similar to the Dinka.⁴²¹ Nonetheless, there has been limited historical interaction between the Nuer and the Ngok Dinka. The Abyei Development Project participants noted that “the Ngok policy to the Nuer is to avoid this aggressive people whenever possible” and consequently the limits of the southeastern grazing of the Ngok Dinka cattle camps is “Nuer Land.”⁴²²

⁴¹⁴ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 81 (2004), **Exhibit-FE 12/18**. James Lual Deng, the SPLM “neighbour” on the ABC is a member of the Rek Dinka.

⁴¹⁵ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 81 (2004), **Exhibit-FE 12/18**.

⁴¹⁶ S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 82-83 (2004), **Exhibit-FE 12/18**.

⁴¹⁷ Gurtong Peace Project, available at www.gurtong.org, **Exhibit-FE 16/19**.

⁴¹⁸ Based on 1952 figures. P. Howell, *A Manual of Nuer Law* 239 (1970), **Exhibit-FE 4/20**.

⁴¹⁹ M. Yakan, *Almanac of African Peoples & Nations* 574 (1999), **Exhibit-FE 8/18**.

⁴²⁰ Gurtong Peace Project, available at www.gurtong.org, **Exhibit-FE 16/19**.

⁴²¹ M. Yakan, *Almanac of African Peoples & Nations* 574 (1999), **Exhibit-FE 8/18**.

⁴²² M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 16 (1983), **Exhibit-FE 7/1**. The ABC Report refers to Howell’s statement that “[i]t is clear too that there were Dinka living in the present country of the Ngok [sic] long before the Nuer invasions eastward started.” ABC Report, Part I, at p. 31 (citing Howell 1951), **Appendix B**. The Ngok generally avoid the Nuer and not enter their land for migration or other purposes. M. Niamir, R. Huntington & D. Cole, *Ngok Dinka Cattle Migrations and Marketing* 16 (1983), **Exhibit-FE 7/1**.

III. THE ABYEI REGION AND THE NGOK DINKA AT THE BEGINNING OF THE 20TH CENTURY

266. The geographic, ecological and climatic conditions of southern Sudan, described above, shaped the culture of the Ngok Dinka and the various seasonal visitors to their lands. The Ngok culture enabled the tribe to survive, and flourish, in the Bahr river basin centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems, while the Misseriya ranged across the drier, desert lands to the north in the area of Muglad.

267. As discussed above, by the end of the 19th century, the Ngok Dinka villages and farm lands remained largely untouched by the outside world, including by the devastation of the Mahdiyya, sheltered by the remote and difficult to access to river basin of the Bahr region. At the same time, the nomadic Misseriya had suffered drastically at the hands of the Mahdi and the Anglo-Egyptians, but continued their nomadic lifestyle in the desert lands surrounding Muglad and extending north.

268. The Mahdiyya was brought to an end in 1898, after Anglo-Egyptian forces prevailed at the Battle of Omdurman and subsequently (in November 1899) finally located and killed the Khalifa Abdullahi.⁴²³ The defeat of the Mahdist forces was accompanied by the creation of the distinctive Anglo-Egyptian Condominium by the British and Egyptians, which governed Sudan for the next five decades.

269. The advent of the Condominium also produced, for the first time, at least a measure of contemporaneous documentation concerning the Abyei region and southern Sudan generally. As discussed below, these documentary materials provide important evidence regarding the location and extent of the Ngok Dinka territories at the beginning of the 20th century. At the same time, the very serious obstacles to the Sudan Government's administration of southern Sudan limited the scope of its knowledge and require treating its records with care.

A. *Anglo-Egyptian Condominium in Southern Sudan and the Abyei Area Prior to 1910*

270. It is important to consider the general character of the Anglo-Egyptian Condominium in Sudan at the turn of the 20th century before turning to the specific question of the Abyei region and Ngok Dinka Chiefdoms in 1905. The Condominium's formal administration of Sudan began only in 1899, with the defeat of the Mahdist forces. During the first decade of the 20th century, the embryonic Sudan Government functioned under the unsettled conditions of a military occupation and remained at a formative and ad hoc stage.

271. During the period in question, the Abyei region was a remote extremity of the Sudan Government's territory. It attracted little attention from the Sudan Government and remained largely unexplored until well past the first decade of the 20th century.

1. The Anglo-Egyptian Government's Administration of Sudan

272. The British had no desire to colonize Sudan following the defeat of the Mahdist forces at the end of the 19th century. In particular, the British wished to avoid the cost and

⁴²³ The best account is M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 1-11 (2003), **Exhibit-FE 11/5**; see also *A Handbook of the Anglo-Egyptian Sudan* 160-164 (1922), **Exhibit-FE 3/10**.

diplomatic criticism that would result from direct British rule of Sudan.⁴²⁴ For its part, Egypt aspired to a substantial role in Sudan's future, to safeguard both historical claims and the headwaters of the Nile.⁴²⁵

273. The British and the Egyptians therefore agreed to share an unusual form of joint sovereignty and control over Sudan. The basic terms of these arrangements were set out in the Anglo-Egyptian Agreement of 1899, later referred to as the Condominium Agreement, which was signed on 19 January 1899 (only six years before the transfer of the Ngok Dinka Chiefdoms in 1905).⁴²⁶

274. The Condominium Agreement defined Sudan as a territory south of the 22nd parallel which had formerly been either: (a) administered by Egypt and now been reconquered by the Anglo-Egyptian Army; or (b) occupied by Egyptian troops.⁴²⁷ The Condominium Agreement provided (among other things) for Egyptian and British control over the country, established the foundations for trade duties and prohibited the trade of slaves.⁴²⁸

275. Although the Condominium Agreement provided for joint Anglo-Egyptian governance of Sudan, the country's administration was in practice substantially controlled by Britain, while the cost of administration was substantially borne by Egypt.⁴²⁹ The (British) Governor General could only be removed with British consent;⁴³⁰ all major policy decisions were made by the Governor General in consultation with British officials in Cairo and London.⁴³¹

276. During its first decade after the reconquest, until at least 1910, the Sudan Government had a decidedly military character. Sudan's first Governor-General, Lord Kitchener, who had successfully commanded the Anglo-Egyptian forces during the reconquest, served for less than a year (from 1898 to 1899).⁴³²

⁴²⁴ See *A Handbook of the Anglo-Egyptian Sudan* 165 (1922), **Exhibit-FE 3/10**.

⁴²⁵ Annual Report on Egypt and the Soudan, 1905, at p. 118, **Exhibit-FE 2/12**; R. Statin Pasha, *Fire and Sword in the Sudan* 626 (1896), **Exhibit-FE 1/5**.

⁴²⁶ *Agreement Relative to the Future Administration of the Soudan*, 19 January 1899, **Exhibit-FE 1/9**. See also M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 14 *et seq.* (2003), **Exhibit-FE 11/5**; P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 102 (5th ed. 1999), **Exhibit-FE 9/3**. In recognition of the Sudan's formal status as a Condominium government, rather than a colony, Britain co-ordinated governance of the country through its Foreign Office, rather than its Colonial Office.

⁴²⁷ *Agreement Relative to the Future Administration of the Soudan*, 19 January 1899, **Exhibit-FE 1/9**. Using broad language, the new Sudan was defined as including areas which had not been under the control of the Mahdists (for example the south of Sudan), and permitted further southern expansion by the British and Egyptian forces. See M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 15 (2003), **Exhibit-FE 11/5**.

⁴²⁸ *Agreement Relative to the Future Administration of the Soudan*, 19 January 1899, **Exhibit-FE 1/9**.

⁴²⁹ G. Warburg, *The Sudan under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 13 (1971), **Exhibit-FE 5/1**; Annual Report on Egypt and the Soudan, 1899, at pp. 44-45, **Exhibit-FE 1/12**; *Handbook of the Anglo-Egyptian Sudan* 278-279 (1922), **Exhibit-FE 3/10**.

⁴³⁰ M. Daly, *Empire on the Nile - The Anglo-Egyptian Sudan, 1898-1934* 15 (2003), **Exhibit-FE 11/5**.

⁴³¹ G. Warburg, *The Sudan under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 13 (1971), **Exhibit-FE 5/1**.

⁴³² Kitchener's appointment reflected the immediate priority of the Anglo-Egyptian Condominium to establish internal security and order, while giving very little attention to even the rudiments of civil administration. Kitchener, a British military officer who held the rank of general in the Egyptian army, had led the military reconquest of Sudan; he had virtually no experience of civilian governance. See M. Daly, *Empire on the Nile - The Anglo-Egyptian Sudan, 1898-1934* 39 (2003), **Exhibit-FE 11/5**; P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 102-103 (5th ed. 1999), **Exhibit-FE 9/3**.

277. Sudan's second Governor General, Sir Reginald Wingate, another British military officer, held office from 1899 until 1916.⁴³³ The selection of military men to fill the Sudan Government's highest post from 1889 until 1916 illustrated the Government's overwhelming focus on pacification and internal security during this period.⁴³⁴ Consistent with this, the Government's efforts during its first 20 years (particularly in the South) were largely directed towards establishing security, setting up posts and training staff, rather than attempting to exercise governmental authority over the country.⁴³⁵ Nothing remotely resembling most of the basic administrative functions of a modern state (public works, taxation, health and education) existed in most of the country, and particularly in southern Sudan.⁴³⁶

278. Administration of Sudan in the first decades of the Condominium faced difficult challenges. As noted above, Sudan was vast and environmentally hostile, while previously having been subject to only limited central governmental authority.⁴³⁷ The lack of even rudimentary means of transportation and communications in most of the country made administration even more difficult.⁴³⁸

279. The Sudan Government's administration faced additional challenges arising from its lack of staffing. Most senior Government positions in Sudan were held by British (or other European) nationals,⁴³⁹ who had no knowledge of local Sudanese languages and cultures, while all other positions were held by Egyptians (or other non-British nationals), whose knowledge of the Sudanese was also very limited.⁴⁴⁰ The number of British administrators in Sudan during the Anglo-Egyptian Condominium was extremely low, particularly in early years.⁴⁴¹

2. The Anglo-Egyptian Condominium's Administration of Bahr el Ghazal and Kordofan Between 1899 and 1910

280. The Sudan Government faced even greater challenges during its first decade in southern and western Sudan than elsewhere in the country. One commentator concludes that “[i]t was clear from the outset that the establishment of orderly government [in the south]

⁴³³ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 102 (5th ed. 1999), **Exhibit-FE 9/3**.

⁴³⁴ See R. Collins, *Land Beyond Rivers - The Southern Sudan, 1898-1918* 179, 230-232 (2003), **Exhibit-FE 4/21**. Until 1908 every provincial governor was also an army officer. *A Handbook of the Anglo-Egyptian Sudan* 282 (1922), **Exhibit-FE 3/10**.

⁴³⁵ M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 135 (2003), **Exhibit-FE 11/5**.

⁴³⁶ R. Collins, *Land Beyond Rivers - The Southern Sudan, 1898-1918* 338 (2003), **Exhibit-FE 4/21**; The Sudan Government, *The Sudan: A Record of Progress: 1898-1947*, at pp. 12-13, **Exhibit-FE 3/18**; Daly Expert Report, at p. 28.

⁴³⁷ The little governmental authority that had historically existed had been subject to “absolute uprootal” under the Mahdists. Lord Kitchener, *Memorandum to Mudirs*, dated 1899, **Exhibit-FE 1/10**; see also K. Henderson, *Survey of the Anglo-Egyptian Sudan: 1898-1941* 2 (1946) (“The Sudan Government had all the advantages and disadvantages of starting from zero.”), **Exhibit-FE 3/17**.

⁴³⁸ R. Collins, *Land Beyond Rivers - The Southern Sudan, 1898-1918* 238 (2003), **Exhibit-FE 4/21**; P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 103 (5th ed. 1999), **Exhibit-FE 9/3**.

⁴³⁹ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol.I, 1-3 (1905), **Exhibit-FE 2/14**. In November 1898 Maxwell wrote to Wingate “We want more officers... We want men who will try at least to understand the people, study their habits and customs, get to know about the tenure of the land and the various questions connected with land and tribal feuds”, cited in M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan 1891-1934* 83 (2003), **Exhibit-FE 11/5**.

⁴⁴⁰ R. Collins, *Land Beyond Rivers - The Southern Sudan, 1898-1918* 230-231 (2003), **Exhibit-FE 4/21**; M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan 1891-1934* 134 (2003), **Exhibit-FE 11/5**.

⁴⁴¹ M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 91 (2003), **Exhibit-FE 11/5**.

*was impossible....*⁴⁴² As detailed below, these deficiencies were particularly pronounced in Bahr el Ghazal and Kordofan.

a) Administration of Bahr el Ghazal

281. All of the difficulties faced by the Sudan Government in understanding and governing Sudan were more acute in the South. Southern Sudan was populated by more than 50 distinct tribes, each with a different culture, language and political system.⁴⁴³ Understanding and administering these diverse peoples would have been difficult in any circumstances; achieving that in the space of the few years from 1899 to 1905, so soon after the Mahdiyya and the military operations of the Anglo-Egyptian conquest, was peculiarly difficult.

282. While the Anglo-Egyptian Condominium had taken control over the northern parts of the country with relative ease, the pacification of the South took many years. The whole of southern Sudan was initially administered from Fashoda. It was an unadministered military zone until 1901 when there was an attempt to establish a government presence in Bahr el Ghazal.⁴⁴⁴ Even after a government post was established at Wau, the Bahr el Ghazal region remained subject to martial law until 1907.⁴⁴⁵

283. Among the many difficulties faced by the Sudan Government in the South was inter-tribal unrest, which the government had great difficulty controlling. As two historians of the region observe: “Progress in intertribal peace was in the Southern Sudan slow in becoming a reality. The government, operating with limited resources in a vast land, simply could not cope with the innumerable incidents of intertribal friction.”⁴⁴⁶

284. Another obstacle to the Sudan Government’s administration of the South, and particularly the Bahr region inhabited by the Ngok Dinka, was the territory’s inaccessibility (discussed above).⁴⁴⁷ Gleichen referred in 1898 to the “*impenetrable marshes*”⁴⁴⁸ of the Bahr river systems in Bahr el Ghazal and Kordofan. More generally, in 1904, British administrators reported that the southern Sudan was still being “*explored*,” and that “[*t*]*here still exist extensive tracts in the Soudan which are as yet but slightly known.*”⁴⁴⁹ The region of the Ngok Dinka was one of the “*extensive tracts*” which were unknown in 1909, when it was reported that “[*m*]*uch of the course of the Bahr-el-Arab is still unexplored.*”⁴⁵⁰

⁴⁴² G. Warburg, *The Sudan under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 186 (1971), **Exhibit-FE 5/1**.

⁴⁴³ M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 134 (2003), **Exhibit-FE 11/5**; R. Collins, *Land Beyond Rivers - The Southern Sudan, 1898-1918* 179, 230-231 (2003), **Exhibit-FE 4/21**; *The Bahr el Ghazal Province*, Anglo-Egyptian Sudan Handbook Series, December 1911, at pp. 22-23, **Exhibit-FE 3/8**.

⁴⁴⁴ E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* 153 (1905), **Exhibit-FE 2/14**.

⁴⁴⁵ Sudan Gazette No. 107, dated 7 February 1907, at p. 1 (“The Sudan Penal Code, the Code of Criminal Procedure and the Sudan Civil Justice Ordinance 1900 shall henceforth be in force in the Bhar el Ghazal Province.”), **Exhibit-FE 3/1**.

⁴⁴⁶ R. Collins & R. Herzog, *Early British Administration in the Southern Sudan*, 2 (1) *Journal of African History* 1, 131-132 (1961), **Exhibit-FE 4/9**. An Agar Dinka tribe’s killing of a British Inspector and his party in November 1901, prompting harsh military retaliation, was representative. M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 142 (2003), **Exhibit-FE 11/5**; see also *A Handbook of the Anglo-Egyptian Sudan* 160-164 (1922), **Exhibit-FE 3/10**.

⁴⁴⁷ R. Collins, *Land Beyond Rivers - The Southern Sudan, 1898-1918* 238-242 (2003), **Exhibit-FE 4/21**; M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 135 (2003), **Exhibit-FE 11/5**.

⁴⁴⁸ E. Gleichen (ed.), *The Handbook of the Sudan* 111 (1898), **Exhibit-FE 1/6**.

⁴⁴⁹ Annual Report on Egypt and the Soudan, 1904, at p. 113, **Exhibit-FE 2/3**.

⁴⁵⁰ Annual Report on the Sudan, 1909, Memorandum of Major General Sir R. Wingate, at p. 52, **Exhibit-FE 3/6**. See also Sudan Intelligence Report No. 99, dated October 1902, at p. 4, **Exhibit FE 1/18**.

285. For all these reasons, “Southern Sudan ... in the main ... changed little during the first decade of Anglo-Egyptian administration.”⁴⁵¹ Indeed, the Sudan Government recognized some years later that “in practice *it took a quarter of a century before the [Condominium] administration extended itself over the whole [of Southern Sudan].*”⁴⁵²

286. The Bahr el Ghazal, comprising the southwestern portions of Sudan, was peculiarly remote during the first decade of the 20th century. The Sudan Government did not even send an exploratory expedition to the region until 1900 and Condominium reports repeatedly acknowledged that the few government officials in the region by 1905 had no knowledge of or control over the area.

287. The introductory description of the province in Gleichen’s 1905 compendium on *The Anglo-Egyptian Sudan* summarized the government’s recent military occupation of the Bahr el Ghazal region and its administrators’ lack of knowledge and access to the region:

“The Bahr el Ghazal was re-occupied by the troops of the Sudan Government during the winter of 1900-1901. Before their advent the most recent detailed descriptions of the country (not counting the necessarily superficial writing of the Marchand Expedition in 1898) date from pre-Dervish days (*e.g.*, Junker, Schweinfurth, etc.). Although there has not been time or opportunity for the whole of the country to be subjected to a searching examination since 1901, still, sufficient is known to prove that great changes have taken place in the province since 1881. Roads and places have disappeared, the face of the country has in many parts completely changed, and tribes have disappeared, have been thinned out, or have emigrated to other territories.”⁴⁵³

288. As Gleichen noted, there was no Condominium or British presence, military or otherwise, in the Bahr el Ghazal region until 1901. It was not until November 1900 that the Sudan Government dispatched what was termed an “*expedition*” to explore the region.⁴⁵⁴ The expedition involved a small military force reconnoitering the region and setting up temporary headquarters in Tonj in 1901.⁴⁵⁵ “Lieutenant-Colonel Sparkes, has been dispatched to the Bahr-el-Ghazal *in order to explore and occupy some of the districts* lying between the river and the Nile-Congo watershed.”⁴⁵⁶

289. The Bahr el Ghazal was not even recognized as a province (*Mudiria*) until 1902, instead possessing the status of a military district.⁴⁵⁷ Once Bahr el Ghazal Province was

⁴⁵¹ Collins & Herzog, *Early British Administration in the Southern Sudan*, 2(1) *Journal of African History*, 135 (1961), **Exhibit-FE 4/9**.

⁴⁵² The Sudan Government, *The Sudan: A Record of Progress: 1898-1947*, at p. 12, **Exhibit-FE 3/18** (emphasis added).

⁴⁵³ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* 153 (1905), **Exhibit-FE 2/14**.

⁴⁵⁴ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* 273 (1905), **Exhibit-FE 2/14**.

⁴⁵⁵ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* 273 (1905), **Exhibit-FE 2/14**; G. Warburg, *The Sudan under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 138 (1971), **Exhibit-FE 5/1**. *The Bahr el Ghazal Province, Anglo-Egyptian Handbook Series*, December 1911, at p. 59, **Exhibit-FE 3/8**.

⁴⁵⁶ Annual Report on Egypt and the Soudan, 1900, at p. 65, **Exhibit-FE 1/14** (emphasis added).

⁴⁵⁷ 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. 229, **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**. As mentioned above, martial law did not appear to be lifted until some years later.

established in 1902, the new administration, based in Wau, confronted a vast, largely inaccessible territory about which its (very few) British officials knew virtually nothing. The provincial Governor Boulnois wrote in November 1904 that much of the Province remained inaccessible and that “[a]dministration is not assured until the Province can be traversed without difficulty.”⁴⁵⁸

290. The same conditions were reflected in a 1908 report, which underscored the difficulty that the Anglo-Egyptian officials were still having in accessing the territories of the Dinka:

“*The whole Dinka country is difficult to traverse at any time*, as during the rains it is swampy and covered with high grass, and in the dry season the surface soil shrinks, and, as a result, travelling with horses or other animals is rendered dangerous by the large cracks that have appeared.”⁴⁵⁹

291. As with other southern areas, the provincial government of Bahr el Ghazal was too small and underfunded to administer even the few areas of the Province that were accessible.⁴⁶⁰ For example, Gleichen’s 1905 *The Anglo-Egyptian Sudan* reported that: “The Bahr El Ghazal now forms a Province under a Mudir or Governor (and Commandant) assisted by *three or four* British officers and inspectors.”⁴⁶¹ Even in 1911, the *Bahr el Ghazal Province Handbook* reported that while “[a] comparatively small proportion of the tribe living in the Central district [of the province] has been brought under administration, and *many of the northern districts are practically unvisited*.”⁴⁶²

292. The Sudan Government’s presence in the Bahr el Ghazal was limited and precarious for many years after 1905, with the Province remaining subject to martial law until 1907.⁴⁶³ Intertribal unrest was endemic and armed insurrections against Sudan Government authorities continued.⁴⁶⁴ Indeed, commercial and other travel to Bahr el Ghazal and southern Kordofan and regions of Upper Nile was prohibited until after 1905 without government permit.⁴⁶⁵

b) Kordofan Province

⁴⁵⁸ Annual Report on the Sudan, 1904, Province of Bahr el Ghazal, at p. 11 (“I do not think much can be done to develop [sic] the natural resources of the country until the communications have been improved. Moreover, Administration is not assured until the Province can be traversed without difficulty.”), **Exhibit-FE 2/4**.

⁴⁵⁹ Sudan Intelligence Report 171, October 1908, at Appendix D, at p. 60, **Exhibit-FE 3/5** (emphasis added). See also Notes on the Military Situation in the Southern Sudan and British East Africa, War Office 5 (1905) **Exhibit-FE 2/10**.

⁴⁶⁰ M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 80-82 (2003), **Exhibit-FE 11/5**. The high turnover of Condominium officials in Bahr el Ghazal (as elsewhere) added to the Province’s administrative instability. Between 1902 and 1914, Bahr al-Ghazal had seven governors and the average tenure of inspectors was only just over two years.

⁴⁶¹ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* 154 (1905), **Exhibit-FE 2/14** (emphasis added).

⁴⁶² See also *The Bahr el Ghazal Province*, Anglo-Egyptian Sudan Handbook Series, December 1911, at p. 29, **Exhibit-FE 3/8** (emphasis added).

⁴⁶³ *A Handbook of the Anglo-Egyptian Sudan* 182 (1922) (“By an Ordinance of February 7, 1907, the Sudan Codes were first applied to the [Bahr el Ghazal Province].”), **Exhibit-FE 3/10**; see also *The Bahr el Ghazal Province*, Anglo-Egyptian Sudan Handbook Series, December 1911, at p. 43, **Exhibit-FE 3/8**; Sudan Gazette No. 107, dated 7 February 1907, at p. 1, **Exhibit-FE 3/1**.

⁴⁶⁴ G. Warburg, *The Sudan under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 138-139 (1971), **Exhibit-FE 5/1**.

⁴⁶⁵ Government Notice published in Sudan Gazette No. 50, dated 1 August 1903, **Exhibit-FE 1/23**; Proclamation on Permits to Trade in Bahr el Ghazal, Upper Nile Province and Western Kordofan, published in Sudan Gazette No. 65, dated 1 August 1904, **Exhibit-FE 2/2**; Government Notice published in Sudan Gazette No. 55, Supplement to Sudan Gazette No. 54, dated December 1903, at p. 143, **Exhibit-FE 1/25**.

293. The region of Kordofan was given the status of a province by the Sudan Government in 1900.⁴⁶⁶ The Anglo-Egyptian presence in Kordofan was described as “reoccupation,”⁴⁶⁷ with the Annual Report of 1900 commenting: “[t]he Province of Kordofan, of which the old capital – El Obeid – was occupied on the 17th December, 1899, now forms the most western district directly administered by the Soudan Government.”⁴⁶⁸

294. The Sudan Government’s administration of Kordofan Province also encountered serious challenges. The 1900 Annual Report commented that “some sort of civil Government ... [had been] started in a *very primitive manner*,”⁴⁶⁹ and “[t]he province may scarcely be said to have as yet *any settled form of administration*.”⁴⁷⁰ That observation is hardly surprising given that the Khalifa (and a sizeable Mahdist army) remained at large in the Province until November 1898).

295. Describing Kordofan in 1901, the Province’s Governor stated “*a great portion of [the Province] has never been explored*.”⁴⁷¹ Similarly, in 1904, the Kordofan Governor reported that “Government Officials are very few and far between”⁴⁷² and the number of police was “quite inadequate for the area they are expected to control.”⁴⁷³ The report noted:

“[t]he great difficulty at present is the large area which Inspectors and Mamurs [less senior Condominium administrators] have to look after. It is practically impossible for some of the Inspectors to get round their districts in the working year, and *there are still portions of the Province that have never been visited by a Government Official*.”⁴⁷⁴

296. Likewise, a 1904 report noted that various areas of southern Kordofan “*are not yet fully subject to Government control*.”⁴⁷⁵ Even in 1907, Condominium reports noted that Southern Kordofan was largely unknown to government officials, who lamented that “*much still remains to be done before these extensive districts may be said to be fully under control*.” Similar remarks also apply to large portions of the Bahr-el-Ghazal, Mongalla and the Upper Nile Provinces.⁴⁷⁶

3. The Development of Sudanese Provincial Boundaries in the Early 20th Century

297. Against this background, we turn to the development of administrative boundaries between the Sudanese provinces in the early 20th century, with emphasis on that between Bahr el Ghazal and Kordofan. This development was characterized by the Condominium’s very recent origins (commencing only in 1899) and its limited presence in and access to Bahr el Ghazal and Kordofan.⁴⁷⁷ As a consequence of these factors, the Sudan Government was slow to develop or delimit provincial boundaries during the first decade of the 20th century

⁴⁶⁶ Annual Report on Egypt and the Soudan, 1900, at p. 68, **Exhibit-FE 1/14**.

⁴⁶⁷ Annual Report on Egypt and the Soudan, 1899, at p. 43, **Exhibit-FE 1/12**.

⁴⁶⁸ Annual Report on Egypt and the Soudan, 1900, at p. 68 **Exhibit-FE 1/14**.

⁴⁶⁹ Annual Report on Egypt and the Soudan, 1900, at p. 67, **Exhibit-FE 1/14** (emphasis added).

⁴⁷⁰ Annual Report on Egypt and the Soudan, 1900, at p. 82, **Exhibit-FE 1/14** (emphasis added).

⁴⁷¹ Annual Report on Egypt and the Soudan, 1901, at p. 73, **Exhibit-FE 1/15**.

⁴⁷² Annual Report on the Sudan, 1904, Province of Kordofan, at p. 104, **Exhibit-FE 2/4**.

⁴⁷³ Annual Report on the Sudan, 1904, Province of Kordofan, at p. 105, **Exhibit-FE 2/4**.

⁴⁷⁴ Annual Report on the Sudan, 1904, Province of Kordofan, at p. 106, **Exhibit-FE 2/4** (emphasis added).

⁴⁷⁵ Annual Report on the Sudan, 1904, Memorandum by Major General Wingate, at p.10, **Exhibit-FE 2/4**.

⁴⁷⁶ Annual Report on the Sudan, 1907, at p. 2, **Exhibit-FE 3/3** (emphasis added).

⁴⁷⁷ See above at paras. 270-292.

and, when administrative boundaries were referred to, they typically were uncertain, approximate and provisional.

298. Following the reconquest of Sudan, administration of the country by the Condominium was organized on the basis of provinces, with the country's central administration in Khartoum. In 1899, the Sudan Government announced the organization of the country into six provinces, being Khartoum, Berber, Dongola, Kassala, Sennar and Fashoda.⁴⁷⁸ As noted above, Bahr el Ghazal was not one of the original six provinces (instead having the status of an occupied military district), only being categorized as a province in 1902.⁴⁷⁹

299. In adopting a provincial structure, the Anglo-Egyptian forces and Sudan Government did not preserve the internal boundaries of the Mahdiyya.⁴⁸⁰ Instead, after 1899 the Sudan Government attempted to develop Sudanese provincial boundaries based on those of the *mudirias* as they were understood to have existed under the Turkiyya prior to 1885.⁴⁸¹ Thus, according to Holt, “[t]he country was divided into provinces, which, in the north, originally corresponded closely to those of the Turco-Egyptian period.”⁴⁸²

300. There were, however, considerable difficulties in ascertaining the administrative boundaries adopted by the Turco-Egyptian regime, which were peculiarly acute in southern Sudan. This was in part because these regions (including Bahr el Ghazal) had only been conquered by Turco-Egyptian forces in the 1870s⁴⁸³ and even then remained largely beyond governmental control (virtually the preserve of slave traders).⁴⁸⁴ One commentator described the southern “frontiers” under the Turkiyya regime as follows:

*“there were no definite frontiers in the modern European sense of the word, and boundaries simply ebbed and flowed with the rise and fall of the effective power of the state... The South was a little-known part of ‘Darkest Africa,’ occasionally raided for booty and slaves, and the North was divided into a number of competing tribal domains roughly organised under three medieval sultanates...”*⁴⁸⁵

301. The Turco-Egyptian *mudirias*' boundaries were also difficult for the Sudan Government to identify, not only because they were vague (and more than 20 years in the

⁴⁷⁸ Sudan Intelligence Report No. 60, dated 25 May to 31 December 1898, at p. 22, **Exhibit-FE 1/8**.

⁴⁷⁹ See above at paras. 287-289.

⁴⁸⁰ R. Hill, *Egypt in the Sudan 1820-1881* 167 (1959) (“When the British created the Condominium in 1899 after the Anglo-Egyptian reconquest of the Sudan, they did not look for their inspiration to British institutions, still less to Mahdist precedents drawn from classical Islam; they built squarely on Egyptian foundations... The permanent element in the local government, and most of the provincial capitals and boundaries, go back to Egyptian times.”), **Exhibit-FE 4/7**.

⁴⁸¹ M. Rahim, *Imperialism & Nationalism in the Sudan* 39 (2d ed. 1986), **Exhibit-FE 7/5**; R. Hill, *Egypt in the Sudan 1820-1881* 167 (1959), **Exhibit-FE 4/7**.

⁴⁸² P. Holt, *A Modern History of the Sudan* 118 (1961), **Exhibit-FE 4/10**.

⁴⁸³ R. Collins, *The Southern Sudan 1883-1898, A Struggle for Control* (1962) (“Kasala and Sawakin were acquired in 1840, and in the 1870s - during the reign of the Khedive Ismail - Dar Fur, the Bahr al-Ghazal and Equatoria were occupied.”), **Exhibit-FE 4/12**.

⁴⁸⁴ Bahr el Ghazal was effectively an autonomous region ruled by the slave-trader Al-Zubeir. “Gessi was Governor of the Bahr el Ghazal, but administration was practically non-existent and the slavetraders held sway [while] Darfur and Kordofan had never been fully subdued and were in a state of turmoil...” H. MacMichael, *The Sudan* 34 (1954), **Exhibit-FE 4/5a**.

⁴⁸⁵ M. Rahim, *Imperialism & Nationalism in the Sudan* 2-3 (2d ed. 1986), **Exhibit-FE 7/5** (emphasis added). Another author explains that, even with regard to Sudan's international boundaries during the Turkiyya, “[a] frontier in the European sense, with visible demarcation and regular frontier guards, did not exist. The border was a no-man's land varying in depth from twenty miles inland of Massawa to several hundred miles along the Nile-Congo divide.” R. Hill, *Egypt in the Sudan 1820- 1881* 153 (1959), **Exhibit-FE 4/7**.

pre-Mahdiyya past), but because they had frequently changed during the Turkiyya. As of 1878, Sudan had been divided into:

“eighteen *mudiriyya* and five governorates:
Khartoum, Sinnar, Fazughli (on the Blue Nile), Berber, Dongola, Taka (Nubia), Kurdufan east (?), Fashir, Dara, Kabkabiyya (Dar Fur), Bahr al-Ghazal, Fashoda (White Nile) Keri, Bor, Magongo, Muruli, Rol, Makarak (all Equatorial provinces), Musawwa, Sawakin, Zayla, Berbera (governorates on the Red Sea), Harar on the eastern side of Abyssinia is a general *mudirriya*.”⁴⁸⁶

A few years later, on the eve of the Mahdiyya, the Egyptians had revised the organization of the Sudan by dividing the country into three independent *hukumdariyat* under the direct control of Egypt.⁴⁸⁷

302. As a consequence, in many instances (including the Kordofan/Bahr el Ghazal boundary), the early Sudan Government’s administrators had at best a vague understanding of the Turkiyya *mudiria* boundaries from which Sudan’s new *mudiria* were to be derived.⁴⁸⁸ Thus, according to Gleichen’s 1898 *Handbook of the Sudan*, the *mudiria* “*limits*” were in general “*ill-defined*,”⁴⁸⁹ and they “[could not] be fixed with any precision.”⁴⁹⁰

303. The Sudan Government’s administrators were also hampered in their attempt to develop internal administrative boundaries by their lack of geographical and other knowledge of the territories in question; this meant that any administrative divisions could only be vague, impermanent and ad hoc. This was underscored in a 1900 report from Maxwell to Wingate that it was “*impossible to fix*” Sudan’s internal provincial boundaries with “*any idea of permanency*”:

“You ask me about my views on the boundaries between Mudeiries, here you touch on a very big question, it is impossible to fix them with any idea of permanency until we have a real systematic survey of the whole country and more or less fix our lines of [unintelligible] communication, along the river there is no great difficulty but where Sennar ends and Kassala begins in the desert is rather vague, the limits of Dongola as regards Khartoum, the limits of Khartoum as regards Kordofan or Berber desertwards *must all more or less be vague until we survey it piecemeal and know tribal boundaries*, more or less we have had no great difficulty so far but I

⁴⁸⁶ Santoni, *A Director of Posts on Tour* in P. Santi and R. Hill (eds.), *The Europeans in the Sudan 1834-1878* 224 (1980), **Exhibit-FE 6/9**.

⁴⁸⁷ R. Collins, *The Southern Sudan 1883-1898, A Struggle for Control* 10 (1962), **Exhibit-FE 4/12**; G. Warburg, *The Sudan under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 69 (1971), **Exhibit-FE 5/1**; see also A. Theobald, *The Mahdiya, A History of the Anglo-Egyptian Sudan, 1881-1899* 177 (1951) (“The Sudan was divided into provinces, as in the days of the Egyptian government, but the boundaries and capitals were not rigidly defined, and varied chiefly according to military necessity. Thus Kordofan and Darfur were sometimes administered as one unit, sometimes as two; similarly the eastern Sudan at first all came under the authority of 'Uthman Digna, but after the fall of Tokar, appears to have been sub-divided.”), **Exhibit-FE 4/17**. Subsequently, to an even greater extent than during the Egyptian government, provinces under the Mahdiya were “changed as districts were combined or transferred for military, fiscal or administrative purposes.” P. Holt, *The Mahdist State in the Sudan 1881-1898* 225 (1970), **Exhibit-FE 4/19**.

⁴⁸⁸ See below at paras. 315-318.

⁴⁸⁹ E. Gleichen, *Handbook of the Sudan* 40 (1898), **Exhibit-FE 1/6**.

⁴⁹⁰ E. Gleichen, *Handbook of the Sudan* 40 (1898), **Exhibit-FE 1/6**. The Sudan Government recognized the uncertain character of the *mudiria* boundaries and aspired (in a 1900 Report) to an “*eventual delimitation*” of provincial boundaries – but without suggesting when this would occur. Annual Report on Egypt and the Soudan, 1900, at p. 66, **Exhibit-FE 1/14**.

know it is bound to come up as a big question one day. *I recollect as a small boy writing in a copy book “Procrastination is the thief of time”, one has to procrastinate here.*⁴⁹¹

304. Not surprisingly, during the first decade of the Condominium, no Sudanese provincial boundaries were prescribed in any constitutional, legislative or executive decree or proclamation. Equally, during the same period, the Sudan Government issued no map of Sudan delimiting boundaries between the Sudanese provinces and, as discussed below, even after 1910 maps produced by the Government generally referred only to “approximate” provincial boundaries.⁴⁹² Instead, the Sudan Government made efforts to develop provincial boundaries in the form of *ad hoc* practice, reflected in a variety of administrative reports (including Annual Reports for each province), semi-official handbooks and periodic communications.

305. By 1905, the only real effort comprehensively to describe the limits of the territory of Sudan’s provinces was an Appendix to Gleichen’s unofficial 1905 *The Anglo-Egyptian Sudan*. Gleichen’s 1905 Appendix contained a discursive, textual description of the author’s views regarding the administrative boundaries of the then existing Sudanese provinces. That unofficial account was by its terms vague, approximate and provisional, reflecting Gleichen’s understanding of the Sudan Government’s ongoing efforts to develop internal administrative regions.

306. For example, Gleichen’s description of the northern boundary of Berber province was “[t]he northern boundary of the Sudan from *about E. long. 33°* to the Red Sea.”⁴⁹³ Similarly, the description of the boundary between Berber and Suakin provinces was by reference to neighboring tribes: “[f]rom the point where the northern boundary touches the sea the line runs in a southerly direction to Kokreb, leaving the Hamedorab, Shantirab, and other Bisharin tribes to Berber and the Amarar to Suakin.”⁴⁹⁴ As described in Professor Daly’s expert report, numerous other aspects of Gleichen’s descriptions were similar.⁴⁹⁵

307. To the same effect, Gleichen’s 1905 *The Anglo-Egyptian Sudan* included a map of Sudan, which identified some provincial boundaries, but omitted boundaries between many provinces (recognizing that such boundaries were in the process of development and uncertain and/or provisional). The map is attached as **Map 36** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905)).⁴⁹⁶ Among other things, Gleichen’s map depicted no boundary (not even an approximate one) between Bahr el Ghazal and Kordofan.

⁴⁹¹ Letter from Maxwell to Wingate, dated 19 January 1900, at 270/1/77, **Exhibit-FE 1/3** (emphasis added).

⁴⁹² See below at paras. 329-330.

⁴⁹³ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. 1, 335 (1905), **Exhibit-FE 2/14** (emphasis added).

⁴⁹⁴ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. 1, 335 (1905), **Exhibit-FE 2/14**.

⁴⁹⁵ Daly Expert Report, at pp. 29-30. The description of the boundaries of White Nile Province was also vague: “From Meshra Abadam on the White Nile (13 miles south of Khartoum) *to a point about half-way between it and Soba on the Blue Nile*.” Similarly, the northern boundary of Halfa province is described as: “the line runs due south to Murrat wells leaving the desert tribes to Berber, thence *in a south-west direction across the railway, a few miles north of No. 6 Station*, to Abu Fatma on the right bank of the Nile”. The description of the Southern boundary of the Sennar province was described as “from Fadasi Amarab to J. Atshan, and thence southwards, leaving the Segadi-Moya-Gule road to Sennar, to Jebel Geravid, *and thence to about the intersection of 33° E. Long. with 10° N. Lat.*” E. Gleichen, (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. 1, 336-337 (1905), **Exhibit-FE 2/14** (emphasis added).

⁴⁹⁶ **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).

308. The same absence of definite or permanent provincial boundaries was evident in a map prepared by Mardon for his 1906 *Geography of Egypt and the Anglo-Egyptian Sudan*, which is attached as **Map 32** (*The Anglo-Egyptian Sudan*, Mardon, 1906).⁴⁹⁷ Mardon's 1906 text noted that "[t]he exact limits of the provinces, especially those in the south, are not yet very definitely fixed."⁴⁹⁸ The qualification applied *a fortiori* to an earlier map prepared by Mardon in 1901, attached as **Map 33** (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903)),⁴⁹⁹ although not specifically noted. Both Mardon maps were unofficial products and were simplistic in their presentations, obviously not purporting to define provincial boundaries.

309. In addition to being vague and *ad hoc*, early Sudan Government provincial boundaries were provisional administrative arrangements which were frequently changed.⁵⁰⁰ As the GoS summarized the point in one of its presentations to the ABC, "[t]hroughout the first decade of the Condominium, *Mudiria* boundaries were frequently altered."⁵⁰¹

310. Not surprisingly, there is a multitude of examples of changes to the boundaries of Sudan's provinces in the first decades of the Condominium.

- a. In 1903, the boundaries of the provinces of Dongola, Gezira and Khartoum were amended.⁵⁰²
- b. In 1903, the boundary of Bahr el Ghazal with the Congo Free State was the subject of ongoing negotiations (these negotiations continued until 1906).⁵⁰³
- c. In 1904, the boundaries between Berber and Gezira Provinces were altered, as were the boundaries between Berber and Kassala and Kassala and Gezira.⁵⁰⁴
- d. In 1905, a new province named White Nile was created⁵⁰⁵ and Gezira was reconstituted as Blue Nile Province.⁵⁰⁶

⁴⁹⁷ **Map 32** (*The Anglo-Egyptian Sudan*, Mardon, 1906).

⁴⁹⁸ 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.

⁴⁹⁹ **Map 33** (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903)).

⁵⁰⁰ G. Warburg, *The Sudan under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 71 (1971), **Exhibit-FE 5/1**. Among other things, in the early years of the Condominium there were changes in provincial boundaries in order to facilitate closer administrative control of the government over the people or to unify tribes which had been split by an arbitrary border.

⁵⁰¹ GoS Presentation, 1 April 2005, at slide 22, **Exhibit-FE 14/2**.

⁵⁰² These boundary alterations were, however, published after more than two years in Sudan Gazette No. 83, dated 1 November 1905, at p. 63, **Exhibit-FE 2/11**.

⁵⁰³ Annual Report on the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13**. Between 1902 and 1906 the British Foreign Office was negotiating with the representatives of Leopold II of Belgium, the ruler of the Congo Free State, who disputed the Anglo-Egyptian Condominium's claim to southern areas of Sudan. It was not until 1906 that this issue was resolved, when King Leopold entered into an agreement with the Anglo-Egyptian Condominium, which provided King Leopold with significant commercial rights and allowed him to continue to reign over the Lado Enclave in southern Sudan throughout his lifetime. Annual Report of the Sudan 1906, at pp. 11-12, **Exhibit-FE 2/19**; Annual Report on Egypt and the Soudan, 1906, at p. 119, **Exhibit FE 2/18**. Upon King Leopold's death in 1910 the Lado Enclave was transferred to the Anglo-Egyptian Condominium.

⁵⁰⁴ Sudan Intelligence Report No. 115, dated February 1904, at pp. 5-6, **Exhibit-FE 2/1**.

⁵⁰⁵ Sudan Gazette, No. 70, dated 1 January 1905, at p. 278 ("A new Province, comprised of Duein Gedid, Goz-Abu-Gunna, Geteina and Kawa Districts is from this date formed, which will be called the 'White Nile Province'"), **Exhibit-FE 2/5**.

⁵⁰⁶ Sudan Gazette, No. 70, dated 1 January 1905, at p. 279, **Exhibit-FE 2/5**.

- e. In 1905, the boundaries of Khartoum Province were altered,⁵⁰⁷ as were those of the Markaz of the White Nile Province.⁵⁰⁸
- f. In 1906, a portion of Upper Nile Province was hived off and created into a new province named Mongolla Province, thus altering the boundaries of the Upper Nile Province.⁵⁰⁹
- g. In 1906, Suakin was re-named Red Sea Province, the boundary between the newly named Red Sea and Kassala Provinces was also amended.⁵¹⁰
- h. In 1906, various towns were transferred from Sennar Province to the Blue Nile Province, altering the boundary between the two provinces.⁵¹¹
- i. More generally, Wingate noted that between 1899 and 1905, “[n]umerous other small changes in boundaries have taken place, but they are not of sufficient importance to merit record” in reports to Condominium authorities.⁵¹²

311. Provincial boundary alterations were also made without serious consideration. For example, the Governor of Kordofan commented that the area of Kaka and Um Aherin in eastern Kordofan had been transferred from Kordofan to Fashoda, and that at the time of the transfer he had “made no remark,” because he “did not know of any good reason for or against it.”⁵¹³ Learning more about the people who were transferred, he later reported that “I certainly think that on the west bank of the White Nile north of Kaka, and up to the boundary at Dueim, ought to be transferred back to Kordofan.”⁵¹⁴

312. In sum, for the first decade of the 20th century, the Sudan Government was engaged in developing provincial boundaries between the Sudanese provinces. This process had not been completed by 1910, much less 1905, as the Government’s administrators themselves recognized. Instead, internal Sudanese administrative boundaries had not been delimited and remained approximate, uncertain and provisional.⁵¹⁵

4. The Development of Provincial Boundaries Between Bahr el Ghazal and Kordofan in the Early 20th Century

313. The general characteristics of the development of Sudanese provincial boundaries applied with particular force to the development of provincial boundaries between Bahr el Ghazal and Kordofan in the early 20th century. The location of the Bahr el Ghazal/Kordofan boundary during this period was often described in general terms as the “Bahr el Arab,” but

⁵⁰⁷ Sudan Gazette, No. 73, dated 1 March 1905, at p. 312, **Exhibit-FE 2/7**.

⁵⁰⁸ Sudan Gazette, No. 78, dated 1 July 1905, at p. 346, **Exhibit-FE 2/9**.

⁵⁰⁹ Sudan Gazette, No. 86, dated 1 January 1906, at p. 413, **Exhibit-FE 2/16**.

⁵¹⁰ Sudan Gazette, No. 86, dated 1 January 1906, at p. 415, **Exhibit-FE 2/16**.

⁵¹¹ Sudan Gazette, No. 86, dated 1 January 1906, at p. 414, **Exhibit-FE 2/16**.

⁵¹² Annual Report on the Sudan, 1905, Memorandum of Major General Sir R. Wingate, at p. 24, **Exhibit-FE 2/13**. The same Memorandum noted that, “it has been possible during the past year to make some important alterations in the provincial boundaries, which have tended to a general improvement in administration, and a few further changes will also take place from the beginning of the new year.” *Ibid*, at p. 23.

⁵¹³ Sudan Intelligence Report No. 104, dated March 1903, at Appendix E, at p. 20, **Exhibit-FE 1/21**.

⁵¹⁴ Sudan Intelligence Report No. 104, dated March 1903, at Appendix E, at p. 20, **Exhibit-FE 1/21**.

⁵¹⁵ By 1905, even some of Sudan’s international borders were yet to be properly demarcated and delimited: the northern boundary was “nominally the twenty-second parallel of N. latitude,” but in fact began “for administrative purposes, on the Nile at Faras Island, 12 miles north of the parallel”; H. Mardon, *A Geography of Egypt and the Anglo-Egyptian Sudan* 159, footnote 1, (1906), **Exhibit-FE 2/20**; and as at 1906, “the fifth parallel of N. latitude is, for the present, considered as the dividing line between the Sudan and Uganda.” H. Mardon, *A Geography of Egypt and the Anglo-Egyptian Sudan* 161 (1906), **Exhibit-FE 2/20**.

this was a provisional and approximate reference, made by officials who had very little knowledge of the geography or peoples of the region. Indeed, as discussed below, this putative boundary was also based on a demonstrably mistaken geographic understanding, with Sudan Government administrators confusing the Bahr el Arab for other waterways (lying further to the north).

314. Preliminarily, it bears emphasis that any provincial boundaries between Bahr el Ghazal and Kordofan in the first decade of the 20th century had extremely limited practical significance. As already discussed, the Sudan Government had essentially no administrative or governmental presence in the border region (however defined) of the two provinces.⁵¹⁶ As Professor Daly's expert report explains, there were no serious questions of taxation, judicial or legislative administration, education, health, commercial regulation, or even security in southern Sudan that depended on provincial boundaries during this period; accordingly, there was little reason for the Government to devote more than passing attention to the subject of developing administrative boundaries in that area, and it did not do so.⁵¹⁷

a) Uncertain and Approximate Character of the Kordofan/Bahr el Ghazal Boundary

315. Not surprisingly, given the inaccessibility of the region and the fact that it had historically not been subject to formal administration, no boundary had been delimited between Bahr el Ghazal and Kordofan under either the Turkiyya or the Mahdiyya. Instead, in 1844, during the Turkiyya, the area of Kordofan was described as follows:

“[I]n the north from Haraza to Kodero ... The desert of Dongola forms its northern border, that of Darfur its western limit. ***Towards the south, no definite confines can be described***, as the extent of these dominions increases or decreases accordingly as inhabitants of this part of the country become tributary, either by their free will, or [become] subjects by force, as occasionally occurs, and subsequently free themselves from the yoke.”⁵¹⁸

316. Major Prout, an officer of the Egyptian Army, in his 1877 “General Report on the Province of Kordofan,” explained similarly that “[t]he limits of the jurisdiction of the *Mudir* (governor) of Kordofan are ***not well defined***.”⁵¹⁹ He described the “***approximate***” extent of Kordofan as reaching only as far south as parallel 12°, asserting:

“the Province of Kordofan is situated between the parallels 12° and 16° of north latitude, and the 29°30' and the 32°30' meridians of longitude east from Greenwich.”⁵²⁰

317. In 1898, just before the Condominium was established, Gleichen's *Handbook on the Sudan* reported on the Bahr el Ghazal region under Turco-Egyptian rule as follows:

“1. *Bahr el Ghasal* – This mudirieh was vaguely defined, but may be described as enclosing the entire district watered by the southern tributaries of the Bahr el Arab and the Bahr el Ghazal Rivers.”⁵²¹

⁵¹⁶ See above at paras. 281-296.

⁵¹⁷ Daly Expert Report, at p. 31.

⁵¹⁸ I. Pallme, *Travels in Kordofan* 1 (1844), **Exhibit-FE 1/3** (emphasis added).

⁵¹⁹ H. Prout, “General Report on the Province of Kordofan”, at p. 1 (1877), **Exhibit-FE 1/4**.

⁵²⁰ H. Prout, “General Report on the Province of Kordofan”, at p. 1 (1877), **Exhibit-FE 1/4** (emphasis added).

318. This description was uncertain and approximate – not just by its express admission (the *mudiria* boundary “*was vaguely defined*, but *may be described...*”), but also by its broad-brush reference to an “*entire district watered by [unnamed] southern tributaries*” of two rivers. That uncertainty was aggravated substantially by the fact (discussed below) that the Kiir/Bahr el Arab, Bahr el Ghazal and Lol were sprawling, shifting river systems which had not been explored, much less surveyed, by Sudan Government officials, and whose actual course(s) were unknown.⁵²²

319. Accordingly, it is unsurprising that Sudan Government communications at the turn of the 20th century were particularly vague, uncertain and confused with regard to any administrative boundary between Bahr el Ghazal and Kordofan. Thus, in the first Annual Report for Bahr el Ghazal Province, issued in 1902, the new Governor provided his understanding of the *mudiria* boundaries in the following terms:

“**Mudiria Boundaries.** – *I understand them* to be ... on North Bahr-el-Ghazal and Bahr-el-Arab....”⁵²³

320. Likely referring to Gleichen’s equally uncertain description of the province’s former boundaries (“*vaguely defined*”), this tentative observation (“*I understand them to be*”) illustrated the continuing uncertainty surrounding the development of the province’s boundaries. (Moreover, as discussed below, the uncertainty surrounding the “Bahr-el-Arab” as a putative boundary was heightened by the Sudan Government’s confusion of the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga.⁵²⁴)

321. By 1905, the most concrete references to a Bahr el Ghazal/Kordofan boundary were the 1903 Kordofan Annual Report, which referred to the southern boundary of Kordofan as being “*Bahr-El-Arab and Bahr-El-Ghazal to Lake No*”⁵²⁵ and the description in Gleichen’s 1905 *The Anglo-Egyptian Sudan* (noted above), which referred to a boundary running “southwards to *the Bahr el Arab*, leaving the Maalia and Rizeigat to Darfur, and the Homr and Dar Jange to Kordofan.”⁵²⁶

322. These references did not indicate the adoption or delimitation of any definitive boundary between Kordofan and Bahr el Ghazal. As discussed above, there was no Condominium legislation, proclamation, ordinance, decree or order delimiting any boundary between Bahr el Ghazal and Kordofan.⁵²⁷ Rather, the Sudan Government’s officials were

⁵²¹ E. Gleichen, *Handbook of the Sudan* 110 (1898), **Exhibit-FE 1/6**. Similarly, Gleichen, in the *Precis of Events on the Upper Nile and Adjacent Territories including Bahr-el-Ghazal and Uganda from 1878 to March 1898*, Intelligence Division, War Office, March 1898, at p. 2, reported “the country termed hereafter Bahr-el-Ghazal is considered to be that irregular, well-watered, right-angled triangle comprised by the Bahr-el-Arab and Bahr-el-Ghazal Rivers on the north, the White Nile between its junction with the Bahr-el-Ghazal and the Albert Nyanza on the east [sic.] (here called the Bahr-el-Jebel), and the Nile-Congo watershed in the southwest.”, **Exhibit-FE 1/7**.

⁵²² See below at paras. 337-343.

⁵²³ Annual Report on the Sudan, 1902, Province of Bahr el Ghazal, at p. 230, **Exhibit-FE 1/20** (emphasis added).

⁵²⁴ See below at paras. 337-339.

⁵²⁵ Annual Report on the Sudan, 1903, Province of Bahr el Ghazal, at p. 71, **Exhibit-FE 1/25**. This statement merely repeated the previous comment by Gleichen’s 1898 *Handbook on the Sudan*, at p. 110, observing generally that the Bahr el Arab and Bahr el Ghazal were understood to be the boundary between Kordofan and Bahr el Ghazal.

⁵²⁶ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. I, 337 (1905), **Exhibit-FE 2/14**.

⁵²⁷ The 1903 Bahr el Ghazal Annual Report made no reference at all to the province’s boundaries, and the 1904 Bahr el Ghazal and Kordofan Annual Reports simply noted that there had been no alterations to the provinces’

engaged in attempting to develop workable boundaries for the territories they were to govern through administrative practice.

323. This was reflected in the earlier comments that “*it is impossible to fix*” the “*boundaries between Muderiehs*,” which would necessarily be “*vague*” and lacking “any idea of permanency.”⁵²⁸ It was also reflected in the subsequent observations in the 1911 *Bahr el Ghazal Province Handbook*, which said that “[t]he actual boundary line is not yet delimited [sic]”⁵²⁹ between Kordofan and Bahr el Ghazal.

324. The Sudan Government’s maps confirmed the absence of any clearly recognized or definite boundary between Kordofan and Bahr el Ghazal during the first decade of the 20th century.

325. These maps did not identify any Kordofan/Bahr el Ghazal boundary at all until well after 1905, and, even when a boundary began to be identified, it was labeled “appropriate.”

326. Thus, 1904 review of Sudan’s surveys, reported in relation to the Bahr el Ghazal that “no maps have yet been printed, though many sketches have been made,” and “[t]he frontier of the Bahr-el-Ghazal also remains to be done.”⁵³⁰ That was true in 1905 and remained so for a number of years thereafter.

327. As noted above, the map attached to Gleichen’s 1905 *The Anglo-Egyptian Sudan* omitted any boundary for Bahr el Ghazal and Kordofan (as indicated on **Map 36** *The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905)⁵³¹), as did the 1906 version of the Mardon map (as indicated on **Map 32** (*The Anglo-Egyptian Sudan*, Mardon, 1906)).⁵³²

328. Likewise, the Survey Department of Cairo produced a 1907 map titled “The White Nile and Kordofan,” **Map 42** (*The White Nile and Kordofan*, Survey Department Cairo, 1907).⁵³³ Although the map identified a boundary between Darfur and Kordofan, it did not mark any boundary between Bahr el Ghazal and Kordofan.

329. It was only in 1910 that the Royal Geographic Society produced an unofficial map (to show the travels of Watkiss Lloyd) that identified a boundary between Kordofan and Bahr el Ghazal, running somewhat south of the Bahr el Arab, which it described as an “*Approximate Boundary*.”⁵³⁴ The 1910 Royal Geographic Society map is attached as **Map 44** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910).

boundaries. Annual Report on the Sudan, 1904, Province of Bahr el Ghazal, at p. 3 (“[n]o alterations”), **Exhibit-FE 2/4**; Annual Report on the Sudan, 1904, Province of Kordofan, at p. 101 (“[t]he Boundaries of the Province have not altered”), **Exhibit-FE 2/4**.

⁵²⁸ Letter from Maxwell to Wingate, dated 19 January 1900, at 270/1/77 **Exhibit-FE 1/13** (emphasis added).

⁵²⁹ *The Bahr el Ghazal Province*, Anglo-Egyptian Sudan Handbook Series, December 1911, at p. 5, **Exhibit-Exhibit-FE 3/8** (emphasis added).

⁵³⁰ Annual Report on Egypt and the Soudan, 1904, at p. 114, **Exhibit-FE 2/3**.

⁵³¹ **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). See above at para. 307.

⁵³² **Map 32** (*The Anglo-Egyptian Sudan*, Mardon, 1906). See above at para. 308.

⁵³³ **Map 42** (*The White Nile and Kordofan*, Survey Department Cairo, 1907); **Map 43** (*The White Nile and Kordofan*, Survey Department Cairo, 1907- Overlay).

⁵³⁴ **Map 44** *The Sudan Province of Kordofan*, Watkiss Lloyd, 1910) see grid 14/28 “Approximate Boundary”; **Map 44a** *The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Detail); **Map 45** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Overlay); According to the ABC, a 1912 map issued by the Condominium’s

330. To similar effect, the Survey Office of Khartoum produced a map in 1916 which also identified a boundary between Bahr el Ghazal and Kordofan, but again described this as “**Approx. Province Bdy**: Kordofan/Bahr El Ghazal.”⁵³⁵ The 1916 Survey Office map is attached as **Map 50** (*Achwang: Sheet 65-K*, Survey Office Khartoum, 1916).

b) Sudan Government’s Lack of Geographic Information About Bahr el Ghazal and Kordofan

331. The absence of any definite boundary between Kordofan and Bahr el Ghazal in the first decade of the 20th century was attributable in part to the Sudan Government’s lack of geographic information about the region. As discussed above, Gleichen wrote in 1899:

“It will be all the more interesting to learn the details of the course of the Bahr el Arab; that great river *Almost a century has passed since Brown marked it vaguely on the map, and our knowledge of it is even now hardly more definite. No European has explored the whole course of the stream* It therefore follows that nothing definite has resulted from these diverse observations.”⁵³⁶

332. The Kiir/Bahr el Arab river system had not been explored, much less surveyed, by Sudan Government officials in 1904. It was reported that year (1904) that:

“Lieutenant Bayldon, R.N., is at present employed in collecting information about the Bahr-el-Arab, the Kyr, the Lol, and other streams in the vicinity, of *whose courses no thoroughly trustworthy information is as yet available.*”⁵³⁷

333. Gleichen’s 1905 *The Anglo-Egyptian Sudan* contained similar observations. It explained that:

“The surface of the Bahr El Ghazal country is intersected by many rivers threading their way from the watershed towards the Nile The courses of [most such rivers], whether ultimately falling into the Bahr El Ghazal itself, or first joining the Bahr Telgona or Bahr El Arab, *have not yet been properly explored, and the exploration is rendered difficult by the fact that, owing to the flatness of the country in their lower courses, the water spreads all over the land and forms enormous swamps which stretch to those which join the Bahr El Ghazal itself.*”⁵³⁸

central Sudan Survey department cautioned that “[t]he course of the Bahr el Arab is entirely unsurveyed.” ABC Report, Part I, at p. 38, **Appendix B**.

⁵³⁵ **Map 50** (*Achwang: Sheet 65-K*, Survey Office Khartoum, 1916) (emphasis added); **Map 50a** (*Achwang: Sheet 65-K*, Survey Office Khartoum, 1916 – Detail); **Map 51** (*Achwang: Sheet 65-K*, Survey Office Khartoum, 1916 – Overlay).

⁵³⁶ E. Gleichen, *Supplement to the Handbook of the Sudan* 188-189 (1899), **Exhibit-FE 1/11** (emphasis added).

⁵³⁷ Annual Report on Egypt and the Soudan, in 1904, at p. 113, **Exhibit-FE 2/3** (emphasis added). Governor of the Bahr al-Ghazal province wrote in 1904, “I can’t help thinking that the best way to find these rivers is to trace them downwards.” W. Boulnois to Wingate, dated 3 January 1904, SAD 275/9, **Exhibit-FE 1/28**; ABC Report, Part I, at p. 38, **Appendix B**.

⁵³⁸ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. I, 154 (1905), **Exhibit-FE 2/14** (emphasis added).

The lack of information concerning Bahr el Arab/Kiir and other rivers in the region was emphasized by Wingate’s 1904 Annual Report of the Sudan, which commented: “During my visit to the Bahr-el-Ghazal **I was much struck with the difficulty of identifying various rivers** owing to the fact that the natives, through whose territory they pass, give to those portions of them their own distinctive names. For instance, the Bahr-el-Arab, in its upper reaches, is known as the Bahr-el-Rizeigat, as it passes through the Rizeigat country; lower down, for the same reason, it is known as the Bahr-el-Janghe; and still further down, as the Bahr-el-Homr.” Annual Report on Egypt and the Soudan, 1904, at p. 114, **Exhibit-FE 2/3** (emphasis added).

334. Other contemporaneous authorities made similar observations. An “Itinerary of the Bahr el Ghazal River,” by the Governor of Bahr el Ghazal, notes that “[t]he Bahr El Ghazal has evidently changed its course here very recently. It is now much closer to the left bank than it was in 1899.”⁵³⁹ Specifically in relation to the Bahr el Arab, Boulnois stated “[n]ext to *nothing is known of this river* It is impossible to investigate this river, as, at some 1,300 yards above the junction, it is closed by sudd and reeds.”⁵⁴⁰

335. Similarly, the 1907 Bahr el Ghazal Annual Report noted: “*very little is known of the country on either side of the northern boundary of the Province*, and probably swamps or other obstacles will be found”⁵⁴¹ Even in 1909, it was reported that “[m]uch of the course of the *Bahr-el-Arab is still unexplored*.”⁵⁴²

336. In these circumstances, it was entirely understandable that the Sudan Government’s administrators did not adopt the Kiir/Bahr el Arab as a definitive or permanent boundary between Kordofan and Bahr el Ghazal during the first decade of the 20th century. As the Sudan Government’s internal reports repeatedly cautioned, its officials lacked the geographic information necessary for a definite or permanent boundary between the provinces (as well as any pressing administrative need to define such a boundary⁵⁴³).

c) Confusion between Bahr el Arab, Bahr el Homr and Ngol/Ragaba ez Zarga

337. Beyond the Sudan Government’s recognition of the general state of its ignorance regarding the southern territories and rivers of Bahr el Ghazal and Kordofan, there was a further, specific aspect of uncertainty. Specifically, Government administrators realized in 1905 that they had frequently been mistaken in their understanding of the location and identity of the so-called “Bahr el Arab” River.

338. As noted above, the approximate boundary between Bahr el Ghazal and Kordofan was occasionally referred to in administrative reports between 1902 and 1905 as the Bahr el Arab.⁵⁴⁴ In reality, however, Sudan Government administrators were mistaken about what constituted the “Bahr el Arab,” wrongly believing that the Ngol/Ragaba ez Zarga was the “Bahr el Arab.” Indeed, the Gleichen 1904 Map⁵⁴⁵ mislabeled the Ngol/Ragaba ez Zarga as the “Bahr el Arab.”⁵⁴⁶

⁵³⁹ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. I, 167 (1905), **Exhibit-FE 2/14**.

⁵⁴⁰ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. I, 168 (1905), **Exhibit-FE 2/14**.

⁵⁴¹ Annual Report on the Sudan, 1907”, Province of Bahr el Ghazal, at p. 165, **Exhibit-FE 3/3** (emphasis added).

⁵⁴² Annual Report on the Sudan, 1909, at p. 52, **Exhibit-FE 3/6**. By 1913, Wingate commented upon the continuing uncertainty surrounding the Bahr el Arab, when he told the Royal Geographical Society that “*once the mystery of the possible connexion between the Bahr el-Arab and the Lol with the Jur had been unravelled, a way might be found to penetrate the north-western extremity of the Bahr el-Ghazal Province by way of the Bahr el-Arab*.” R. Hill, *Sudan Transport - A History of Railway, Marine and River* 60 (1965), **Exhibit-FE 4/14** (emphasis added).

⁵⁴³ See above at paras. 301-303; Daly Expert Report, at p. 31.

⁵⁴⁴ See above at paras. 319-321.

⁵⁴⁵ **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*, 1904 (in Gleichen, 1905) – Overlay).

⁵⁴⁶ The 1904 Gleichen Map incorrectly labels the Ngol as the Bahr el Arab. This error is corrected in the 1910 Lloyd Kordofan Map, which shows the Ngol correctly labelled. **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913), incorrectly labels the Kiir/Bahr el Arab as the Lol. Sudan Intelligence Report 141, dated April 1906, at p. 6, **Exhibit-FE 2/17**; ABC Report, Part I, at p. 18, **Appendix B**.

339. The extent of the confusion over the Bahr el Arab River was realized by the Sudan Government's administrators following explorations of the region by Lieutenant Bayldon in 1904/1905.⁵⁴⁷ Bayldon's findings were reported in 1906, and explained that the river previously identified as the Bahr el Arab (or Gurf), was actually the "Bahr el Homr" (at that time also referred to as the Ngol/Ragaba ez Zarga River). Bayldon's finding also explained that the Bahr el Arab was instead actually a river to the south of the Ngol/Ragaba ez Zarga River (that is, the Kiir/Bahr el Arab). As a Sudan Intelligence Report (No. 141) explained:

"The explorations of Lieut. Bayldon, R.N., seem to establish that, *contrary to the view hitherto held*, the river rising to the south of Hofrat en Nahas and bending eastwards to the north of lat. 10° N. *should be called the Bahr el Homr*, while the more southern river rising in the Dar Fertit hills to the west of Liffi is *the Bahr El Arab or Kir*...."⁵⁴⁸

340. The identification of the Bahr el Arab as south of the Bahr el Homr, and therefore the southern boundary of Kordofan province, was clarified in a 1908 Sudan Intelligence Report (No. 171): "*Some thirty miles south [of the Bahr el Homr/Ngol River] is the Bahr El Arab (or Gurf), which forms the southern boundary of the Province.*"⁵⁴⁹

341. The Sudan Government's mistakes regarding the identity, location and course of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, and therefore the approximate boundary between affected provinces, underscores the uncertain and provisional character of the provincial boundaries which were being developed by the Sudan Government during this period. This was the conclusion of the ABC, which explained:

"The experts' research revealed to them that *there was considerable geographical confusion about the Bahr el-Arab and the Bahr el-Ghazal regions for the first two decades of the Condominium rule*. This was part of a broad range of geographical inaccuracies regarding most of the Sudan in that time."⁵⁵⁰

342. Based on the Sudan Government's mistaken understanding of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, the ABC concluded that the approximate boundary between Bahr el Ghazal and Kordofan was in fact regarded by the Sudan Government as what is now known to be the Ngol/Ragaba ez Zarga River: "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."⁵⁵¹

343. In sum, when Sudan Government officials had previously referred to the Bahr el Arab, they had in fact generally meant the Ngol/Ragaba ez Zarga, and not what is today known the Kiir/Bahr el Arab. In turn, when the "Bahr el Arab" was referred to as the Kordofan/Bahr el Ghazal boundary (as discussed above⁵⁵²), this confusion compounded the uncertain and approximate character of the putative provincial boundary.

⁵⁴⁷ Lieutenant Colonel Bayldon's report on the Bahr el Arab was published in Sudan Intelligence Report No. 128, dated March 1905, Appendix C, at p. 10 where he reported that "*the river usually spoken of as the Bahr el Arab ... is really the Bahr el Homr*", **Exhibit-FE 2/8**.

⁵⁴⁸ Sudan Intelligence Report, No. 141, dated April 1906, Appendix C, at p. 6, **Exhibit-FE 2/17** (emphasis added). (In fact there was further confusion when the even more southern, Lol, was sometimes referred to as the Bahr el Homr instead.)

⁵⁴⁹ Sudan Intelligence Report, No. 171, dated October 1908, Appendix D, at p. 35, **Exhibit-FE 3/5**.

⁵⁵⁰ ABC Report, Part I, at p. 18, **Appendix B** (emphasis added).

⁵⁵¹ ABC Report, Part I, at p. 39, **Appendix B**.

⁵⁵² See above at paras. 319-321.

5. The Territory of the Ngok Dinka in 1905

344. As discussed below, after an extensive evidentiary review, the ABC Experts unanimously concluded that the Ngok Dinka had occupied and used an area that stretched north from the current boundary between Bahr el Ghazal and Kordofan, encompassing the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems, and extending to latitude 10°35'N and as far as Meiram on the west and Heglig on the east. The ABC Experts reasoned that the Ngok had settled in “Ragaba ez Zarga/Ngol [which] has similarly been a site of Ngok Dinka permanent settlement since at least the late eighteenth century,”⁵⁵³ and that:

“[t]here is *compelling evidence to support the Ngok claims to having dominant rights to areas along the Bahr el Arab[/Kir] and Ragaba ez-Zarga[/Ngol] and that these are long-standing claims that predated 1905.*”⁵⁵⁴

345. The ABC’s conclusions are supported by a wide range of historical and contemporary evidence. As discussed in detail below, pre-1905 Sudan Government records, subsequent documentary evidence and cartographical evidence all consistently show that the Ngok Dinka were well-established in 1905 in the Bahr river basin of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga.⁵⁵⁵ This evidence is corroborated by a considerable body of highly-detailed witness testimony, as well as geographic, climatic and ecological evidence, also discussed in detail below.⁵⁵⁶ These varied materials demonstrate, with remarkable consistency, the location of the Ngok Dinka’s ancestral homeland in the Abyei region.

6. Transfer of the Ngok Dinka Chiefdoms to Kordofan in 1905

346. Against this background, we turn to the transfer of the Ngok Dinka chiefdoms to Kordofan in 1905. This transfer is recorded, if only very briefly, in the Sudan Government’s records from the first decade of the 20th century. Those records show that, during early 1905, the Ngok Dinka were transferred by Sudan Government officials from what was described at the time by those officials as Bahr el Ghazal to Kordofan and the administrative authority of the Kordofan provincial government. The purpose of the transfer was to reduce the risk to the Ngok Dinka of slave and cattle raids, conducted by Baggara Arabs located in Kordofan, by placing the Ngok and the Baggara under the same provincial administration.

347. As discussed above, the Baggara and other northern Sudanese tribes had historically conducted slave (and other) raids against southern Sudanese tribes, including the Dinka.⁵⁵⁷ These raids continued during the early years of the Condominium, as the Sudan Government struggled with pacifying the southern regions of the country.⁵⁵⁸

348. Against this background, Sudan Government reports record that in September 1903, residents of villages of “Sheikh Rob,” in the Dinka district of “Gnak” (a reference to

⁵⁵³ ABC Report, Part I, at p. 35, **Appendix B**.

⁵⁵⁴ ABC Report, Part I, at p. 21, **Appendix B** (emphasis added).

⁵⁵⁵ See below at Section VIII (1).

⁵⁵⁶ See below at Section VIII (1).

⁵⁵⁷ See below at paras. 80 and 129.

⁵⁵⁸ T. Hargey, *The Suppression of Slavery in the Sudan 1898-1939* 159-167 (1981), **Exhibit-FE 6/10**; R. Collins, *Land Beyond the Rivers-The Southern Sudan, 1898-1915* 255-256 (2003), **Exhibit-FE 4/21**.

Ngok),⁵⁵⁹ had complained about a slave raid by Humr Arabs which carried off some 30 Dinka and 1,000 of their cattle:

“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 [villages] 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.”⁵⁶⁰

The reference to “Sheikh Rob” was a reference to the Paramount Chief of the Ngok at the time (Arop Biong), paralleling other references to “Sultan Rob.”⁵⁶¹

349. Similarly, Sudan Government records note that in January 1905 the Chief of the Twic Dinka complained to Condominium authorities (both in Kodok and Khartoum) that slave-raiding was being carried out against his tribe by the Baggara. The Sudan Intelligence Report described this report as follows:

“Sheik Rihan Gorkwei, of the district of Tweit or Toj, which he says is situated between the Kir and Lol Rivers, reported to Bimbashi Bayldon on the 29th January that **a party of Homr Arabs, under Sheikh Ali Gula, armed with some 15 rifles and many spears, had come and raided his district,** saying they were sent to collect cattle for Government. Sheikh Rihan, after a journey of 23 days to Taufikia, came into Kodok to see a representative of the Government. The Governor sent him on to Khartoum, where he arrived on the 26th February. He repeated his story of the raids by the Homr, **who he says captured some 16 boys of the Toj Dinkas whilst the latter were out fishing.** The Camel Corps Company, now in the Bahr el Ghazal, will investigate the case on their return to Kordofan.”⁵⁶²

350. The continuing raids against the Ngok and Twic Dinka resulted in a decision by Sudan Government authorities to ensure that the victims and the perpetrators of the raids would all be placed under the administration of the same government officials. The stated rationale was that a single administrator with oversight and authority over all those concerned in the slave and cattle raiding would be best able to prevent and respond to such incidents.⁵⁶³

351. Accordingly, in March 1905, the Sudan Intelligence Report noted a decision that “Sultan Rob” (the Paramount Chief of the Ngok Dinka, Arop Biong)⁵⁶⁴ and his people would be placed under the administration of the province of Kordofan:

⁵⁵⁹ There are many instances where Condominium records misspell the names of tribes or geographic features by spelling them phonetically. For example, the Ngok were also referred to as the Gnok. See Sudan Intelligence Report No. 128, dated March 1905, at p. 6 (“The Gnok Dinkas”), **Exhibit-FE 2/8**. Similarly, the Ngol/Ragaba ez Zarga is referred to in varying forms, including the “Ngowl” and the “Ngol.” See A. Sabah, Tribal Structure of the Ngok Dinka of Southern Kordofan Province 4 (1978): “moved up to the present **Ngowl**”, **Exhibit-FE 6/7** (emphasis added); see also Henderson, “A Note on History of the Homer tribe of Western Kordofan,” 660/11/1-244 SNR1, 4 (1930) (“the Ngork Dinka already held the Gnol river (Regeba Zarga).”), **Exhibit-FE 3/12** (emphasis added).

⁵⁶⁰ Sudan Intelligence Report No. 110, dated September 1903, at p. 1, **Exhibit-FE 1/24** (emphasis added).

⁵⁶¹ See below at para. 57; Daly Expert Report, at p. 17.

⁵⁶² Sudan Intelligence Report, No. 127, dated February 1905, at p. 2, **Exhibit-FE 2/6** (emphasis added).

⁵⁶³ Daly Expert Report, at p. 41.

⁵⁶⁴ See above at para. 57.

“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*.”⁵⁶⁵

352. The decision to place the people of Sultan Rob and Sheikh Rihan under the administration of Kordofan, rather than that of Bahr el Ghazal, was reported in the 1905 Kordofan Province Annual Report:

“**Province Boundaries** – ... *The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei are now included in Kordofan instead of the Bahr El Ghazal*.”⁵⁶⁶

353. The transfer was also reported in the 1905 Bahr el Ghazal Province Annual Report:

“**Province Boundaries** – In the north *the territories of Sultan Rob and Sheikh Gokwei have been taken from this Province and added to Kordofan*.”⁵⁶⁷

354. The transfer of the Ngok Dinka was also referred to in Gleichen’s 1905 *The Anglo-Egyptian Sudan*, which described “Sultan Rob and Dar Jange *belonging to Kordofan*.”⁵⁶⁸

355. Consistent with the uncertain, approximate and provisional nature of the Kordofan/Bahr el Ghazal boundary at the time, the transfer of the Ngok Dinka and Twic Dinka to Kordofan was not accompanied at the time by any recorded change to the putative provincial boundaries of either Kordofan or Bahr el Ghazal.⁵⁶⁹ Indeed, despite the transfer of the Ngok and Twic Dinka Chiefdoms to Kordofan in 1905, reports in October 1908 still referred to the Kiir/Bahr el Arab as the southern boundary of Kordofan, noting “the Bahr El Arab (or Gurf), which forms the southern boundary of the Province.”⁵⁷⁰

356. This transfer was also not recorded on maps for some five years, until a 1910 map (discussed above) identified a boundary between Kordofan and Bahr el Ghazal running somewhat south of the Bahr el Arab, which was described as an “*approximate boundary*.”⁵⁷¹ As also noted above, even in 1916, a map by the Survey Office of Khartoum marked the boundary between Bahr el Ghazal and Kordofan as “*Approx. Province Bdy: Kordofan/ Bahr El Ghazal*.”⁵⁷²

357. Again, this reflected the uncertain, approximate and provisional nature of any Kordofan/Bahr el Ghazal boundary at the time.

⁵⁶⁵ Sudan Intelligence Report No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

⁵⁶⁶ Annual Report on the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13**.

⁵⁶⁷ Annual Report on the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13** (emphasis added).

⁵⁶⁸ 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).

⁵⁶⁹ See above at paras. 315-330.

⁵⁷⁰ Sudan Intelligence Report No. 171, October 1908, at p. 35, **Exhibit-FE 3/5**.

⁵⁷¹ **Map 44a** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Detail, see 14° 25° N).

A similar boundary was marked on a 1913 map of Kordofan **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913).

⁵⁷² **Map 50** (*Achwang: Sheet 65-K*, Survey Office Khartoum, 1916) (emphasis added); see above at paras. 329-330.

B. *The Anglo-Egyptian Condominium's Administration of Southern Sudan After 1910*

358. The period of Anglo-Egyptian administration following 1910 reflected many of the characteristics of the first decade of Condominium rule. At the same time, Condominium policy evolved towards one of "Indirect Rule," which relied on local and traditional tribal and other mechanisms for most aspects of administration.

1. Governance of the Anglo-Egyptian Condominium Prior to Independence

359. Following 1910, the Sudan Government's administration continued to be relatively detached from the peoples and territories that it nominally governed. One commentator noted that even by 1918 "the territory over which the Sudan government exercised theoretical jurisdiction was in fact *far from being under any kind of systematic administration.*"⁵⁷³

360. During the 1920s, as the result of a number of related factors, "Indirect Rule" was officially introduced into Sudanese administrative policy-making. The "Indirect Rule" policy devolved significant administrative powers to traditional Sudanese tribal institutions and leaders.⁵⁷⁴ The policy formalized and accentuated reliance on local Sudanese institutions for governance.

361. Under the "Indirect Rule" policy, the three southern Sudanese provinces (Bahr el Ghazal, Upper Nile and Equatoria) were treated as "closed districts" through the imposition of the *Passports and Permits Ordinance* of 1922.⁵⁷⁵ Islamic influences in the South were discouraged, including Arab dress and the Arabic language,⁵⁷⁶ while Christian missionaries were the few outsiders permitted to operate in the region.

362. Subsequently, the "Southern Policy" was adopted during the 1930s.⁵⁷⁷ This policy provided that the South be developed in accordance with its indigenous traditions and that foreign influences should be excluded.⁵⁷⁸ Together with the "Indirect Rule" policy, the "Southern Policy" had the effect of perpetuating, or enhancing, the isolation of the South (including in practice the Ngok Dinka) from Arabic speaking, Muslim tribes in the North.

363. The Sudan Government deliberately limited the influence of Islam in the South,⁵⁷⁹ including by encouraging the work of Christian missionaries.⁵⁸⁰ As anticipated, missionaries

⁵⁷³ R. Collins, *Shadows in the Grass - Britain in the Southern Sudan, 1918-1956* 4 (1983), **Exhibit-FE 6/13** (emphasis added).

⁵⁷⁴ R. Collins, *Land Beyond the Rivers-The Southern Sudan, 1898-1915* 164-165 (2003), **Exhibit-FE 4/21**.

⁵⁷⁵ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 119-122 (5th ed. 1999), **Exhibit-FE 9/3**; R. Collins, *A History of Modern Sudan* 41 (2008), **Exhibit-FE 16/24**.

⁵⁷⁶ The Sudan Government, *The Sudan: A Record of Progress: 1898-1947*, at pp. 12-14, **Exhibit-FE 3/18**; T. Hargey, *Suppression of Slavery in the Sudan 1898-1939* 454-455 (1981), **Exhibit-FE 6/10**.

⁵⁷⁷ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 119-122 (5th ed. 1999), **Exhibit-FE 9/3**; Sudan Government, *The Sudan: A Record of Progress 1898-1947*, at pp. 12-14, **Exhibit-FE 3/18**. M. Daly, *Imperial Sudan - the Anglo-Egyptian Condominium 1934-56*, 38-39 (1991), **Exhibit-FE 7/9**.

⁵⁷⁸ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 119 (5th ed. 1999), **Exhibit-FE 9/3**; Sudan Government, *The Sudan: A Record of Progress 1898-1947*, at pp. 12-14, **Exhibit-FE 3/18**.

⁵⁷⁹ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 118-120 (5th ed. 1999), **Exhibit-FE 9/3**; G. Warburg, *Sudan Under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 121 (1971), **Exhibit-FE 5/1**; R. Collins, *A History of Modern Sudan* 43(2008), **Exhibit-FE 16/24**.

⁵⁸⁰ In recognition of the importance of these missionaries, and in order to avoid disputes and rivalry between the various segments of the Christian church, the South was divided into spheres of influence, with the American

played a very important role in the development of southern Sudan and for a number of years provided the only education in the entire region.⁵⁸¹

364. The Sudan Government's policies also sought to protect the southern tribes from slave raiding by the North. As one authority puts it, Sudanese slaves during this period were treated "little better than domestic animals, with no civil and judicial rights. In fact they were mere chattels, the absolute property of their ... owner"⁵⁸² (As discussed above, one reason for the transfer of Sultans Rob and Rihan Gorkwei to Kordofan administration had been better to protect their tribes from slave-raiding by their northern neighbors.⁵⁸³)

365. The Condominium Agreement dealt with this issue at best obliquely, stating that "the importation of slaves into the Sudan, as also their exportation, is absolutely prohibited," while not addressing the status of slave-holding itself.⁵⁸⁴ The "Indirect Rule" and "Southern" policies had the effect of insulating, to a degree, the southern Sudanese from the continued depredations by armed northern slaving expeditions.

2. Sudanese Independence

366. The 1930s and 1940s witnessed the beginnings of a Sudanese nationalist movement. In April 1942, the "Graduates Congress" (a forum for civil servants, teachers and other educated Sudanese) submitted a list of 12 demands to the Anglo-Egyptian administration.⁵⁸⁵ The most crucial was a demand for "the issue, on the first possible opportunity, by the British and Egyptian governments, of a joint declaration granting the Sudan, in its geographical boundaries, the right of self-determination."⁵⁸⁶

367. Although the demand was rejected out of hand by the Government, the Sudanese independence movement continued to gain momentum. In 1943, the Ashigga became the first political party in Sudan, seeking the union of Sudan and Egypt.⁵⁸⁷ Shortly thereafter, the followers of Sayyid 'Abd al-Rahaman al-Mahdi joined together to create their own political party, the Umma, which sought an independent Sudan, free from British and Egyptian influence.⁵⁸⁸

368. In response to the growing political pressure, and following the successful conclusion of World War II, the Sudan Government announced in April 1946 that it was "aiming at a free independent Sudan which will be able as soon as independence has been achieved to

Presbyterians, the Verona Fathers and the Christian Missionary Society each allocated different regions in which to operate. G. Warburg, *The Sudan under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 118-122 (1971), **Exhibit-FE 5/1**; R. Collins, *A History of Modern Sudan* 43 (2008), **Exhibit-FE16/24**.

⁵⁸¹ G. Warburg, *The Sudan under Wingate - Administration in the Anglo-Egyptian Sudan 1899-1916* 121-122 (1971), **Exhibit-FE 5/1**.

⁵⁸² T. Hargey, *Suppression of Slavery in the Sudan 1898-1939* 422 (1981), **Exhibit-FE 6/10**.

⁵⁸³ See above at paras. 350-351.

⁵⁸⁴ The wording of this provision expressly refrained from prohibiting the existence of slavery, only sanctioning the trade of slaves. This distinction was important: on the one hand the British outwardly asserted that the moral obligation to abolish slavery was one of its motivations for administering the Sudan, and yet it was unwilling to prohibit slavery as an institution because of its concern of the effect that such an act would have on the country's economy and social institutions. So while the government arguably did not have the power to abolish slavery entirely, it did seek to protect potential victims of slavery. M. Daly, *Empire on the Nile - the Anglo-Egyptian Sudan, 1898-1934* 18 (2003), **Exhibit-FE 11/5**.

⁵⁸⁵ R. Collins, *A History of Modern Sudan* 50-51 (2008), **Exhibit-FE 16/24**.

⁵⁸⁶ Graduates' Congress, Memorandum of Demands, dated 3 April 1942, as cited in P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 126 (5th ed. 1999), **Exhibit-FE 9/3**.

⁵⁸⁷ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 126-127 (5th ed. 1999), **Exhibit-FE 9/3**.

⁵⁸⁸ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 127 (5th ed. 1999), **Exhibit-FE 9/3**; R. Collins, *A History of Modern Sudan* 52-53 (2008), **Exhibit-FE 16/24**.

define for itself its relations with Great Britain and Egypt.”⁵⁸⁹ In pursuit of this objective, the Sudan Government held an administrative conference to discuss the future governance of Sudan by the Sudanese.⁵⁹⁰

3. Pre-Independence Sudan and the South

369. Movement towards Sudanese independence raised issues regarding the role of the South in any future Sudanese state. The differences between the northern and southern peoples – linguistic, ethnic, religious, cultural and otherwise – and the historic separation of North and South through the “Southern Policy,” raised grave questions about the viability of a single independent state governed from Khartoum.⁵⁹¹

370. In June 1947, the Sudan Government sponsored a conference in Juba to address the role of the South in a future independent Sudan.⁵⁹² Some British officials advocated a system of federalism, with special provisions and safeguards recognizing the limited development of the South. In contrast, representatives of the North (with token southern support) sought the incorporation of southern Sudan into the contemplated legislative assembly as equals with the northern representatives.⁵⁹³ As discussed below, the latter approach (without federalist safeguards for the South) was eventually adopted.⁵⁹⁴

371. During pre-independence deliberations, it was recognized that the Ngok Dinka occupied a unique position in Sudan. That position was subsequently recognized in the Abyei Protocol, which provided that the Ngok’s traditional homeland in “*Abyei is a bridge between the north and the south, linking the people of Sudan.*”⁵⁹⁵

372. Accordingly, the Sudan Government offered the Ngok Dinka the opportunity to move to the administration of the southern province Bahr el Ghazal.⁵⁹⁶ The British were concerned in particular that the interests of the Ngok Dinka would not be fairly represented by the power structures in northern Sudan.⁵⁹⁷

373. The proposal for transferring to the South was put to the Ngok Dinka in 1951.⁵⁹⁸ The Ngok Dinka Paramount Chief (Deng Majok) discussed this proposal with each of the leaders

⁵⁸⁹ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 129 (5th ed. 1999), **Exhibit-FE 9/3**.

⁵⁹⁰ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 129 (5th ed. 1999), **Exhibit-FE 9/3**; R. Collins, *A History of Modern Sudan* 55-56 (2008), **Exhibit-FE 16/24**.

⁵⁹¹ R. Collins, *Shadows in the Grass - Britain in the Southern Sudan, 1918-1956* 280-288 (1983), **Exhibit-FE 6/13**.

⁵⁹² P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 131 (5th ed. 1999), **Exhibit-FE 9/3**; R. Collins, *Shadows in the Grass - Britain in the Southern Sudan, 1918-1956* 289 (1983), **Exhibit-FE 6/13**.

⁵⁹³ R. Collins, *Shadows in the Grass - Britain in the Southern Sudan, 1918-1956* 290 (1983), **Exhibit-FE 6/13**; F. Deng, *The Recollections of Babo Nimir* 40 (1982), **Exhibit-FE 6/11**; F. Deng, *Africans of Two Worlds* 159 (1978), **Exhibit-FE 6/6**; R. Collins, *A History of Modern Sudan* 55-57 (2008), **Exhibit-FE 16/24**.

⁵⁹⁴ See below at paras. 378.

⁵⁹⁵ Abyei Protocol, Art. 1.1.1, **Appendix C**.

⁵⁹⁶ Letter from P. Hogg (District Commissioner of Western Kordofan) to Governor of Kordofan, “Future of the Ngok Dinka” No. WKD/66.E.5, dated 15 March 1951. In this letter District Commissioner Hogg reported on the Abyei Meeting of 7 March 1951, noting the meeting resolved that “*the best future for the Ngok Dinka lay in Bahr el Ghazal Province* but there were two factors which led the meeting to agree to recommend no action this year. The first was the projected trunk road, the routing of which had not yet been settled; the other that the local Government situation in Bahr el Ghazal had not yet crystallised,” **Exhibit-FE 3/12** (emphasis added).

⁵⁹⁷ Letter from Governor Kordofan to Governor Upper Nile Province and Governor Bahr el Ghazal, dated 31 March 1951, **Exhibit-FE 4/2**.

⁵⁹⁸ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 223 (1986), **Exhibit-FE 7/4**.

of the Ngok Chiefdoms, but as no consensus could be reached among them,⁵⁹⁹ the decision was deferred to allow for further consideration.⁶⁰⁰

374. One of the key reservations of some Ngok Dinka about moving to the administration of Bahr el Ghazal was that Kordofan, being a province in the north of Sudan, would be better administered and better funded than Bahr el Ghazal.⁶⁰¹ Moreover, Deng Majok, felt personally that a transfer of the Ngok Dinka to the administration of the South could endanger the prospects of peace in Sudan:

“I am now the thread of the Arabs and the South. I am a thread like the thread with which clothes are mended. If I pull away, the country will break apart”⁶⁰²

375. In 1952, the Sudan Government sought to incorporate the Ngok Dinka (and the Abyei region) into the Misseriya Rural Council.⁶⁰³ While representatives of the Misseriya encouraged the Ngok Dinka to remain in Kordofan,⁶⁰⁴ the Misseriya opposed their inclusion in the Misseriya Rural Council. Nevertheless, the Ngok Dinka and the Abyei region were incorporated into the Council as an independent unit with their own court.⁶⁰⁵

376. The fact that the Ngok Dinka were included in the Misseriya Rural Council was not an indication that the Ngok Dinka were living in Misseriya lands. In fact, the British District Commissioner at the time remarked:

“It should be emphasised that although the new District retained the name of Dar Messeria, this was not intended to confer any particular rights of the Messeria trib over the Nuba, Dagu or Ngok Dinka.”⁶⁰⁶

377. In October 1952, the Egyptian revolutionary government and the Umma party reached agreement on self-determination for Sudan following a period of transitional self-government supervised by the Governor General.⁶⁰⁷ This agreement was rapidly endorsed by all of the key Sudanese political parties. On 12 February 1953, a new Anglo-Egyptian Agreement was executed, establishing a transitional period prior to Sudanese self-determination.⁶⁰⁸

378. The Agreement established the terms of elections to a new Sudanese legislature and the process by which Sudan would exercise its self-determination,⁶⁰⁹ as well as a transitional

⁵⁹⁹ Letter from P. Hogg (District Commissioner of Western Kordofan) to Governor of Kordofan, dated 15 March 1951, **Exhibit-FE 3/21**.

⁶⁰⁰ Letter from Governor Kordofan to Governor Upper Nile Province and Governor Bahr el Ghazal, dated 31 March 1951, **Exhibit-FE 4/2**.

⁶⁰¹ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 229 (1986), **Exhibit-FE 7/4**.

⁶⁰² F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 229 (1986), citing Cho, **Exhibit-FE 7/4**. See also ABC Report, Part 1, at p. 32 (The ABC concluded: “The testimony of Mr. Michael Tibbs, the district commissioner in charge at the time of the change, is categorical that this name did not imply any recognition of the Misseriya having ‘Dar rights’ over the entire territory.”), **Appendix B**. M. Tibbs & A. Tibbs, *A Sudan Sunset* 127 (1999), **Exhibit-FE 8/17**.

⁶⁰³ Letter from District Commissioner Dar Messeria District Tibbs to Governor Kordofan Province, dated 18 August 1954, at p. 5 (Reproduced in M. Tibbs & A. Tibbs, *A Sudan Sunset* (1999)), **Exhibit-FE 8/17**.

⁶⁰⁴ Letter from Howley to Governor of Kordofan, dated 26 March 1951 (“As regards the Messeria, the Homr Agaira have a strong incentive to keep the Ngork in their Coucil...”), **Exhibit-FE 4/1**.

⁶⁰⁵ Report on the Administration of the Sudan in 1951/1952, at p. 158, **Exhibit-FE 4/4**.

⁶⁰⁶ Letter from M. Tibbs to Z. Deng, dated 6 January 2004, **Exhibit-FE 11/9**.

⁶⁰⁷ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 137 (5th ed. 1999), **Exhibit-FE 9/3**.

⁶⁰⁸ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 137 (5th ed. 1999), **Exhibit-FE 9/3**.

⁶⁰⁹ D. Johnson, *The Root Causes Of Sudan’s Civil Wars* 26 (2003), **Exhibit-FE 11/6**.

period toward independence. No southern Sudanese leaders were included in the talks leading to the agreements regarding Sudan's future nor were their interests represented in the discussions.⁶¹⁰ Moreover, no provisions regarding the South were included in these agreements.⁶¹¹

379. Elections were held in 1953 for the Sudanese legislative assembly. The National Unionist Party ("NUP"), dominated by the Ashigga, won 50 of the 97 seats, with urban and riverrain support; the Umma, supported by Mahdists from Darfur, Kordofan and Blue Nile, claimed 23 seats; and only nine seats were won by the newly-formed Southern Party, which had contested 22 southern constituencies.⁶¹²

380. The results of the election, together with other developments, portended difficult relations between the North and South in post-Independence years. The southern Sudanese had only a marginal voice in the national legislature, and were also severely under-represented in administrative posts during the process of "Sudanisation" of the government after 1953. Of approximately 800 posts that were Sudanised, only six posts were allocated to southerners.⁶¹³ Likewise, in relation to the Ngok Dinka, the Misseriya opposed the appointment of Ahmed Deng to the position of executive officer in Abyei in 1955.⁶¹⁴

381. In November 1955 British troops were withdrawn from Sudan, and in December the last Governor General departed. Sudan became independent on 1 January 1956.

⁶¹⁰ C. Gurdon, *Sudan at the Crossroads* 13 (1984), **Exhibit-FE 7/2**.

⁶¹¹ D. Johnson, *The Root Causes Of Sudan's Civil Wars* 26 (2003), **Exhibit-FE 11/6**.

⁶¹² P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 138 (5th ed. 1999), **Exhibit-FE 9/3**; R. Collins, *A History of Modern Sudan* 62-63 (2008), **Exhibit-FE 16/24**.

⁶¹³ P. Holt & M. Daly, *A History of the Sudan - From the Coming of Islam to the Present Day* 139 (5th ed. 1999), **Exhibit-FE 9/3**; R. Collins, *A History of Modern Sudan* 65 (2008), **Exhibit-FE 16/24**.

⁶¹⁴ Salih, "New Wine in Old Bottles": *Tribal Militias and the Sudanese State*, 7 (45/46) *Rev. of African Political Economy* 168 (1989), **Exhibit-FE 7/7**.

IV. NORTH-SOUTH CIVIL WAR IN SOUTHERN SUDAN AND THE ABYEI AREA

A. North-South Civil War – 1955 to 1972

382. The 1953 election results, and subsequent under-representation of the southern Sudanese in administrative positions, were ill-received in the South. Southern Sudanese saw these developments as the beginning of Northern colonization of the South and widespread southern discontent developed. That discontent was exacerbated by a number of religious and cultural issues, which pitted the Muslim North against the non-Muslim South.⁶¹⁵

383. Beginning almost immediately after independence, southern Sudanese including the Ngok Dinka were subjected to discriminatory government policies in employment, education and other areas.⁶¹⁶ At independence, the South was already far less developed than many parts of northern Sudan, with a per capita income of less than half the national average (and less than one tenth of the per capita income of Khartoum).⁶¹⁷ The relative poverty of the South and other conflict areas was exacerbated markedly in the decades after independence.⁶¹⁸

384. At the same time, the religious, cultural, educational and other freedoms that had prevailed in the South and in Abyei prior to independence began to be eroded. This process began almost immediately following the announcement of independence.⁶¹⁹

385. A variety of steps were taken to Islamicize cultural life in both northern and southern Sudan.⁶²⁰ In 1958, Christian mission schools (which were the only means of receiving a rudimentary education in the South⁶²¹) were nationalized or closed.⁶²² In 1960, the Sunday holiday was abolished and replaced by Friday in the South.⁶²³ Local languages and English were disfavored by the GoS, with Arabic promoted in their place in workplaces, where

⁶¹⁵ C. Eprile, *War and Peace in the Sudan 1955-1972* 45 (1974) (citing “The Report of the Commission of Inquiry”, which was set up by the GoS in 1955 to investigate the mutinies of that year, and which was chaired by Mr Justice Cotran. That Report lists as one of the direct causes of the 1955 disturbances a number of discrete injustices being perpetrated against the South, and, especially “Southerners’ extreme disappointment and frustration” at the underrepresentation of the southern Sudanese in administrative positions. Particularly, “Sudanisation” of the country in 1954, to the Southerners’ immense disappointment and resentment, gave them only 6 out of 800 senior government posts previously occupied by British officials” (*Ibid.* at 20). The Report is described by Eprile as “one of the essential documents of modern Sudanese history.” (*Ibid.* at 39), **Exhibit-FE 5/9**.

⁶¹⁶ C. Gurdon, *Sudan at the Crossroads* 15 (1984), **Exhibit-FE 7/2**.

⁶¹⁷ Yongo-Bure, *The Underdevelopment of the Southern Sudan Since Independence* in M. Daly and A. Sikainga (eds.), *Civil War in the Sudan* 51 (1993), **Exhibit-FE 8/9**.

⁶¹⁸ Yongo-Bure, *Underdevelopment of the Southern Sudan Since Independence* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 53 (1993) (“While the South was hardly developed, the war destroyed what little there was”), **Exhibit-FE 8/9**.

⁶¹⁹ F. Deng, *War of Visions: Conflict of Identities in the Sudan* 11-12 (1995), **Exhibit-FE 8/13**; see also R. Collins, *A History of Modern Sudan* 78 (2008) (“a rigorous military administrative policy was imposed on the South characterized by appalling ignorance, racial insensitivity, and shameless provocation, when no effort was made to sweeten the bitter pill of Arabization and Islamization with economic development.”), **Exhibit-FE 16/24**.

⁶²⁰ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 24 (2d ed. 1992), **Exhibit-FE 8/3**. These steps angered citizens in the South including those in the Abyei area, and simply intensified the rebellion in the South.

⁶²¹ C. Gurdon, *Sudan at the Crossroads* 10 (1984), **Exhibit-FE 7/2**.

⁶²² L. Deng, “Education in Southern Sudan: War, Status and challenges of achieving Education For All Goals”, Paper prepared for UNESCO EFA Monitoring Report, May 2003, at p. 4, **Exhibit-FE 10/23**.

⁶²³ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 24 (2d ed. 1992), **Exhibit-FE 8/3**. In protest against this action all southern schools went on strike, to which the government retaliated strongly. See also F. Deng, *War of Visions: Conflict of Identities in the Sudan* 138 (1995), **Exhibit-FE 8/13**; R. Collins, *A History of Modern Sudan* 78 (2008), **Exhibit-FE 16/24**.

southern officials were made redundant because of their lack of working knowledge of Arabic.⁶²⁴

386. The GoS also began to replace English with Arabic as the medium of higher education in the South.⁶²⁵ These and other decisions, including a directive to transfer southern teachers en masse out the South,⁶²⁶ reflected a deliberate policy of “minimum education to the minimum number of Southern children.”⁶²⁷

387. As a consequence of this policy, the disparity between the more developed portions of the North and the entire South in access to education was enormous.⁶²⁸ This is illustrated in the following table.⁶²⁹

Table 2.1: British Colonial Legacy: Level of Access to education by 1960

Level of Education	Number of Education Facilities (streams, schools and universities)		
	North	South	Total
Intermediate Streams (Boys)	194 (91%)	20 (9%)	214
Intermediate Streams (Girls)	55 (98%)	1 (2%)	56
Secondary School Streams (Boys)	49 (96)	2 (4%)	51
Secondary School Streams (Girls)	14 (100%)	0 (0%)	14
Commercial Secondary Schools	2 (67%)	1 (33%)	3
Technical Secondary Schools	3 (100%)	0 (0%)	3
Universities	4 (100%)	0 (0%)	4
Khartoum University students	1,156 (95%)	60 (5%)	1,216
Population Census in 1956 (000)	7,480 (72%)	2,783 (28%)	10,263

Source: Oduho and Deng (1963)

388. These developments bred deep-seated dissatisfaction in the South towards northern rule, which soon gave rise to small-scale mutinies in Equatoria in the summer of 1955. These eventually developed into a full-scale civil war, starting in the early 1960s and lasting until 1972. The central issue of the civil war was the desire of southern Sudanese to exercise rights of self-determination.⁶³⁰

389. The first civil war had devastating effects on southern Sudan and its people, as well as the conflict areas straddling the north-south border populated by peoples of the southern Sudanese tribes, including Abyei.⁶³¹ Precise casualty figures are unavailable but it is clear that a significant portion of the southern Sudanese population died or was displaced as a

⁶²⁴ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 24 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶²⁵ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 24 (2d ed. 1992), **Exhibit-FE 8/3**; see also L. Deng, “Education in Southern Sudan: War, Status and challenges of achieving Education For All Goals,” Paper prepared for UNESCO EFA Monitoring Report, May 2003, at p. 4, **Exhibit-FE 10/23**.

⁶²⁶ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 24 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶²⁷ C. Eprile, *War and Peace in the Sudan 1955-1972* 85 (1974), **Exhibit-FE 5/9**.

⁶²⁸ L. Deng, “Education in Southern Sudan: War, Status and challenges of achieving Education For All Goals,” Paper prepared for UNESCO EFA Monitoring Report, May 2003, at p. 4, **Exhibit-FE 10/23**.

⁶²⁹ J. Oduho & W. Deng, *The Problem of the Southern Sudan*, 1963 – replicated in L. Deng, “Education in Southern Sudan: War, Status and challenges of achieving Education For All Goals,” Paper prepared for UNESCO EFA Monitoring Report, May 2003, at p. 4, **Exhibit-FE 10/23**.

⁶³⁰ D. Johnson, *The Root Causes Of Sudan’s Civil Wars* 30 (2003), **Exhibit-FE 11/6**.

⁶³¹ The cost in human suffering is impossible to quantify precisely, although general assessments can be given. E. O’Ballance, *The Secret War in the Sudan, 1955-1972* 158 (1977), **Exhibit-FE 6/3**; C. Eprile, *War and Peace in the Sudan 1955-1972* 49 (1974), **Exhibit-FE 5/9**.

result of the war. By the end of the 1960s, the war had caused the deaths of more than 500,000 people (from direct violence, malnutrition, neglect or famine).⁶³² Unconfirmed reports put the total number of deaths during the first civil war in the region of one million.⁶³³

390. The first civil war was notable for the wanton infliction of atrocities on civilian southern Sudanese populations. The brutality of the conflict is detailed in Eprile's *War and Peace in the Sudan 1955–1972*, which exhaustively recounts the atrocities against the southern Sudanese peoples (including the Ngok Dinka).⁶³⁴ This chapter is included as Exhibit FE 5/9.

391. For the Ngok Dinka, residing in the Abyei region that served as the “bridge” from the North to the South, the first civil war had particularly severe consequences.⁶³⁵ In addition to the violence inflicted on the citizens of this region by official GoS forces, conflict between the Misseriya and the Ngok began in the mid 1960s, and a number of raids made by the Misseriya were condoned by the GoS security forces.⁶³⁶

392. During the conflict, atrocities against the Ngok civilian population were common. Among those atrocities which have been recorded, the 1965 massacre of more than 200 civilians in Muglad and Babanusa and the 17 September 1970 assassination of the Ngok Paramount Chief Monyyak Deng (Deng Majok's son and successor), together with other five members of his family by GoS army units were particularly notorious.⁶³⁷ The conflict also led to large-scale displacement of Ngok people from their traditional lands in the Bahr river system.⁶³⁸ These events eventually put the Ngok Dinka firmly on the side of the Anya Nya, a predecessor of the SPLA.⁶³⁹

B. Addis Ababa Accords – 1972

393. Despite the brutality of the conflict, efforts were made to resolve the first civil war through negotiations. These efforts were at least temporarily successful and the first civil war was brought to an end when the GoS and the Southern Sudanese Liberation Movement (“SSLM”) entered into the 1972 Addis Ababa Accords. As discussed below, the Accords established regional autonomy and a degree of self-government for the South, as well as

⁶³²E. O'Ballance, *The Secret War in the Sudan, 1955–1972* 158 (1977), **Exhibit-FE 6/3**; L. Deng, “Education in Southern Sudan: War, Status and challenges of achieving Education For All Goals”, Paper prepared for UNESCO EFA Monitoring Report, May 2003, at p. 5, **Exhibit-FE 10/23**; see also C. Eprile, *War and Peace in the Sudan, 1955-1972* 49 (1974) (“[a] report in 1967 put the estimated number of black Southerners killed between 1963 and 1966 at more than half a million”), **Exhibit-FE 5/9**.

⁶³³C. Eprile, *War and Peace in the Sudan 1955-1972* 49 (1974), noting (with caution), the unofficial estimates putting deaths at closer to 1 million people, **Exhibit-FE 5/9**.

⁶³⁴C. Eprile, *War and Peace in the Sudan 1955-1972* 49-67 (1974), **Exhibit-FE 5/9**.

⁶³⁵F. Deng, *Abyei and the Challenge of Sustainable Peace in the Sudan* 6 (2000) (“The conflict in the South has now engulfed the Ngok Dinka since its first phase – 1955-1972. The people of Abyei have not been able to sustain their bridging role and have now been forced to join their kith and kin in the liberation struggle.”), **Exhibit-FE 9/1**.

⁶³⁶Letter from Abyei Citizens to His Excellency, the President of the Republic, dated 18 August 1980, at pp. 1-2, **Exhibit-FE 6/7a**. Among those atrocities which have been recorded, the 1965 massacre and immolation of more than 200 civilians in Muglad and Babanusa and the 17 September 1970 assassination of the Ngok Paramount Chief, Abdalla Deng (Deng Majok's son), together with five other members of his family by GoS army units were particularly brutal. *Ibid.* See also F. Deng, *War of Visions: Conflict of Identities in the Sudan* 290, 297 (1995), **Exhibit-FE 8/13**.

⁶³⁷Letter from Abyei Citizens to His Excellency, the President of the Republic, dated 18 August 1980, at pp. 1-2, **Exhibit-FE 6/7a**.

⁶³⁸Letter from Abyei Citizens to His Excellency, the President of the Republic, dated 18 August 1980, at pp. 1-2, **Exhibit-FE 6/7a**.

⁶³⁹F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 238 (1986), **Exhibit-FE 7/4**; see also K. Fukuki and J. Markakis, *Ethnicity and Conflict in the Horn of Africa* 195 (1994), **Exhibit-FE 8/11**.

special provisions regarding a referendum for areas “culturally and geographically” part of the South, including the Abyei region.⁶⁴⁰

394. In May 1969, Colonel Jaafar Nimeiri seized power in Sudan through, a coup d’etat. The new regime formed a 10 member Revolutionary Command Council (“RCC”), chaired by Nimeiri as prime minister. Ironically, the coup opened the way for resolution to the conflict in Sudan by political rather than military means: upon assuming control, the RCC suspended the Sudanese Transitional Constitution (which had been adopted shortly after independence), abolished all government institutions and banned all political parties.⁶⁴¹

395. On 9 June 1969, the Nimeiri Government issued the “Declaration of Regional Autonomy for the Southern Provinces,” outlining its plans for regional self-governance for the South, which paved the way for the Addis Ababa Agreement.⁶⁴² Among other things, the declaration stated:

“The revolutionary Government is confident and competent enough to face existing realities. It recognizes the historical and cultural differences between the North and South and firmly believes that the unity of our country must be built upon these objective realities. *The Southern people have the right to develop their respective cultures and traditions within a united Socialist Sudan.* In furtherance of these objectives the Revolutionary Council and the Council of Ministers held joint meetings and after a full discussion of the matter resolved to recognize the right of the Southern people to Regional Autonomy within a united Sudan”⁶⁴³

396. Nimeiri accompanied these declarations with details of proposed concrete steps directed at addressing southern aspirations for autonomy. These included the appointment of southern Sudanese to government posts⁶⁴⁴ and the commencement of informal discussions with the southern Sudanese forces.⁶⁴⁵

397. After several years of little progress, an unofficial cease-fire was largely implemented by January 1972, and arrangements for formal talks were put in place.⁶⁴⁶ Between 15 and 27 February 1972, negotiations for a series of compromises which would collectively be known

⁶⁴⁰ R. Collins, *A History of Modern Sudan* 110 (2008), **Exhibit-FE 16/24**; see also C. Jendia, *The Sudanese Civil Conflict 1969 – 1985* 95 (2002), **Exhibit-FE 10/7**.

⁶⁴¹ H. Chapin Metz (ed.), *Sudan: A Country Study*. Washington: GPO for the Library of Congress 51 (1991), **Exhibit-FE 7/8**. The RCC proclaimed a “Democratic republic,” which was to be dedicated to advancing “Sudanese socialism.”

⁶⁴² *President Nimeiri’s Policy Statement on the Southern Question, 9 June 1969*, replicated in D. Wai, *The Southern Sudan: The Problem of National Integration* 219, Appendix VI (1993), **Exhibit-FE 5/8**.

⁶⁴³ *President Nimeiri’s Policy Statement on the Southern Question, 9 June 1969*, replicated in D. Wai, *The Southern Sudan: The Problem of National Integration* 220, Appendix VI (1993), **Exhibit-FE 5/8** (emphasis added).

⁶⁴⁴ Nimeiri appointed three Southerners as Commissioners of the three Southern provinces, which was met with much approval in the region. C. Gurdon, *Sudan at the Crossroads* 29 (1984), **Exhibit-FE 7/2**.

⁶⁴⁵ The issues addressed also included expansion of existing amnesty laws, creation of a legislative body for Southern Sudan, Southern control over local affairs (including police, and importantly, the incorporation of members of the Anyanya into these forces, as well as language promotion, administration etc), guarantee of social and political rights for all (importantly, preventing discrimination on the basis of lack of knowledge of Arabic), constitutional enshrinement of Southern autonomy, protection for returning exiles and a Government supported call to non-violence. A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 63-65 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶⁴⁶ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 79-89 (2d ed. 1992), **Exhibit-FE 8/3**.

as the Addis Ababa Accords, took place between Nimeiri's government and the SSLM in Addis Ababa, Ethiopia.⁶⁴⁷

398. Over the course of the two weeks during which talks took place, agreement was reached on a range of issues regarding southern regional autonomy, including government, finance and military arrangements. In addition, the question of the areas which were to comprise the southern Sudan (and particularly, whether the Abyei region was to constitute part of the South or part of the North) was discussed at length during the Addis Ababa talks.⁶⁴⁸

399. The negotiations which Nimeiri proposed were conditioned on acceptance of a united Sudan with regional autonomy for the South.⁶⁴⁹ Ultimately, the parties agreed that southern Sudan (defined as the "Southern Region") would have autonomy through administration under a Southern Regional Government.⁶⁵⁰ In turn, the Southern Regional Government would be structured to ensure the participation of both the regional assembly and the central Government.⁶⁵¹

400. The Addis Ababa Accords were signed on 27 February 1972. As finally executed, the Accords comprised eight documents: (1) the draft Southern Provinces Regional Self-Government Agreement (the core constitutional document), which set out the structure of government in the new southern autonomous region, as well as the powers which it was to have;⁶⁵² (2) the Cease-Fire Agreement; (3) the Protocol for Repatriation, Relief and Resettlement; (4) the Protocol for Interim Administrative Arrangements; (5) the Protocol for Temporary Military Arrangements; (6) the Protocol for Judicial and Amnesty Arrangements; (7) the Fundamental Rights and Freedoms Appendix (which was to form part of the 1973 Constitution) and (8) Draft Ordinance on Items of Revenue and Grants-in-Aid for the Southern Region.⁶⁵³

401. Shortly after signature, on 3 March 1972, President Nimeiri announced the government endorsement of the Addis Ababa Accords. An official cease-fire order was promulgated that same day, and the Southern Provinces Regional Self-Government Act 1972, which was to give legislative force to the constitutional compromise reached by the parties, was ratified and came into effect.⁶⁵⁴ Section 34 of the Act purported to be an entrenchment provision, precluding amendment to the Act unless a majority of three-quarters of the People's National Assembly as well as the approval, in a referendum, of two-thirds of the citizens of the Southern Region was first obtained. March 3 was declared National Unity Day, in recognition of the agreements.

⁶⁴⁷ Minutes of the Press Conference held by Sayed Abel Alier about Addis Ababa Agreement, dated 3 March 1972, at p. 3, **Exhibit-FE 5/3**.

⁶⁴⁸ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 100-101 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶⁴⁹ D. Johnson, *The Root Causes Of Sudan's Civil Wars* 39 (2003), **Exhibit-FE 11/6**.

⁶⁵⁰ D. Johnson, *The Root Causes Of Sudan's Civil Wars* 40 (2003), **Exhibit-FE 11/6**.

⁶⁵¹ M. Omer Beshir, *The Southern Sudan: From Conflict to Peace* 110 (1975), **Exhibit-FE 6/1**.

⁶⁵² This document was officially entitled: "Draft Organic Law to Organize Regional Self-Government in the Southern Provinces of the Democratic Republic of the Sudan, 1972", **Exhibit-FE 5/6**.

⁶⁵³ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 114-115 (2d ed. 1992), **Exhibit-FE 8/3**; *see also* Draft Organic Law to Organize Regional Self-Government in the Southern Provinces of the Democratic Republic of Sudan" (1972), **Exhibit-FE 5/6**.

⁶⁵⁴ Southern Regional Provinces Self-Government Act 1972, reproduced in H. Hannum, *Documents on Autonomy and Minority Rights* 689 (1993), **Exhibit-FE 8/4**.

402. A number of Presidential Orders necessary to implement the Regional Self-Government were made one month later on 3 April 1972,⁶⁵⁵ and the Fundamental Rights and Freedoms Appendix was incorporated into a new Permanent Constitution of Sudan in 1973,⁶⁵⁶ completing the process of incorporating the Addis Ababa Accords into legislation. This Constitution purported further to safeguard the provisions of the Addis Ababa Accords by prohibiting amendment to the Southern Provinces Regional Self-Government Act 1972, except as provided for in section 34 of that Act.⁶⁵⁷

403. Among other things, the negotiations of the Addis Ababa Accords addressed the question of the geographic area which was to constitute the “Southern Region.” During negotiations, the SSLM maintained that Abyei (within Southern Kordofan), Blue Nile (within Southern Blue Nile) and Hofrat El Nahas (within Southern Darfur) should be incorporated into the Southern Region.⁶⁵⁸ The GoS resisted, with an eye towards the location of natural resources.⁶⁵⁹

404. The parties ultimately agreed in the Addis Ababa Accords that the boundaries between the Southern Region and the North would be as they existed on 1 January 1956 (the date of Sudanese independence). Critically, however, the Accords also provided that any area within the North which was decided by a referendum of the people in that area to be “*culturally and geographically a part of the Southern Complex*” could join the Southern Provinces.⁶⁶⁰

405. In this context, the Addis Ababa Accords made special provision for the people of the Abyei region. The Accords gave the people of Abyei the right to choose by referendum whether to remain in the north or to join the south by defining the Southern Provinces. to include such other areas that were “culturally and geographically” part of the South “as may be decided by a referendum.”⁶⁶¹

406. The definition was found in Article 3(iii), which defines the “Southern Provinces of Sudan” as:

⁶⁵⁵ *Presidential Orders of the Implementation of the Regional Self-Government in the Southern Region of the Sudan*, dated 3 April 1972, Democratic Republic of the Sudan Ministry of Information and Culture (1972), **Exhibit-FE 5/4**.

⁶⁵⁶ Constitution of Sudan (1973) (excerpts) reproduced in H. Hannum, *Documents on Autonomy and Minority Rights* 691 (1993), **Exhibit-FE 8/4**.

⁶⁵⁷ Constitution of Sudan (1973) (excerpts), at p. 689, reproduced in H. Hannum, *Documents on Autonomy and Minority Rights* Art. 8, 689 **Exhibit-FE 8/4**; see also D. Johnson, *The Root Causes Of Sudan’s Civil Wars* 41 (2003), **Exhibit-FE 11/6**.

⁶⁵⁸ L. Akol, *Southern Sudan: Colonialism, Resistance, and Autonomy* 131 (2007) **Exhibit-FE 15/14**; see also A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 101 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶⁵⁹ Abel Alier’s account of the Addis Ababa talks suggests that the reluctance of the government to concede this point stemmed from the view that leaving richly resourced areas (Hofrat El Nahas was known to contain deposits of copper and uranium) within Southern control might encourage and strengthen secessionist trends in the South. Alier was the Minister of Southern Affairs in the GoS at the time the Addis Ababa agreement was negotiated, and led the GoS delegation at these negotiations. A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 101 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶⁶⁰ The Draft Organic Law to Organize Regional Self-Government in the Southern Provinces of the Democratic Republic of the Sudan, Chapter II, Art. 3, at para. iii (1972) (a core component of “The Addis Ababa Agreement”), **Exhibit-FE 5/6**; see also the Southern Provinces Regional Self Government Act 1972, reproduced in H. Hannum, *Documents on Autonomy and Minority Rights* 691 (1993), **Exhibit-FE 8/4**.

⁶⁶¹ The Draft Organic Law to Organize Regional Self-Government in the Southern Provinces of the Democratic Republic of the Sudan, Chapter II, Art. 3, at para. iii (1972) (a core component of “The Addis Ababa Agreement”), **Exhibit-FE 5/6**; see also the Southern Provinces Regional Self Government Act 1972 Chapter I, Art. 2(iii), reproduced in H. Hannum, *Documents on Autonomy and Minority Rights* 691 (1993), **Exhibit-FE 8/4**.

“the Provinces of Bahr El Ghazal, Equatoria and Upper Nile in accordance with their boundaries as they stood on January 1, 1956, *and any other areas that were culturally and geographically a part of Southern Complex as may be decided by a referendum.*”

407. Article 4 of the Addis Ababa Accords reiterated this, providing that “[t]he Provinces of Bahr El Ghazal, Equatoria and Upper Nile as defined in Article 3(iii) shall constitute a self-governing Region within the Democratic Republic of the Sudan and shall be known as the Southern Region.” The Addis Ababa Accords neither specified what the Abyei region was nor provided a mechanism for identifying the area to which the referendum would apply. Nonetheless, the clear intention was to encompass the territory of the Ngok Dinka, as one of the peoples affiliated to the “Southern Region.” That was made clear throughout the Addis Ababa negotiations, where the Abyei region was consistently identified as part of the Southern Complex.⁶⁶²

C. Tentative Peace in Southern Sudan – 1973 to 1983

1. The GoS’s Failure to Implement the Addis Ababa Accords

408. With implementation of the Addis Ababa Accords, the newly-formed Regional Government in the Southern Region was confronted with the legacy of a 17 year civil war. As well as the large-scale loss of life, the war had brought desolation of great tracts of farmland, destruction of infrastructure, devastation of villages and buildings (including hospitals, schools and governmental offices), and the displacement of over one million people, over a third of whom had fled the country.⁶⁶³ Before the Southern Regional Government could turn to matters of regional development, the most immediate tasks were repatriation, relief and rehabilitation.⁶⁶⁴

409. Although efforts were made to address these issues, as well as the issue of regional development, they eventually failed. The Addis Ababa Accords produced a decade of

⁶⁶² A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 98-99, 101 (2d ed. 1992), 98-99 (“The SSLM document put forward the proposal for a federal government for Sudan. It addressed itself to issues such as ‘language’, areas outside the Southern provincial boundaries which ought to have been parts of the Southern complex. Such areas were listed as Abyei, the centre of Ngok Dinka in Southern Kordofan, and parts of Blue Nile Province...), and 101 (“On the size and number of areas that made Southern complex, the SSLM maintained that Abyei, within Southern Kordofan ... [was] originally par[t] of the Southern Sudan and should be reincorporated into the Southern Provinces.... Abyei had been part of the Southern Kordofan for a longer period before independence and would have been returned to Bahr El Ghazal in 1951 but for the objection of Paramount Chief, Deng Majok for personal reasons. Most of the members of the Sudan [government] delegation wanted the status quo maintained in these areas, on the grounds that the SSLM delegation was not entitled to speak on behalf of people who were not associated with the SSLM and Anya-nya war. Yet this was not true since some of the youth of Abyei fought on the side of the Anya-nya. The deadlock was in the end broken and a compromise was reached: the boundaries of the South with the Northern Provinces would be as they existed on 1st January 1956, the date of Sudanese independence. However, any area within the Northern Provinces whose people wished to transfer to Southern administration could decide for themselves by referendum”), **Exhibit-FE 8/3**; see also Wakoson, *The Politics of Southern Self-Government 1972-1983* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 32 (1993) (“The ‘Southern Complex’ referred to here includes Abyei on the frontier (between Bahr al-Ghazal and southern Kordofan and Darfur), Kurmuk at the southern tip of eastern Sudan (formerly Kassala Province); and Hufat al-Nahas and Kafia Kingi in the extreme northwestern Bahr al-Ghazal”), **Exhibit-FE 8/8**.

⁶⁶³ Ministry of Culture and Information, *The Pride of May: Self Government in Southern Sudan*, at pp. 19- 20 (1977), **Exhibit-FE 6/4**.

⁶⁶⁴ Ministry of Culture and Information, *The Pride of May: Self Government in Southern Sudan*, at pp. 19- 20 (1977), **Exhibit-FE 6/4**.

relative peace, but its provisions were eventually largely abrogated, and civil war resumed soon thereafter (as discussed below⁶⁶⁵).

410. A number of factors contributed to the failure of the Addis Ababa Accords. These included a lack of funding from the central government, the central government's actions upon the discovery of oil in the Southern Region, the redivision of the Southern Region, the imposition of Sharia law to all of Sudan, including in the Southern Region, and the failure of the government to honor the Addis Ababa Accords' provision that the Abyei Area (and other areas) be entitled to referenda.⁶⁶⁶

411. Even during the period of relative peace, a number of factors limited the extent to which conditions could improve in the South. When the Southern Regional Government was established in Juba in March 1972, it had virtually no financial or other resources for basic governmental services such as education, health, basic infrastructure.⁶⁶⁷ An account of conditions in Juba at this time is illustrative:

“Despite the abundant fund of goodwill behind the peace terms, it was soon apparent that the problems of putting the agreement into practice quickly were immense. Not the least of them was to establish an adequate structure for the regional government in Juba. A reporter who visited the town three months after the settlement wrote that Hilary Logali, the Regional Minister of Economic Planning, was working from three offices with a staff of five people, including a filing clerk and a typist ... The ratio of doctors to patients in the South is thought to be 1 to 150,000. The primary schools can only take ... 5% of the children eligible for places”⁶⁶⁸

412. All financing for the South needed to come from the central government (as provided for by the Addis Ababa Accords).⁶⁶⁹ Despite this, between 1972 and 1978, the Regional Government received not more than 25 percent of the funding anticipated from the central government.⁶⁷⁰

413. The persistent failures to fund reconstruction or basic government services in the South added to the burden already created by the neglect and devastation of war. The state of the infrastructure in the South by the end of the first civil war posed numerous difficulties:

“by 1972 one third of its none too numerous roads were completely impassable. Sixty concrete bridges and 500 culverts had been destroyed. The water channels through the Sudd were overgrown with water hyacinth and blocked by sunken steamers. The

⁶⁶⁵ See below at paras. 417-424.

⁶⁶⁶ See generally, C. Gurdon, *Sudan at the Crossroads* 60-67, 70-80 (1984), **Exhibit-FE 7/2**; A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 239-250, 256 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶⁶⁷ Wakoson, *The Politics of Southern Self-Government 1972-1983* in M. Daly & A. Sikainga (eds.), in *Civil War in the Sudan* 44 (1993), **Exhibit-FE 8/8**.

⁶⁶⁸ African contemporary record 1972/73, at p. 100, quoted in Wakoson, *The Politics of Southern Self-Government 1972-1983* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 43 (1993), **Exhibit-FE 8/8**.

⁶⁶⁹ Wakoson, *The Politics of Southern Self-Government 1972-1983* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 44 (1993), **Exhibit-FE 8/8**; Southern Regional Provinces Self-Government Act 1972, Art. 25, reproduced in H. Hannum, *Documents on Autonomy and Minority Rights* 697 (1993), **Exhibit-FE 8/4**.

⁶⁷⁰ Yongo-Bure, *The Underdevelopment of the Southern Sudan Since Independence* in M. Daly & A. Sikainga, *Civil War in the Sudan* 53-54 (1993), **Exhibit-FE 8/9**. There were perpetual discrepancies between estimated budgets and actual expenditures, and also between planned capital investment and realised investment; this was despite the considerable contemporaneous investment in large-scale economic projects that was taking place in the North. See also Wakoson, *The Politics of Southern Self-Government 1972-1983* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 44 (1993), **Exhibit-FE 8/8**. The only real exception to this was the economic projects in the South that would be of much greater value to the North: the Jonglei Canal scheme and (secret) oil exploration. *Ibid.*

two Southern secondary schools had been transferred to the North. Cash crops had disappeared and food crops were dangerously inadequate. Industrial schemes no longer functioned. Famine and epidemic sapped the energy of the surviving population. Infant mortality had risen to extraordinary levels.⁶⁷¹

414. In addition, these problems were exacerbated by the resettlement of approximately one million refugees and internally displaced persons within a period of little more than a year, increasing the population of the South by more than one third.⁶⁷² Accordingly, despite the attempts made by the Regional Government to improve the situation, the widespread, pervasive suffering which had arisen during the war still existed for some time.⁶⁷³

415. Finally, after the Addis Ababa Accords were concluded, oil was discovered in the Southern Region (including in the Abyei region).⁶⁷⁴ Major reserves were discovered in the Unity field, near Bentiu in the Upper Nile Province in the South (in 1978) and at the Heglig Field (in 1982).⁶⁷⁵

416. Once the existence of the oil fields became public, the use of oil revenues became one of the most contentious issues in Sudan.⁶⁷⁶ This was exacerbated by Nimeiri's decision in 1980 to create Unity Province out of Bentiu district, and place it under his own authority, thereby removing oil-rich Bentiu from the administrative jurisdiction of the South,⁶⁷⁷ and the Government's decision in 1981 to build an oil refinery at Kosti in the North, connecting the Unity field by a 570 kilometer pipeline, instead of at Bentiu (in the South). This unilateral diversion of southern resources for the benefit of the North was a significant source of renewed southern dissatisfaction with central government policies after the Addis Ababa Accords.⁶⁷⁸

2. Non-Implementation of the Addis Ababa Accords in Abyei

417. In the immediate aftermath of the Addis Ababa Accords, representatives of the Ngok Dinka of the Abyei Area were appointed to responsible positions in the Southern Regional Government.⁶⁷⁹ Nonetheless, the problems referred to above, including the discovery of oil in the Abyei region, intervened. Over time, the role of southerners in the governance of Abyei

⁶⁷¹ Kasfir, "Southern Sudanese Politics Since the Addis Ababa Agreement," 76(303) African Affairs 143, 153 (1977), **Exhibit-FE 6/2**.

⁶⁷² Kasfir, "Southern Sudanese Politics Since the Addis Ababa Agreement," 76(303) African Affairs 143, 154-155 (1977), **Exhibit-FE 6/2**.

⁶⁷³ Wakosen, *The Politics of Southern Self-Government 1972-1983*, in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 42 (1993) ("...the socio-economic development of the South was expected to improve rapidly after the signing of the peace agreement. But the records of the ten-year period of self-rule reveal that socio-economic development took a negative direction"), **Exhibit-FE 8/8**.

⁶⁷⁴ D. Johnson, *The Root Causes Of Sudan's Civil Wars* 45 (2003), **Exhibit-FE 11/6**.

⁶⁷⁵ See above at para. 110; see also C. Gurdon, *Sudan at the Crossroads* 76-78 (1984), **Exhibit-FE 7/2**.

⁶⁷⁶ C. Gurdon, *Sudan at the Crossroads* 76 (1984), **Exhibit-FE 7/2**. At first, the central government tried to keep the facts surrounding the prospecting as secret as possible, and were reluctant to reveal the location and capacity of the discovered fields. Wakosen, *The Politics of Southern Self-Government 1972-1983*, in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 45 (1993), **Exhibit-FE 8/8**.

⁶⁷⁷ Wakosen, *The Politics of Southern Self-Government 1972-1983* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 34 (1993), **Exhibit-FE 8/8**.

⁶⁷⁸ C. Gurdon, *Sudan at the Crossroads* 79-80 (1984), **Exhibit-FE 7/2**.

⁶⁷⁹ "Abyei Facts and Documents" presented by GoS in early 2004, at p. 18, **Exhibit-FE 11/11**. Among others, Dr. Zacharia Bol Deng (son of Deng Majok) was appointed Regional Minister for Health and Justin Deng Agwer was nominated official spokesman of the Southern Youth in Khartoum.

diminished and it became evident that the GoS did not intend to conduct the referendum contemplated by the Addis Ababa Accords.⁶⁸⁰

418. The citizens of the Abyei region repeatedly requested that the GoS conduct the referendum contemplated by the Addis Ababa Accords. Numerous petitions requesting that the referendum be conducted were circulated in Abyei between 1973 and 1982, while the Southern People's Regional Assembly adopted a resolution to the same effect.⁶⁸¹ All of these overtures were ignored by the GoS and, contrary to the terms of the Addis Ababa Accords, no referendum was ever conducted in the region.⁶⁸²

419. In 1974, the Abyei Area was given a special administrative status, and President Nimeiri assumed various direct presidential powers over the Abyei Area.⁶⁸³ The special administrative status was cancelled in 1977, at which point the area was reinstated to the administration of its former commissioner.⁶⁸⁴

420. In 1976, heavily armed Misseriya militia launched a series of assaults in Abyei town and neighboring areas.⁶⁸⁵ The attacks culminated in the June 1977 ambush of unarmed Dinka civilians by Misseriya militia, resulting in nearly 100 deaths.⁶⁸⁶ In the winter of 1980, Misseriya forces, protected by GoS security forces, staged a massive attack on Ngok Dinka villages, burning houses, destroying crops, looting livestock, killing at random, and forcing large number of people to flee.⁶⁸⁷

D. *The GoS's Dissolution of the Southern Regional Government*

421. In the midst of other tensions between the North and Southern Region, President Nimeiri issued on 5 June 1983 a presidential decree that contradicted the basic purpose of the Addis Ababa Agreement and ushered in the second phase of the Sudanese civil war. The decree dissolved the institutions of the Southern Region's government and ordered the

⁶⁸⁰ "Abyei Facts and Documents" presented by GoS in early 2004 [IGAD 9.22], at p. 18 for the GoS position on the implementation of the referendum under the Addis Ababa Agreement. ("However, the Khartoum Government, fully aware of the volatile situation in the area, was not willing to conduct any referendum. The Government legal advisors, Justice Dafalla El Radi in particular, advised that even if the proviso 'culturally and geographically part of the southern complex' is construed in the light of the circumstances to mean or include Abyei, the word 'may' is not merely stating the choices available in the referendum, as it also gives the Government the liberty to conduct or not to conduct that referendum. The usage of the indefinite Article 'a' in the reference to 'a referendum' was also construed to indicate that this referendum is unspecified, undefined, and consequently optional."), **Exhibit-FE 11/11**.

⁶⁸¹ Wakoson, *The Politics of Southern Self-Government 1972-1983* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 33 (1993), **Exhibit-FE 8/8**.

⁶⁸² Wakoson, *The Politics of Southern Self-Government 1972-1983* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 33 (1993), **Exhibit-FE 8/8**.

⁶⁸³ *The SPLM Final Presentation on the Boundaries of Abyei Area*, at p. 10 (2005), **Exhibit-FE 14/13**; see also Witness Statement of Kuol Deng Kuol Arop, at p. 3, ¶12. Among other things, a national committee of cabinet ministers was constituted, nine local government officers, one for each Chieftaincy, were posted to the area. Justin Deng Agwer, a southerner, was appointed by the control GoS as assistant commissioner to head the administration at the area. F. Deng, *War of Visions: Conflict of Identities in the Sudan* 307-312 (1995), **Exhibit-FE 8/13**; ABC Report, Part II, App. 4, at p. 148 ("I was sent to Abyei ... as assistant Commissioner for Abyei Area ... I was answerable to the Minister of the Local Government, and not to the district or province level."), **Exhibit-FE 15/1**.

⁶⁸⁴ "Abyei Facts and Documents" presented by GoS in early 2004, at p. 20, **Exhibit-FE 11/11**. See also F. Deng, *War of Visions: Conflict of Identities in the Sudan* 326 (1995), **Exhibit-FE 8/13**.

⁶⁸⁵ *The SPLM Final Presentation on the Boundaries of Abyei Area*, at p. 8 (2005), **Exhibit-FE 14/13**.

⁶⁸⁶ *The SPLM Final Presentation on the Boundaries of Abyei Area*, at p. 9 (2005), **Exhibit-FE 14/13**. See also F. Deng, *War of Visions: Conflict of Identities in the Sudan* 325 (1995), **Exhibit-FE 8/13**; Witness Statement of Kuol Deng Kuol Arop, at p. 3, ¶12.

⁶⁸⁷ F. Deng, *War of Visions: Conflict of Identities in the Sudan* 328 (1995), **Exhibit-FE 8/13**.

redivision of the autonomous Southern Region into three provinces which had existed prior to 1972: Equatoria, Bahr el Ghazal and Upper Nile.⁶⁸⁸

422. In addition to re-dividing the Southern Region, the 1983 decree abrogated a number of other major terms of the Addis Ababa Accords. In particular, the decree abrogated guarantees for regional languages and English as the principal languages of the South⁶⁸⁹ and removed the financial powers and benefits previously reserved to the South, leaving the new regions without an independent source of revenue.⁶⁹⁰

423. Four months later, in September 1983, Islamic Sharia law was imposed throughout Sudan. In the Southern Region, the imposition of Sharia law was uniformly condemned as a further contravention of the principles and letter of the Addis Ababa Accords.⁶⁹¹

E. Second Civil War: Famine and Destruction in Abyei Area – 1983 to 2005

424. Following the Addis Ababa Accords, there had been a decade of relative peace. Nonetheless, in 1983, after the GoS's imposition of Sharia Law and abrogation of self-government in the Southern Region, civil war between the North and the South resumed. This second civil war would last for two more decades, until the South and the North agreed to enter into the Comprehensive Peace Agreement ("CPA") in early 2005. During this period, the Ngok Dinka of Abyei suffered staggering human casualties at the hands of GoS army and Misseriya militia attacks, slave raids and other atrocities.

1. The Second Civil War in the South

425. Sudan's second civil war has been described as the "world's most destructive civil conflict."⁶⁹² As with the first civil war, the civilian population of the South suffered enormous casualties during the second phase of the civil war between 1982 and 2005.

426. The estimated death toll resulting from the second civil war varies widely. As of April 2001, the U.S. Committee for Refugees estimated that nearly two million had died due to "war-related famine, disease and casualties, [while] four million people (nearly 80%) of the southern Sudanese population ha[d] been forced to flee ... at one time or another."⁶⁹³ U.S. Senator John Danforth, who was intimately involved in subsequent negotiations to resolve the civil war, commented similarly in 2002 that "**[a]fter 18 years, with over two million dead and over 4.5 million refugees and internally displaced, the war continued.**"⁶⁹⁴ Before the second civil war ended, estimates that it had claimed 2.5 to 3 million lives were more commonly cited.⁶⁹⁵

427. In addition, at the end of the war (in 2005), the International Organization for Migration estimated that approximately four million further people had been displaced from

⁶⁸⁸ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 246 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶⁸⁹ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 249 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶⁹⁰ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 250 (2d ed. 1992), **Exhibit-FE 8/3**.

⁶⁹¹ International Crisis Group, "Sudan's Best Chance for Peace: How Not to Lose It," dated 17 September 2002, at p. 2, **Exhibit-FE 9/16**; see also R. Collins, *A History of Modern Sudan* 147 (2008), **Exhibit-FE 16/24**.

⁶⁹² E. Reeves, "Can Peace Ever Be Made with the National Islamic Front", dated 13 June 2003, at p. 1, **Exhibit-FE 10/28**.

⁶⁹³ U.S. Committee for Refugees, *Sudan: Nearly 2 Million Dead as a Result of the World's Longest Running Civil War* (April 2001), available at <http://web.archive.org/web/20041210024759/http://www.refugees.org/news/crisis/sudan.htm>, **Exhibit-FE 9/4**.

⁶⁹⁴ Danforth Report, dated 26 April 2002, at p. 5, **Exhibit-FE 9/7**.

⁶⁹⁵ D. Johnson, *The Root Causes Of Sudan's Civil Wars* 143, fn 1 (2003), **Exhibit-FE 11/6**.

or within Sudan during the course of that war.⁶⁹⁶ The displaced populations included large numbers of children whose parents and families had been killed: “By 1994 there were about 20,000 displaced children between the ages of 7 and 17 ... forced to walk long distances looking for security, food and education ... about 30,000 children had to walk from Sudan to Ethiopia in 1991.”⁶⁹⁷

428. The second civil war also had severe consequences on the health of the southern Sudanese. Measles, malaria, meningitis and other diseases were epidemic. One outbreak of kala-azar (leishmaniasis) alone killed some 30,000 to 40,000 people in Upper Nile.⁶⁹⁸ Fewer than half of the hospitals in the South remained open in 1988, and most of those remaining open had no medicine or equipment and were grossly understaffed.⁶⁹⁹

429. In addition, the erosion of infrastructure (roads, communications, government offices and services) was accelerated by the resumption of war.⁷⁰⁰ At the same time, the education and training of southerners almost entirely ceased during the second civil war. All secondary schools closed by 1987, and by the middle of 1989, Juba University had also closed.⁷⁰¹ Access of southerners to education in the North was also severely curtailed; in the 1990s, for example, the total student population at the University of Khartoum of 8,831, included only 28 southern Sudanese students.⁷⁰²

430. The livestock industry, one of the South’s most important resources, was also devastated by the resumption of civil war. Before the second civil war began in 1983, there were 7.3 million head of cattle, 3.85 million sheep and 2.55 million goats. Thereafter, the southern herds were drastically reduced by disease and indiscriminate consumption and completely wiped out in some areas.⁷⁰³

2. The Second Civil War in the Abyei Region

431. The second civil war caused massive suffering in the Abyei region. In a repeat of the practices adopted in the mid-1960s,⁷⁰⁴ gangs of armed militia (predominately Misseriya tribal militia known as Murahaleen) began again to attack Dinka villages in Abyei during the late 1970s; their purpose was to drive the Dinka out of their historic lands.⁷⁰⁵ The local police and army in Kordofan collaborated with these gangs, as did members of the Umma party.⁷⁰⁶

⁶⁹⁶ Excerpt from <http://africa.reuters.com>, dated 24 October 2008, **Exhibit-FE 16/18**.

⁶⁹⁷ Biel, *The Civil War in Southern Sudan and its Effect on Youth*, 1 Social Work & Society 119, 122 (2003), **Exhibit-FE 11/4**.

⁶⁹⁸ de Waal, *Starving out the South, 1984-9*, in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 158 (1993), **Exhibit-FE 8/7**.

⁶⁹⁹ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 283 (2d ed. 1992), **Exhibit-FE 8/3**.

⁷⁰⁰ D. Johnson, *The Root Causes Of Sudan’s Civil Wars* 105 (2003), **Exhibit-FE 11/6**; see also Yongo-Bure *The Underdevelopment of the Southern Sudan Since Independence* in M. Daly & A. Sikainga, *Civil War in the Sudan* 58 (1993), **Exhibit-FE 8/9**.

⁷⁰¹ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 283 (2d ed. 1992), **Exhibit-FE 8/3**.

⁷⁰² Yongo-Bure, *The Underdevelopment of the Southern Sudan Since Independence* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 60 (1993), **Exhibit-FE 8/9**.

⁷⁰³ A. Alier, *Southern Sudan: Too Many Agreements Dishonoured* 284 (2d ed. 1992), **Exhibit-FE 8/3**.

⁷⁰⁴ See above at paras. 391-392.

⁷⁰⁵ See generally, Mawson, *Murahaleen Raids on the Dinka 1985-1989*, 15 (2) *Disasters* 137 (1991), **Exhibit-FE 8/2**; de Waal, *Some Comments on Militias in the Contemporary Sudan*, in M. Daly & A. Sikainga, *Civil War in the Sudan* 142 (1993), **Exhibit-FE 8/6**; D. Johnson, *The Root Causes Of Sudan’s Civil Wars* 44 (2003), **Exhibit-FE 11/6**.

⁷⁰⁶ Mawson, *Murahaleen Raids on the Dinka 1985-1989*, 15 (2) *Disasters* 137, 145 (1991), **Exhibit-FE 8/2**; *Abyei Area: The Standard Test for Commitment to Peace in the Sudan* by Abyei Civil Society Organizations, February 2004, at p. 7, **Exhibit-FE 12/2**.

432. A series of steps were also taken against Abyei intellectuals and Ngok government officials during the early 1980s. In 1981, a group of Ngok Dinka intellectuals and Chiefs, who were having an evening social gathering in Abyei, were attacked, resulting in the death of one person and the displacement of intellectuals, senior officials and Ngok paramount chief to Bahr el Ghazal for protection and security.⁷⁰⁷ In 1983, as discussed above, a number of Abyei intellectuals and senior officials in the Southern Regional Government were arrested by the central GoS regime on pretexted charges.⁷⁰⁸

433. These and other developments ultimately led to substantial Ngok Dinka participation in the membership of the SPLM/A.⁷⁰⁹ In mid-1983, factions of the Anya Nya II and southern army units formed the Sudan People's Liberation Army ("SPLA"), under the command of Dr. John Garang de Maboir.⁷¹⁰ By July 1983, after the release of a manifesto by the Sudan People's Liberation Movement ("SPLM"), the political counterpart of the SPLA, presenting SPLM/A's aims and objectives,⁷¹¹ 15,000 northern troops had entered the South and its border regions.⁷¹²

434. With the resumption of civil war, Misseriya and other groups of armed northerners were given further license by the GoS to conduct raids against the Ngok Dinka.⁷¹³ Following the fall of Nimeiri (in April 1985), the GoS's use of tribal militia became more prolific. The Misseriya militia of Kordofan in particular received substantial government support and in the latter part of 1985, raiding in Bahr el Ghazal and Southern Kordofan intensified to a "degree without precedent," with large, well-armed parties of between 500 and 1000 men raiding the Ngok Dinka in the Abyei region.⁷¹⁴ By the end of October 1985, the vast majority of the Ngok Dinka had abandoned their rural livelihoods and large tracts of the Abyei region.⁷¹⁵

435. Among other atrocities which were inflicted on the Ngok Dinka and other IDPs around the Abyei region, the Amnesty International Report in 1989 documented the massacre by a Misseriya militia of over 1,000 displaced Dinka then in Al-Daien (in Southern Darfur) in April 1987.⁷¹⁶ The report also documented an April 1988 attack by a large party of Misseriya on the village of Mareng Akuar, 15 miles northwest of Aweil, in which 170 people were burnt to death in a byre.⁷¹⁷

436. Although looting was one purpose of the Misseriya militia's raids, many attacks "were conducted with a degree of violence that suggests that destroying the Dinka

⁷⁰⁷ *Abyei Area: The Standard Test for Commitment to Peace in the Sudan* by Abyei Civil Society Organizations, February 2004, at p. 7, **Exhibit-FE 12/2**; F. Deng, *War of Visions: Conflict of Identities in the Sudan* 3310 (1995), **Exhibit-FE 8/13**; *The SPLM Final Presentation on the Boundaries of Abyei Area*, at p. 9 (2005), **Exhibit-FE 14/13**.

⁷⁰⁸ F. Deng, *War of Visions: Conflict of Identities in the Sudan* 332 (1995), **Exhibit-FE 8/13**; see also Witness Statement of Kuol Deng Kuol Arop, at p. 3, ¶13.

⁷⁰⁹ Mawson, *Murahaleen Raids on the Dinka 1985-1989*, 15(2) *Disasters* 137, 140 (1991), **Exhibit-FE 8/2**.

⁷¹⁰ F. Deng, *War of Visions: Conflict of Identities in the Sudan* 173 (1995), **Exhibit-FE 8/13**. Garang also became the head of the Sudan People's Liberation Movement ("SPLM"), the SPLA's political wing.

⁷¹¹ Manifesto of the Sudan People's Liberation Movement, 31 July 1983, **Exhibit-FE 6/12**. See also D. Johnson, *The Root Causes Of Sudan's Civil Wars* 63 (2003), **Exhibit-FE 11/6**.

⁷¹² D. Johnson, *The Root Causes Of Sudan's Civil Wars* 62 (2003), **Exhibit-FE 11/6**.

⁷¹³ D. Johnson, *The Root Causes Of Sudan's Civil Wars* 68 (2003), **Exhibit-FE 11/6**.

⁷¹⁴ Mawson, *Murahaleen Raids on the Dinka 1985-1989*, 15 (2) *Disasters* 137, 141-142 (1991), **Exhibit-FE 8/2**; de Waal, *Some Comments on Militias in the Contemporary Sudan*, in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 147 (1993), **Exhibit-FE 8/6**.

⁷¹⁵ *The SPLM Final Presentation on the Boundaries of Abyei Area*, at p. 11 (2005), **Exhibit-FE 14/13**.

⁷¹⁶ Mawson, *Murahaleen Raids on the Dinka 1985-1989*, 15(2) *Disasters* 137, 142 (1991), **Exhibit-FE 8/2**.

⁷¹⁷ Mawson, *Murahaleen Raids on the Dinka 1985-1989*, 15(2) *Disasters* 137, 143 (1991), **Exhibit-FE 8/2**.

communities of the area was also an aim.⁷¹⁸ The Misseriya militia also continued and intensified the slave raids that had occurred during the 1970s.⁷¹⁹ The main targets were woman and children, which not only destroyed Dinka families but (perversely) resulted in the assimilation of Dinka children into Misseriya society as slaves.⁷²⁰

437. The numbers of non-Muslim southerners, particularly the non-Arab groups such as the Dinka, Nuer, Nuba and Ingessana in the “transitional zone” between North and South, abducted into slavery have been subject to divergent estimates (varying from 10,000 to 200,000).⁷²¹ An 18-month study generated the following statistical findings with respect to the previous 20 year period of the second civil war:

- a. during the Second Civil War, there were 1,862 recorded raids on villages in which people were abducted;
- b. 5,145 people are specifically identified as having been killed in these raids;
- c. 60 percent of the abductees taken were under the age of 18; and
- d. the worst affected village – Ajok – experienced 101 recorded abductions in one week.⁷²²

438. Famine was also a major cause of death and widespread displacement in Abyei.⁷²³ Relief to northern Bahr el Ghazal (where many Dinka from Abyei had fled) was never satisfactorily achieved by the international relief groups, largely due to the difficulties in accessing the region,⁷²⁴ but also because of GoS bans against humanitarian flights into southern Sudan and other conflict regions, including the Abyei region.⁷²⁵

439. The loss of life in Abyei due to famine alone was massive. In the summer of 1988, at the camp for displaced Dinka located at Meiram in Southern Kordofan, 1 percent of displaced Dinka died each day.⁷²⁶ In the Abyei region more broadly, 10,000 died between January and

⁷¹⁸ Mawson, *Murahaleen Raids on the Dinka 1985-1989*, 15(2) Disasters 137, 142 (1991), **Exhibit-FE 8/2**.

⁷¹⁹ Mawson, *Murahaleen Raids on the Dinka 1985-1989*, 15(2) Disasters 137, 142 (1991), **Exhibit-FE 8/2**;
D. Johnson, *The Root Causes of Sudan's Civil Wars* 157 (2003), **Exhibit-FE 11/6**.

⁷²⁰ Mawson, *Murahaleen Raids on the Dinka 1985-1989*, 15(2) Disasters 137, 143 (1991), **Exhibit-FE 8/2**.

⁷²¹ *Slavery, Abduction and Forced Servitude in Sudan*, Report of the International Eminent Persons Group, 2002, at pp. 41 *et seq.*, **Exhibit-FE 9/9**. According to the International Crisis Group, “[t]he exact number of Sudanese held in slavery is unknown, and estimates range broadly, [with the] government claim[ing] that as few as 5,000 people have suffered from inter-tribal abductions while, some NGOs suggest that up to 200,000 have been enslaved.” See International Crisis Group Report, *God, Oil, and Country: Changing the Logic of War in Sudan* 122 (January 2002), available at www.crisisgroup.org/library/documents/report_archive/A400534_28012002.pdf, **Exhibit-FE 9/6**.

⁷²² “Database Adds Names and Faces to Sudan’s Slavery Statistics,” U.S. State Department Press Release, 29 May 2003, at p. 2, **Exhibit-FE 10/22**.

⁷²³ *Slavery, Abduction and Forced Servitude in Sudan*, Report of the International Eminent Persons Group 26 (2002), **Exhibit-FE 9/9**; de Waal, *Starving out the South*, in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 157-158 (1993), **Exhibit-FE 8/7**.

⁷²⁴ D. Johnson, *The Root Causes Of Sudan's Civil Wars* 153 (2003), **Exhibit-FE 11/6**.

⁷²⁵ “Sudan Bans All Relief to the South” Human Rights Watch News Release, dated 27 September 2002, available at www.hrw.org/en/news/2002/09/27/sudan-bans-all-relief-south, **Exhibit-FE 9/17**; See also SPLM Opening Statement – Technical Committee Meeting on Peace in the Sudan, 2-5 April 2002, at p. 3, **Exhibit-FE 9/8**.

⁷²⁶ Figures from Médecins sans Frontières, France, cited in de Waal, *Starving out the South*, in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 157, 183, fn 3 (1993), **Exhibit-FE 8/7**. 3,600 people died at that camp alone between 19 June and 9 October 1988, during which time the camp’s population ranged between 6,000 and 26,000.

October 1988, and 30,000 Dinka died in Southern Kordofan that same year.⁷²⁷ The famine has been described as “uniquely bad,” with a “death rate ... four times as high as that prevailing in Korem, Ethiopia, in October 1984”⁷²⁸

440. Those who did not die of famine in the Abyei region were at risk from malnutrition. In February 1988, 74 percent of newly-arriving Dinka children in Abyei suffered severe undernutrition, and a further 20 percent suffered moderate undernutrition.⁷²⁹ The consequences of these conditions for future generations are staggering.

441. During the second civil war, the Abyei region became the “testing ground” for a new GoS “scorched earth warfare” strategy in which regular army forces fought in conjunction with Arab militias to clear the non-Arab (in this case Ngok Dinka) population from the lands near oil fields of their traditional homes. This approach is described in the Human Rights Watch report *Sudan, Oil, and Human Rights*:

“[The southern Sudanese] were pushed off their land, in some cases many times, by government army or militia forces, for the purpose of emptying the oil areas of southern civilians whom the central government regarded as ‘security threats’ to oil development, solely on account of their ethnic origin and therefore presumed rebel loyalties. The government tried to control this ‘security threat’ by the most extreme means of removal, using military land and air invasions, killing, looting, burning, and destroying the local subsistence economy and killing and injuring civilians. At the same time it cut the area off from humanitarian assistance by imposing relief flight bans and denials of access, while only allowing food into garrison towns, where it could serve as a magnet to draw starving people to crowded areas under government control: a textbook case of a counterinsurgency operation.”⁷³⁰

442. Human Rights Watch, in its comprehensive report, recounted the GoS operations.⁷³¹ In Abyei, one of the GoS’s motivations was to gain control of the oil fields in the region. The GoS targeted the Nuer and Dinka residents of Abyei and neighboring areas in what amounted to ethnic cleansing: to that end, the GoS established a “cordon sanitaire” around oil fields in the region after driving out local residents.⁷³² The Government’s tactics differed from those previously used in the tribal warfare, as non-combatant civilians were specifically targeted, often by modern weaponry.⁷³³

⁷²⁷ de Waal, *Starving out the South*, in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 157, 183 (1993), **Exhibit-FE 8/7**.

⁷²⁸ de Waal, *Starving out the South*, in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 157-158 (1993), **Exhibit-FE 8/7**.

⁷²⁹ de Waal, *Starving out the South*, in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 158 (1993), **Exhibit-FE 8/7**.

⁷³⁰ Human Rights Watch Report, *Sudan, Oil, and Human Rights: Internal Displacement And International Humanitarian Law* (November 2003), at p. 313, available at www.hrw.org/sites/default/files/reports/sudanprint.pdf, **Exhibit-FE 11/12**.

⁷³¹ Human Rights Watch Report, *Sudan, Oil, and Human Rights*, at p. 50 (November 2003), available at www.hrw.org/sites/default/files/reports/sudanprint.pdf, **Exhibit-FE 11/12**. See also *Sudan’s Other Wars*, Africa Briefing, available at www.crisisgroup.org/library/documents/report_archive/A401020_25062003.pdf, **Exhibit-FE 10/29**.

⁷³² Human Rights Watch Report, *Sudan, Oil, and Human Rights*, at pp. 36, 46, 50, 51, 102, 189 (November 2003) available at www.hrw.org/sites/default/files/reports/sudanprint.pdf, **Exhibit-FE 11/12**.

⁷³³ Human Rights Watch Report, *Sudan, Oil, and Human Rights* (November 2003), at pp. 127, 297, 300, available at www.hrw.org/sites/default/files/reports/sudanprint.pdf, **Exhibit-FE 11/12**. The weaponry used by the GoS in these operations was far more advanced than previously, including helicopter gunships, fighter planes, Antonov bombers, tanks, and personnel carriers. *Ibid.*, at pp. 43, 186, 457.

443. One observer described a GoS military operation in May 1999; “[this was] just after a food distribution and seeds and tools distribution before the planting season, what would be the worst time to drive the people out.”⁷³⁴ Survivors reported that approximately 1,200 GoS soldiers killed civilians and burned more than 6,000 huts, which constituted roughly 60 percent of the Nuer and Dinka homes in the area. The GoS soldiers carried out this burning and looting as they left the region, “leaving only scorched earth behind.”⁷³⁵

444. This approach continued into 2000s, and by the time that the CPA was entered into in 2005, much of the Ngok Dinka population of the Abyei region had long since fled the area. International efforts to return Ngok refugees to the region began in 2002 and are continuing.⁷³⁶

⁷³⁴ Human Rights Watch Report, *Sudan, Oil, and Human Rights* (November 2003), at p. 192, available at www.hrw.org/sites/default/files/reports/sudanprint.pdf, **Exhibit-FE 11/12**.

⁷³⁵ Human Rights Watch Report, *Sudan, Oil, and Human Rights* (November 2003), at p. 192-193, available at www.hrw.org/sites/default/files/reports/sudanprint.pdf, **Exhibit-FE 11/12**.

⁷³⁶ See Addendum to UNHCR Report of the Representative of the Secretary-General on internally displaced persons, “Profiles in displacement: follow-up missions to the Sudan”, 27 November 2002, **Exhibit-FE 10/3**.

V. THE COMPREHENSIVE PEACE AGREEMENT, THE ABYEI PROTOCOL AND THE ABYEI ANNEX

445. The two decade-long second civil war in Sudan (from 1982 to 2005) was brought largely to a conclusion by the Comprehensive Peace Agreement (“CPA”). The CPA involved three years of difficult negotiations, in which multiple members of the international community were actively engaged, and was finalized by the GoS and the SPLM/A at the end of 2004.

446. The CPA was a wide-ranging and detailed series of agreements, which set forth terms for finally resolving the Sudanese civil war and providing for democratic transformation of the Sudanese government. These agreements included provisions regarding power sharing, wealth sharing, security and the resolution of the conflicts in Abyei, Kordofan and the Southern Blue Nile.⁷³⁷

447. The CPA was a unique and enormously constructive set of agreements. It ended five decades of brutal conflict, which had resisted multiple efforts at settlement, by providing for a process of close collaboration between the GoS and SPLM/A in charting the Sudan’s future. In the words of the President of the UN Security Council, Mr. Joel Adechi (Benin), the signing of the CPA “was a historic moment of great opportunity for the country and one which all its people should strive to seize in order to steer development in the path leading to a solid and long-lasting peace.”⁷³⁸

448. Other responses to the CPA were similar. The SPLM/A Chairman, Colonel John Garang de Maboir, observed that:

“the Sudanese people had themselves voluntarily negotiated a unique peace agreement that, in effect, prescribed a one-country-two-systems model, whereby the people of southern Sudan would decide after six years whether to remain within the Sudan or to opt for independence.”⁷³⁹

449. To the same effect, the Vice-President of the Sudan, Ali Osman Taha, declared that the Sudan was committed “to bring about real change on the ground” after suffering “from the scourge of war for so long.”⁷⁴⁰ Likewise, the U.S. Senior Representative on Sudan declared that the international community “can address the challenge [of the costs of the Sudan’s civil war], finally, after 20 years because there is a Comprehensive Peace Agreement.”⁷⁴¹

450. Central to the CPA was the resolution of the parties’ disagreements over the future of the Abyei region and the Ngok Dinka desire to exercise its right to self-determination. As with the CPA generally, the GoS and SPLM/A agreed to an innovative, carefully-designed

⁷³⁷ CPA, **Exhibit-FE 13/1**.

⁷³⁸ UN Security Council Press Release SC/8306, dated 8 February 2005, available at www.un.org, at p. 1, **Exhibit-FE 13/9**.

⁷³⁹ UN Security Council Press Release SC/8306, dated 8 February 2005, available at www.un.org, at p. 2, **Exhibit-FE 13/9**. See also Speech by John Garang de Maboir, dated 5 June 2004, **Exhibit-FE 12/6**.

⁷⁴⁰ UN Security Council Press Release SC/8306, dated 8 February 2005, available at www.un.org, at p. 1, **Exhibit-FE 13/9**.

⁷⁴¹ Snyder, *A Step Toward Peace: The Sudan Comprehensive Peace Accord*, Briefing at the Washington Foreign Press Center, p. 1, dated 12 January 2005, at p. 1, available at www.state.gov/p/af/rls/rm/2005/40966.htm, **Exhibit-FE 13/2**.

mechanism for resolving these disagreements; that resolution was set forth in the “Abyei Protocol” and “Abyei Annex” to the CPA (as discussed below).⁷⁴²

A. *Negotiations of Comprehensive Peace Agreement*

451. Discussions to end the second civil war began first between the SPLM/A and GoS in the early 1990s, although they were not pursued in earnest until the late 1990s. The parties’ discussions were facilitated by the Inter-Governmental Authority on Development (“IGAD”), a regional African organization which incorporated the seven countries in the Horn of Africa (Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda, and Eritrea).⁷⁴³

452. The IGAD facilitated discussions were augmented by U.S. participation in 2002. That participation included an active role by former U.S. Senator John Danforth, the U.S. Special Envoy for Peace in Sudan. At the commencement of his involvement in the Sudan peace process, Senator Danforth proposed various interim, humanitarian steps aimed at ameliorating the human suffering resulting from the ongoing civil war,⁷⁴⁴ and successfully negotiated one of those steps, a cease-fire between the parties, in January 2002.⁷⁴⁵

453. Senator Danforth’s initiative was one of a number of factors that led to meetings between the GoS and SPLM/A, mediated by the Lieutenant General Lazaro Sumbeiywo, the Kenyan Special Envoy to IGAD. Both IGAD and General Sumbeiywo, as well as the U.S. and other members of the international community, played vitally important roles in the ensuing discussions over the next three years. Among others, General Sumbeiywo and members of the U.S. delegation were actively involved in many of the parties’ discussions and the formulation of the eventual text of the protocols which constitute the CPA.⁷⁴⁶

1. Machakos Protocol in July 2002

454. Early in 2002, discussions were commenced between General Sumbeiywo and representatives of the SPLM/A and GoS. During the initial 2002 negotiations, the SPLM/A maintained a preference for a united, restructured, reformed and secular Sudan, but insisted that, if this was not attainable, exercise of the right of self-determination had to be an alternative for southern Sudan.⁷⁴⁷ A central aspect of the SPLM/A position was the shared political, cultural and ethnic character of the South and the aspirations of the southern Sudanese peoples for self-determination.⁷⁴⁸ The GoS representatives accepted that the North

⁷⁴² See below at paras. 487-490.

⁷⁴³ The IGAD had been established in 1986, originally as the Intergovernmental Authority on Drought and Development. It was renamed and reorganized in 1996. See IGAD website, available at: www.igad.org/index.php?option=com_content&task=view&id=43&Itemid=53.

⁷⁴⁴ Danforth Report, dated 26 April 2002, at p. 5, **Exhibit-FE 9/7**. The four proposals included a ceasefire and comprehensive relief programme for the Nuba Mountains region, “Days of Tranquility” to allow humanitarian relief; halt to attacks on civilians. The Report also set forth the Senator’s thoughts on the substantive issues which would have to be resolved for a peace agreement to be reached; see also R. Collins, *A History of Modern Sudan* 250 (2008), **Exhibit-FE 16/24**.

⁷⁴⁵ R. Collins, *A History of Modern Sudan* 250-251 (2008), **Exhibit-FE 16/24**.

⁷⁴⁶ Witness Statement of Minister Deng Alor Kuol, at p. 2, ¶10.

⁷⁴⁷ SPLM/SPLA Opening Statement – Technical Committee Meeting on Peace in the Sudan, 2-5 April 2002, where right to self-determination is emphasized, at p. 2, **Exhibit-FE 9/8**; see also Draft Framework between the GoS and the SPLM/SPLA arising out of 18 June to 28 July 2002 meeting, at p. 8, providing for secession as an alternative, **Exhibit-FE 9/11**; SPLM Response to the Danforth Report, dated 15 June 2002, at p. 2 (“It [secession] is precisely the most compelling reason why Southern Sudanese have taken up arms twice now, so as to establish their own system of governance that meets their aspirations and guarantees their fundamental human dignity and rights.”), **Exhibit-FE 9/10**.

⁷⁴⁸ SPLM/SPLA Opening Statement – Technical Committee Meeting on Peace in the Sudan, dated 2-5 April 2002, at p. 2, **Exhibit-FE 9/8**; SPLM Response to the Danforth Report, dated 15 June 2002, at p. 10, **Exhibit-**

could not exclude the option of southern independence, if there was to be a credible chance of convincing southerners to freely remain part of a united Sudan.⁷⁴⁹

455. Following initial discussions with General Sumbeiywo, subsequent meetings took place in Machakos, near Nairobi, in June 2002.⁷⁵⁰ These meetings actively involved “facilitators” from each of the U.S., the U.K., and Norway.⁷⁵¹ These talks were aimed at compiling the key issues that divided the parties into a single negotiating text. Ultimately, this produced the so-called Machakos Protocol, which was signed on 20 July 2002.⁷⁵²

456. The Protocol was in large part an agreement for the framework of further discussions (rather than a final agreement).⁷⁵³ It did, however, contain certain substantive “agreed principles” on which these further discussions would be predicated. Among these principles was the declaration that the “unity of the Sudan,” based on democratic principles of protection and equality for the rights of all citizens, “shall be the priority of the parties;”⁷⁵⁴ at the same time, there would be a referendum at the end of the six years, “for the people of South Sudan to: confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement; or to vote for secession.”⁷⁵⁵

457. After the Machakos Protocol was signed, negotiations towards a final comprehensive peace agreement proceeded. Within those negotiations, the Abyei, Nuba Mountains, and Funj (Southern Blue Nile) areas (the “Conflict Areas”) became an issue almost immediately.⁷⁵⁶ The SPLM/A considered the Conflict Areas, and in particular the Abyei Area, to be integral to the negotiations, insisting that the parties’ discussions could not continue without them being addressed.⁷⁵⁷ In contrast, the GoS indicated that it was not prepared to negotiate on the Conflict Areas on the grounds that they were north of the 1956 boundary and did not fall within the IGAD mandate.⁷⁵⁸

458. This disagreement brought the negotiations to a standstill; the ensuing four months largely passed in “negotiations within negotiations,” with General Sumbeiywo attempting to bridge the gap between the SPLM/A and the GoS regarding what matters should be up for negotiation within the framework of a comprehensive peace agreement. During this period,

FE 9/10; see also Witness Statement of Minister Deng Alor Kuol, at p. 3, ¶¶14-15; see also Witness Statement of Lt. Gen. Sumbeiywo, at pp. 3-4, ¶¶15-18.

⁷⁴⁹ D. Johnson, *The Root Causes Of Sudan’s Civil Wars*, 179 (2003), **Exhibit-FE 11/6**; see also Witness Statement of Minister Deng Alor Kuol, at p. 3, ¶¶11-12.

⁷⁵⁰ R. Collins, *A History of Modern Sudan* 263 (2008), **Exhibit-FE 16/24**.

⁷⁵¹ Letter from Dr. M. Siddig, Leader of GoS Delegations to Lt. Gen. Sumbeiywo, dated 8 March 2003, (“Government accepts the countries of Britain, Italy, Norway and the US as observers”), **Exhibit-FE 10/19**; International Crisis Group Report, “Sudan’s Best Chance for Peace: How Not to Lose It,” dated 17 September 2002, at p. i, **Exhibit-FE 9/16**; see also Witness Statement of Minister Deng Alor Kuol, at p. 2, ¶10.

⁷⁵² D. Johnson, *The Root Causes Of Sudan’s Civil Wars* 179 (2003), **Exhibit-FE 11/6**; see also R. Collins, *A History of Modern Sudan* 263 (2008), **Exhibit-FE 16/24**.

⁷⁵³ D. Johnson, *The Root Causes Of Sudan’s Civil Wars* 179 (2003), **Exhibit-FE 11/6**.

⁷⁵⁴ Agreed text on Preamble, Principles and Transition Process, Part A, Section 1.1, Machakos Protocol Section 2.5, agreed 20 July 2002, **Exhibit-FE 9/12**; see also Witness Statement of Lt. Gen. Sumbeiywo, at p. 2, ¶9; Witness Statement of Minister Deng Alor Kuol, at p. 3, ¶12.

⁷⁵⁵ Agreed text on Preamble, Principles and Transition Process, Part B, Sections 2 to 2.5, Machakos Protocol, agreed 20 July 2002, **Exhibit-FE 9/12**; Agreed text on Right to Self Determination, Section 2.5, Machakos Protocol, agreed 20 July 2002, **Exhibit-FE 9/12**; see also Witness Statement of Lt. Gen. Sumbeiywo, at p. 2, ¶9; Witness Statement of Minister Deng Alor Kuol, at p. 3, ¶12.

⁷⁵⁶ W. Waihenya, *The Mediator* 93 (2006), **Exhibit-FE 15/8**. Witness Statement of Minister Deng Alor Kuol, at p. 3, ¶14; Witness Statement Lt. Gen. Sumbeiywo, at p. 3, ¶12.

⁷⁵⁷ Letter from N. Deng Nhial to Lt. Gen. Sumbeiywo, dated 29 October 2002, **Exhibit-FE 10/1**.

⁷⁵⁸ W. Waihenya, *The Mediator* 93 (2006), **Exhibit-FE 15/8**; see also ICG, “Sudan’s Best Chance for Peace: How Not to Lose It,” dated 17 September 2002, at p. 3, **Exhibit-FE 9/16**; GoS Response to IGAD Envoy’s Way Forward on Abyei, Nuba Mountains and Blue Nile, dated 2 September 2002, **Exhibit-FE 9/13**; The GoS Position on Abyei, Southern Kordofan, and Southern Blue Nile (undated), **Exhibit-FE 9/15**.

on 18 October 2002, the parties signed a Memorandum of Understanding on Cessation of Hostilities in All Conflict Areas,⁷⁵⁹ allowing the discussions regarding both the scope and substance of a comprehensive agreement to continue. Ultimately, in November 2002, the GoS reconsidered its refusal to negotiate at all concerning the Conflict Areas and agreed to discussions proceeding under Kenyan mediation, (although still mediated by General Sumbeiywo), outside the auspices of the IGAD process.⁷⁶⁰

2. Karen Talks in 2003

459. The parties' next substantive meetings were held at Karen, Kenya, beginning in January 2003.⁷⁶¹ An important element of these talks was the status of the Conflict Areas, including specifically the Abyei Area.

460. As noted above, by the time of the Karen talks, the GoS had acknowledged that the Conflict Areas would form part of negotiations (albeit in parallel to the IGAD process).⁷⁶² Nonetheless, shortly before the scheduled talks at Karen, the GoS announced that it would not participate because of the inclusion of the Conflict Areas.⁷⁶³ Ultimately, meetings proceeded in the form of a four day Symposium.⁷⁶⁴ These meetings, between 18 and 23 January 2003, commenced with presentations about different aspects of the civil war and the question of Abyei, from both parties and from external experts.

461. Dr. Douglas H. Johnson, who later served as one of the ABC Experts, was one of the external experts who gave a presentation about the Abyei conflict area at the Karen Symposium.⁷⁶⁵ Among other things, he said: "Today, the people who had been living in Abyei before the war, the Ngok Dinka, are now almost entirely expelled from the district Because of these displacement and new settlements, the issue of the ownership of the land has become a central issue in the conflict." He went on to describe the grievances of the parties and history of the conflict. Dr. Johnson concluded that in solving the conflict, the disenfranchisement and grievances of the Ngok would have to be taken into account alongside Misseriya fears of restrictions to necessary dry season water.⁷⁶⁶

462. Following the Symposium and a further meeting with General Sumbeiywo at the end of January 2003, the parties agreed to discuss the modalities of negotiation of the three Conflict Areas at the next session, which were to take place in March 2003.⁷⁶⁷ This agreement was formalized by the "Modalities and Approach to the Negotiation of Conflict Areas," pursuant to which the parties finally agreed that resolution of the status of the Conflict Areas would comprise part of a final comprehensive settlement, with the underlying

⁷⁵⁹ Executive Brief, dated 18 October 2002, **Exhibit-FE 9/20**.

⁷⁶⁰ W. Waihenya, *The Mediator* 95-101 (2006), **Exhibit-FE 15/8**; see also Witness Statement of Lt. Gen. Sumbeiywo, at p. 3, ¶14. Witness Statement of Minister Deng Alor Kuol, at p. 4, ¶23.

⁷⁶¹ Agenda for Karen Talks between 15 January and 5 February 2003, **Exhibit-FE 10/14**.

⁷⁶² Witness Statement of Lt. Gen. Sumbeiywo, at p. 4, ¶19.

⁷⁶³ Witness Statement of Minister Deng Alor Kuol, at p. 4, ¶23; see also Witness Statement of Lt. Gen. Sumbeiywo, at pp. 4-5, ¶¶20-22.

⁷⁶⁴ Witness Statement of Lt. Gen. Sumbeiywo, at p. 5, ¶22.

⁷⁶⁵ D. Johnson, *Conflict Areas: Abyei - A summary and elaboration of points raised in the presentation and discussion on Abyei*, 18 January 2003, at the KCB Management Center, Karen, Nairobi, at p. 1, **Exhibit-FE 10/13**.

⁷⁶⁶ D. Johnson, *Conflict Areas: Abyei - A summary and elaboration of points raised in the presentation and discussion on Abyei*, 18 January 2003, at the KCB Management Center, Karen, Nairobi, at pp. 1 and 11, **Exhibit-FE 10/13**.

⁷⁶⁷ Witness Statement of Lt. Gen. Sumbeiywo, at p. 6, ¶25; Witness Statement of Minister Deng Alor Kuol, at p. 5, ¶24.

negotiations taking place in parallel with broader discussions.⁷⁶⁸ The Conflict Areas were described therein as “Abyei, Nuba Mountains, and Southern Blue Nile which are outside Southern Sudan as per the border of 1/1/56 and where both the GoS and the SPLM/A are fighting.”⁷⁶⁹

463. The issues were not discussed substantively between the parties until October 2003.⁷⁷⁰ Given the lack of progress up to March 2003, General Sumbeiywo called a halt to direct discussions between the parties and undertook a tour of southern Sudan in order to hear first hand what the people in each of the Conflict Areas desired.⁷⁷¹ General Sumbeiywo’s visits to the three affected areas reflected the claims made by the residents of those areas to end their marginalization and give them “a say in running their government.”⁷⁷²

464. Following his trip, General Sumbeiywo worked with the U.S. delegation, headed by Senator Danforth, and others to prepare a Draft Framework on the Outstanding Issues Based on the Machakos Protocol (“the Nakuru Draft Framework”)⁷⁷³. This document sought to identify the remaining issues that were critical to a lasting peace and to provide a proposed resolution of each. General Sumbeiywo intended to present the document to the parties as a draft on which negotiations would be based, and not as a “take it or leave it text.”⁷⁷⁴

465. In broad terms, General Sumbeiywo’s Nakuru Draft Framework proposed a collegial decision making process between Khartoum and the South in future governance of Sudan.⁷⁷⁵ The proposal provided that there would be two separate armies⁷⁷⁶ and, until elections were held, that the incumbent President of Sudan would be the President and Commander-in-Chief of the Sudan Armed Forces, while the Vice President of Sudan would be the current SPLM/A Chairman. The SPLM/A Chairman would also be the head of Government of Southern Sudan, and Commander-in-Chief of SPLA.⁷⁷⁷ In certain matters of importance (such as declarations of states of emergency, or judicial and other appointments), the President would be required to make decisions with the consent of the Vice President.⁷⁷⁸

466. In relation to the Conflict Areas, the Nakuru Draft Framework proposed a border commission, with the power to make recommendations to the National Legislature to determine internal boundaries, and otherwise to return all areas to the administrative boundaries as they stood in 1956.⁷⁷⁹

467. On 11 July 2003, the SPLM/A released a press release, praising the efforts of IGAD and affirming the SPLM/A’s acceptance of the Nakuru Draft Framework as the basis of negotiations with the GoS, noting that it contained “most of the important elements for a just

⁷⁶⁸ “Modalities and Approach to Negotiations on Conflict Areas,” Abyei, Nuba Mountains, Southern Blue Nile, 4–17 March 2003, Final Draft, **Exhibit-FE 10/20**. The approach contemplated specific sub-delegations participating in three concurrent sets of talks.

⁷⁶⁹ “Modalities and Approach to Negotiations on Conflict Areas,” Abyei, Nuba Mountains, Southern Blue Nile, 4–17 March 2003, Final Draft, at p. 1, **Exhibit-FE 10/20**.

⁷⁷⁰ See below at paras. 475 et seq.

⁷⁷¹ W. Waihenya, *The Mediator* 110 (2006), **Exhibit-FE 15/8**. Record of Meetings for Special Envoy’s visit to Khartoum, dated 23-25 February 2003, **Exhibit-FE 10/16**.

⁷⁷² IPF Briefing, dated 29 August 2003, at p. 3, **Exhibit-FE 10/36**.

⁷⁷³ Nakuru Draft Framework, presented in July 2003, **Exhibit-FE 10/32**.

⁷⁷⁴ W. Waihenya, *The Mediator* 114 and 117 (2006), **Exhibit-FE 15/8**.

⁷⁷⁵ Nakuru Draft Framework presented in July 2003, Clause 1.01, **Exhibit-FE 10/32**.

⁷⁷⁶ Nakuru Draft Framework presented in July 2003, Clause 1.02, **Exhibit-FE 10/32**.

⁷⁷⁷ Nakuru Draft Framework presented in July 2003, Clause 1.02, **Exhibit-FE 10/32**.

⁷⁷⁸ Nakuru Draft Framework presented in July 2003, Clause 1.4, **Exhibit-FE 10/32**.

⁷⁷⁹ Nakuru Draft Framework presented in July 2003, Clause 7.0, **Exhibit-FE 10/32**.

and lasting peace.”⁷⁸⁰ The SPLM/A reiterated its “unwavering commitment” to the IGAD mediation, and stated that it would be in a position to present detailed observations on the draft framework “if and when” the GoS signified its readiness to discuss the draft.⁷⁸¹

468. The GoS also responded on 11 July 2003, stating its view that the Nakuru Draft Framework contradicted or ignored the major tenets of the Machakos Protocol.⁷⁸² The GoS also declared that the Nakuru Draft Framework only addressed the SPLM/A’s concerns and proceeded to critique the document’s provisions for supposedly departing from the Machakos Protocol.⁷⁸³

469. When talks between the parties reconvened in July 2003, the GoS refused to negotiate on the basis of the Nakuru Draft Framework and proposed that conduct of the negotiations between the GoS and SPLM/A be taken over by South Africa.⁷⁸⁴ Despite this initial position, the GoS ultimately agreed that IGAD (and General Sumbeiywo) would continue to supervise the negotiations, which they did.⁷⁸⁵

470. In August 2003, the negotiations were reconvened in Naivasha and were to continue for almost a year.⁷⁸⁶ These talks focused on the Conflict Areas and, in particular, the Abyei Area.

471. From the beginning of the Naivasha talks, there was extensive regional African involvement through IGAD and General Sumbeiywo as well as involvement by the international community. The IPF, AU and UN, among others, contributed funding and expertise.⁷⁸⁷ The U.S. also maintained a continual presence led by Mr. Jeffrey Millington (U.S. Charge d’Affaires at the U.S. Embassy in Khartoum), Senator Danforth, and U.S. Ambassador to Kenya, Mr. William Bellamy.⁷⁸⁸

472. Progress on various issues was progressively made over this time period, with the parties at various times agreeing to different protocols that would eventually form part of the final CPA. For example, on 25 September 2003, the GoS and SPLM/A agreed to an internationally monitored ceasefire which would come into effect on signature of the CPA.⁷⁸⁹ After another three months of negotiations, on 7 January 2004, the Wealth Sharing

⁷⁸⁰ “SPLM Response to the Nakuru Draft Framework,” dated 11 July 2003, available at www.reliefweb.int, at p. 1, **Exhibit-FE 10/33**.

⁷⁸¹ “SPLM Response to the Nakuru Draft Framework,” dated 11 July 2003, available at www.reliefweb.int, **Exhibit-FE 10/33**.

⁷⁸² The GoS accused Lt. Gen. Sumbeiywo of being amenable to the machinations of Dr. Garang and GoS leadership was reportedly incensed by the Nakuru Framework. W. Waihenya, *The Mediator* 117 (2006), **Exhibit-FE 15/8**.

⁷⁸³ “GOS Response to the Nakuru Draft Framework,” dated 11 July 2003, available at www.reliefweb.int, **Exhibit-FE 10/34**.

⁷⁸⁴ W. Waihenya, *The Mediator* 115 (2006), **Exhibit-FE 15/8**. This move has been attributed to a desire by GoS to derail the talks. See Record of the Meeting between Hon. Stephen Kalonzo Musyoka (Kenya) and Dr. Mustafa Osman Ismael (Sudan), dated 8 July 2003, where Hon Musyoka stated that setting up a presidential or ministerial committee chaired by South Africa would appear to be “forum shopping”, **Exhibit-FE 10/30**; Draft Decision on Peace Process in the Sudan Proposed by the Sudan, dated 8 July 2003, **Exhibit-FE 10/31**; *Beshir warns mediators to “go to hell” if they insist on Sudan peace draft*, AFP, dated 14 July 2003, **Exhibit-FE 10/35**.

⁷⁸⁵ W. Waihenya, *The Mediator* 119 (2006), **Exhibit-FE 15/8**.

⁷⁸⁶ W. Waihenya, *The Mediator* 119 (2006), **Exhibit-FE 15/8**.

⁷⁸⁷ Key Factors Mitigating the Likely Success of the Sudan Peace Negotiations, dated December 2003, at p. 5, **Exhibit-FE 11/3**. The Norwegian Minister for International Development Cooperation, Hilde Johnson, was often present in Naivasha, as were senior U.S. figures (including Secretary of State Colin Powell). W. Waihenya, *The Mediator* 126 (2006), **Exhibit-FE 15/8**.

⁷⁸⁸ W. Waihenya, *The Mediator* 125-128 (2006), **Exhibit-FE 15/8**; see also Witness Statement of Minister Deng Alor Kuol, at p. 2, ¶10.

⁷⁸⁹ W. Waihenya, *The Mediator* 125 (2006), **Exhibit-FE 15/8**.

Agreement (involving issues of land ownership and national resource management,) was signed, marking another major step forward.⁷⁹⁰

B. Negotiations of Abyei Protocol

473. From the outset of the IGAD-mediated negotiations in 2002, the Ngok Dinka and the SPLM/A repeatedly presented their position regarding the Abyei issue. This occurred in communications from both the SPLM/A and other groups within the Abyei region, which were submitted in parallel to the parties' discussions regarding other aspects of a comprehensive peace agreement.⁷⁹¹

474. A number of position papers were prepared specifically on the Abyei issue. All of these papers proceeded from the premise that the Ngok Dinka were a single cultural unit and then emphasized the historical and cultural bonds between the Ngok Dinka and the South. The SPLM/A position was that the Ngok Dinka were entitled to a vote, to determine where their future would lie – and in particular to a right of self-determination.⁷⁹²

475. When substantive talks finally resumed in Naivasha in October 2003, the SPLM/A maintained its previously stated position on the need for self-determination for the Abyei Area. At the meeting on 10 October 2003, the parties agreed that there was a need to define “what Abyei meant to the parties.”⁷⁹³

476. The SPLM maintained that the Abyei Area meant the area as delimited by the 1905, 1972 up to 1983 borders.⁷⁹⁴ It stated that the “*population of this area was exclusively Dinka Ngok*, with a spattering of other nationalities such as the Falata and Misseriya Arabs and others as traders.”⁷⁹⁵ The SPLM/A also submitted that “*up to 1905, Abyei was administratively and politically a part of the South*,”⁷⁹⁶ and that “[t]he Ngok Dinka believed that the national government favored the Misseriya Arabs and gave them state support and therefore power which the Misseriya then used to ... alienate, discriminate and displace the Ngok Dinka from their original lands.”⁷⁹⁷

477. At the 10 October 2003 meeting, the SPLM/A suggested that the Abyei region be transferred to the South without any referendum, while guaranteeing the Misseriya a “right of access to pastures and water in Abyei.”⁷⁹⁸ The GoS opposed this, stating that “[e]xecutive

⁷⁹⁰ W. Waihenya, *The Mediator* 129 (2006), **Exhibit-FE 15/8**.

⁷⁹¹ See below at paras. 1156-1162.

⁷⁹² Bahr el Ghazal Region's Consultative Coordination Committee Position Paper, dated 12 November 2002, at p. 3 (“The Ngok Dinka Area has been part and parcel of Mounjang’ (Dinka) nationality from time immemorial”), **Exhibit-FE 10/2**; Rumbek Community Position Paper, dated 12 December 2002, **Exhibit-FE 10/4**; Abyei Peace Committee Paper, *The Popular Demand of Ngok-Dinka on Abyei Question*, dated 10 October 2002, at p. 4 (“It is absolutely necessary to have a referendum for Ngok-Dinka people of Abyei area to determine whether they should be part of southern Sudan or not”), **Exhibit-FE 9/18**; Gok-Dinka Paper, dated 30 December 2002, **Exhibit-FE 10/5**; see also Witness Statement of Minister Deng Alor Kuol, at pp. 3-4, ¶¶14-15, 19, 21-22; Witness Statement of Lt. Gen. Sumbeiywo, at pp. 3-4, ¶¶15-18.

⁷⁹³ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 1 **Exhibit-FE 10/38**. Draft Agreement, dated 21 October 2003, at p. 1, **Exhibit-FE 10/40**.

⁷⁹⁴ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 1, **Exhibit-FE 10/38**. Note these minutes contain an error and inaccurately record the dates specified by the SPLM/A as 1952 to 1983. It is clear from the Draft Agreement dated 21 October 2003 that the SPLM/A's position relied on the 1905, 1972 to 1983 borders. **Exhibit-FE 10/38**.

⁷⁹⁵ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 1, **Exhibit-FE 10/38** (emphasis added).

⁷⁹⁶ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 2, **Exhibit-FE 10/38**.

⁷⁹⁷ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 2, **Exhibit-FE 10/38**.

⁷⁹⁸ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 3, **Exhibit-FE 10/38**.

restoration of Abyei to be a part of the south was for the moment unfeasible due to the fact that *Abyei is now larger than it used to be.*⁷⁹⁹

478. By the end of the initial 10 October 2003 meeting, the parties agreed that “Abyei had geographical (to be shown by maps still to be provided) and demographic delimitation and this delimitation could be subject to wider confirmation and consultation by the people in the area.”⁸⁰⁰ Although the parties were able to agree upon certain general principles concerning the Abyei Area, key issues which remained in the “[d]isagreed” category included the definition of the area, and whether it would remain in Western Kordofan or be annexed to Bahr el Ghazal.⁸⁰¹

479. When negotiations between the GoS and SPLM/A resumed in Naivasha on 17 February 2004, the Conflict Areas – an issue which had twice threatened the entire peace talks – were again at the top of the agenda. The most controversial of these negotiations was the issue of Abyei’s boundaries and, specifically, whether the boundaries should remain as they presently were and whether or not a referendum would be held.

480. On 19 March 2004, Senator Danforth met with the parties to present a U.S. proposal entitled “Principles of Agreement on Abyei.”⁸⁰² The Danforth proposal, which is in the same terms as later appeared in Article 1 of the Abyei Protocol, provided for a referendum to be held in the Abyei Area to determine whether the residents of the Area wished to join the South or remain a special administrative unit within the North. Consistent with the previous SPLM/A draft agreements, the Danforth proposal defined the Abyei Area as the “*area of the nine Ngoc (sic) Dinka Chiefdoms transferred to Kordofan in 1905.*”⁸⁰³

481. Mr. Millington, the Chargé d’Affairs at the U.S. Embassy in Khartoum, and the U.S. Department of State representative to IGAD, participated directly in drafting this proposal.⁸⁰⁴ Mr. Millington describes in his Witness Statement the reasons for choosing the 1905 transfer date: “that seemed like the logical place to start and because (as members of the GoS delegation later confirmed) the Government was prepared to accept this date.”⁸⁰⁵

482. Mr. Millington also explains what the U.S. delegation had understood the definition included in the Danforth proposal to mean:

“[i]t was my understanding, and it was certainly our intention when drafting ... to include a definition of the area that would encompass all of the territory of the nine Ngok Dinka Chiefdoms in their entirety.”⁸⁰⁶

483. The same day, the SPLM/A responded to the U.S. proposal on Abyei, stating that the document was an acceptable basis for breaking the impasse in negotiations.⁸⁰⁷ The SPLM/A witnesses testify in their evidence that the Danforth proposal was understood to include all of the territory of the nine Ngok Dinka Chiefdoms as of 1905. As Minister Deng Alor stated in his witness statement,

⁷⁹⁹ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 3, **Exhibit-FE 10/38** (emphasis added).

⁸⁰⁰ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 3, **Exhibit-FE 10/38**.

⁸⁰¹ Points of Agreement and Disagreement, dated 20 October 2003, at p. 2, **Exhibit-FE 10/39**.

⁸⁰² *Principles of Agreement on Abyei* (undated), presented on 19 March 2004, **Exhibit-FE 12/4**.

⁸⁰³ *Principles of Agreement on Abyei* (undated), presented on 19 March 2004, **Exhibit-FE 12/4**.

⁸⁰⁴ Witness Statement of Jeffrey Millington, at pp. 1-2, ¶¶1, 3 and 7.

⁸⁰⁵ Witness Statement of Jeffrey Millington, at pp. 2-3, ¶8.

⁸⁰⁶ Witness Statement of Jeffrey Millington, at p. 3, ¶9.

⁸⁰⁷ SPLM Response to U.S. Government Proposal on Abyei, dated 19 March 2004, **Exhibit-FE 12/5**.

“[w]e understood [the definition of Abyei in Article 1(b) in the ‘Principles of Agreement’] to define Abyei as encompassing all of the land and people over which the Paramount Chief Arop Biong and then Kuol Arop exercised their tribal authority and jurisdiction, no matter where his people and his lands were located. We believed that what was defined here as Abyei was the entirety of lands and resources and people that were tribally administered.”⁸⁰⁸

484. General Sumbeiywo, mediator of the CPA and Abyei Protocol, shared a similar understanding. As he described in his witness statement, “To the Ngok Dinka, the reference to the “nine Ngoc (sic) Dinka chiefdoms” (i.e. all of the people of the nine named Ngok Dinka tribes under the single Paramount Chiefdom), emphasised the Ngok Dinka’s unique tribal identity and unity.”⁸⁰⁹ He continues:

“There was never any suggestion by either party that the language of Article 1(b) would divide the territory of the Ngok Dinka chiefdoms as it existed historically in 1905 into different parts. The intention was exactly the opposite: to fix 1905 as the date at which the Ngok territory would be geographically defined. Neither the SPLM/A nor the GoS could have imagined a situation where, for example, only some of the nine Ngok Dinka chiefdoms or a part of their territory in 1905 would be included in the to be defined Abyei Area. The whole point of the definition was to identify what the Ngok territory was at a fixed point in time being 1905. 1905 was selected because that was when the historical record indicated and the parties understood that the nine Ngok chiefdoms and the entirety of the Ngok people had been transferred to Kordofan.”⁸¹⁰

485. The GoS also accepted the U.S. proposal as a basis for proceeding with negotiations to break the impasse. The parties’ agreement on this issue was recorded in a Program of Work on outstanding issues related to power sharing, which stated that the Principles Agreement on Abyei, dated 19 March 2004, “shall form the basis for the resolution of the Three Conflict Areas and form an integral part of the package on Power Sharing and the Three Conflict Areas.”⁸¹¹ On this basis, the two parties proceeded to negotiate the terms of the final Abyei Protocol.

486. The parties subsequently exchanged joint drafts of what would become the Abyei Protocol dated 20 May 2004 and 21 May 2004, which defined Abyei as the “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”⁸¹² As noted below, this formulation was included in the final version of the Abyei Protocol.

C. *The Abyei Protocol-- May 2004*

487. It took three more months, but, on 26 May 2004, the issue of the three Conflict Areas was resolved and the Abyei Protocol was signed by both parties.⁸¹³ With regard to the Abyei

⁸⁰⁸ Witness Statement of Minister Deng Alor Kuol, at p. 10, ¶57.

⁸⁰⁹ Witness Statement of Lt. Gen. Sumbeiywo, at p. 11, ¶52.

⁸¹⁰ Witness Statement of Lt. Gen. Sumbeiywo, at p. 11, ¶53.

⁸¹¹ Agreed Program of Work Between GoS and SPLM on Outstanding Issues in Power Sharing that Remain to Be Resolved, dated 29 March 2004, at p. 3, **Exhibit-FE 12/6**.

⁸¹² Draft Protocol between the GoS and the SPLM/A on the Resolution of the Abyei Conflict, dated 20 May 2004, **Exhibit-FE 12/11**; Joint Draft Protocol Between the GoS and the SPLM/A on the Resolution of the Abyei Conflict, dated 20 May 2004, **Exhibit-FE 12/12**; Joint Draft Protocol Between the GoS and the SPLM/A on the Resolution of the Abyei Conflict, dated 21 May 2004, at 1.1, **Exhibit-FE 12/14**.

⁸¹³ W. Waihenya, *The Mediator* 130 (2006), **Exhibit-FE 15/8**; Protocol on the Resolution of the Conflict in the Abyei Area, dated 24 May 2004, **Exhibit-FE 12/15**.

Area, the GoS and SPLM/A ultimately agreed to an “Abyei Protocol,” which was to be incorporated into the CPA as Chapter IV. Although relatively brief (seven pages and nine articles), the Protocol is of fundamental importance to the issues in this arbitration.⁸¹⁴ Its terms are discussed in detail below.⁸¹⁵

488. First, Article 1.1 of the Abyei Protocol set out three general principles: (1) “*Abyei is a bridge between the north and south*, linking the people of Sudan”; (2) the territory of Abyei “is defined as *the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905*”; and (3) the “Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.”⁸¹⁶

489. Second, the Abyei Protocol provided for resolution of disputes regarding the definition of the Abyei Area (as set forth above and in Article 1.1.2 of the Protocol). Article 5 of the Protocol was titled “Determination of Geographic Boundaries,” and it provided for the constitution of an “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.”⁸¹⁷

490. Third, the Abyei Protocol set out the terms of a special administrative status for the Abyei Area. This status granted residents of the Abyei Area dual citizenship in both Western Kordofan and Bahr el Ghazal⁸¹⁸ and provided for administration of the Area by an elected Executive Council,⁸¹⁹ special oil revenue sharing for Abyei derived oil,⁸²⁰ assistance to the Abyei Area from the National Government,⁸²¹ and international monitoring.⁸²² The Protocol also provided that, during the Southern referendum, Abyei residents would be provided with a separate ballot, with which to choose “[t]hat Abyei retain its special administrative status in the north” or “[t]hat Abyei be part of Bahr el Ghazal.”⁸²³ The Protocol also provides that the 1 January 1956 “line” between the north and south was to be “inviolable,” except as provided for in the Protocol.⁸²⁴

D. CPA Implementation Modality Abyei Annex - December 2004

491. The parties also agreed to further steps to implement the Abyei Protocol’s provisions regarding establishment of the Abyei Boundaries Commission (“ABC”). The terms of this agreement were contained in the “Abyei Appendix: Understanding on Abyei Boundaries Commission” in the CPA (referred to as the Abyei Annex or Abyei Appendix). As discussed

⁸¹⁴ In respect of Southern Kordofan and the Blue Nile States, the parties agreed on the guaranteeing of political and human rights and the protection of the diverse cultural heritage, although no mechanism for referendum, like that agreed on for Abyei, was incorporated in these agreements. W. Waihenya, *The Mediator* 130 (2006), **Exhibit-FE 15/8**.

⁸¹⁵ See below at paras. 562-571.

⁸¹⁶ Abyei Protocol, Art. 1.1, **Appendix C**.

⁸¹⁷ Abyei Protocol, Art. 5, **Appendix C**.

⁸¹⁸ Abyei Protocol, Art. 1.2.1, **Appendix C**.

⁸¹⁹ Abyei Protocol, Art. 1.2.2, **Appendix C**.

⁸²⁰ Under this agreement, during the Interim Period, 50% of the revenue was to go to the National Government, 42% to the Government of Southern Sudan, and 2% each to the Bahr el Ghazal and Western Kordofan regions, with the remaining 4% to be split equally between the Ngok Dinka and the Misseriya. Abyei Protocol, Art. 3.1, **Appendix C**.

⁸²¹ Abyei Protocol, Art. 1.2.4, **Appendix C**.

⁸²² Abyei Protocol, Art. 1.2.5, **Appendix C**.

⁸²³ Abyei Protocol, Art. 1.3, **Appendix C**. In addition to these provisions, the final provisions of the Abyei Protocol provided for the establishment of a Security Committee (Article 7), and an Abyei Referendum Commission (Article 8).

⁸²⁴ Abyei Protocol, Art. 1.4, **Appendix C**.

in detail below, the Abyei Annex set out in greater specificity the parties' agreement on matters relating to the constitution and activities of the Abyei Boundaries Commission.⁸²⁵

E. Comprehensive Peace Agreement - January 2005

492. With the conclusion of negotiations regarding the Abyei Protocol and Abyei Annex, the remainder of the CPA could be concluded. The final agreement on "Modalities of Implementation, International and Regional Guarantees" and the Comprehensive Ceasefire were concluded on 31 December 2004. The objective was to specify the timing of the various tasks required for implementation, identify the responsible authorities, identify the locations of the institutions, and clarify the costs and sources of funding.⁸²⁶

493. On 31 December 2004, Dr. John Garang and Vice President Taha executed the final version of the CPA in Nairobi. President Al Bashir, along with South African President Thabo Mbeki, witnessed the signing. Representatives of both parties worked into the early hours of the new year to sign each page.⁸²⁷

494. A further signing ceremony took place on 9 January 2005, where the Comprehensive Peace Agreement's signing was witnessed by representatives from Egypt, Italy, the Netherlands, Norway, the United Kingdom, the USA, as well as from a number of agencies, including IGAD, the United Nations, the league of Arab States, the European Union and the African Union.⁸²⁸

⁸²⁵ The terms of the Abyei Annex are discussed in detail below. *See below* at paras. 572-577.

⁸²⁶ Brief on the Developments and Achievements of the Sudan Peace Process, dated 4 January 2005, at p. 5, **Exhibit-FE 12/20**.

⁸²⁷ W. Waihenya, *The Mediator* 138-139 (2006), **Exhibit-FE 15/8**.

⁸²⁸ Comprehensive Peace Agreement, at pp. xiv-xvi, **Exhibit-FE 13/1**.

VI. THE WORK OF THE ABYEI BOUNDARIES COMMISSION

495. As discussed above, resolution of the status of the Abyei Area was central to the negotiation and conclusion of the Comprehensive Peace Agreement.⁸²⁹ The parties' agreements on resolving their disputes over the Abyei Area were negotiated over a 10 month period in 2004 and 2005, during which the SPLM/A and GoS worked together to establish a consensual basis for resolving their disagreements. As finally negotiated, the parties agreed to a remarkable, specifically-tailored dispute resolution mechanism, which they then cooperatively implemented in a spirit of genuine "partnership."

A. *The ABC's Activities*

1. Composition of ABC

496. The Abyei Annex defined in detail the composition of the ABC. The Abyei Annex provided that the ABC was to consist of 15 members, selected in collaboration between the GoS and the SPLM/A,⁸³⁰ with a particular emphasis on individuals from the Abyei Area and surrounding regions and on individuals with demonstrated expertise in African and Sudanese history, ethnography and culture.

497. Under the Abyei Annex, the ABC was to include a representative of each party, selected by that party.⁸³¹ The Abyei Annex also provided that the ABC would include four members from the then "present" two administrations of the Abyei Area (the GoS and SPLM/A each to appoint two of these members).⁸³² Finally, the GoS was to appoint two members from the Misseriya⁸³³ and the SPLM/A was to appoint two people from neighboring Dinka tribes located south of Abyei Area.⁸³⁴

498. The Abyei Annex also provided for the U.S., U.K. and the IGAD to appoint five experts (the "ABC Experts"), who would be knowledgeable in African and Sudanese history, geography and other relevant topics.⁸³⁵ Under the Terms of Reference the parties agreed on a mechanism for the IGAD to resolve disputes as to the composition of the ABC.⁸³⁶

499. Pursuant to the provisions of the Abyei Annex, the 15 members of the Commission were selected by the parties and by the IGAD,⁸³⁷ the U.S.⁸³⁸ and the U.K.⁸³⁹ The composition

⁸²⁹ See above at paras. 450, 473-486, 487-490, 492 and below at paras. 559, 566, 742, 761.

⁸³⁰ See Witness Statement of James Lual Deng, at pp. 3, 5, ¶¶16, 23.

⁸³¹ Abyei Annex, Art. 2.1, **Appendix D**; see also Witness Statement of Minister Deng Alor Kuol, at p. 13, ¶75.

⁸³² Abyei Annex, Art. 2.3, **Appendix D**; see also Witness Statement of Minister Deng Alor Kuol, at p. 13, ¶75; Witness Statement of Lt. Gen. Sumbeiywo, at p. 14, ¶71.

⁸³³ Abyei Annex, Art. 2.4, **Appendix D**; see also Witness Statement of Minister Deng Alor Kuol, at p. 13, ¶¶75, 78; Witness Statement of Lt. Gen. Sumbeiywo, at p. 14, ¶71.

⁸³⁴ Abyei Annex, Art. 2.5, **Appendix D**; see also Witness Statement of Minister Deng Alor Kuol, at p. 13, ¶78; Witness Statement of Lt. Gen. Sumbeiywo, at p. 14, ¶71. Witness Statement of James Lual Deng, at p. 4, ¶21.

⁸³⁵ Abyei Annex, Art. 2.2, **Appendix D**. See also Witness Statement of Minister Deng Alor Kuol, at p. 13, ¶76; Witness Statement of Lt. Gen. Sumbeiywo, at p. 14, ¶71.

⁸³⁶ ABC ToR, Art. 2.1, **Appendix E**.

⁸³⁷ See Letter from Lt. Gen. Sumbeiywo to Dr. Bashir, Executive Secretary of the IGAD Secretariat, dated 19 January 2005, requesting the IGAD Secretariat, in consultation with the GoS and SPLM/A to appoint three experts, **Exhibit-FE 13/4**; Letter from Lt. Gen. Sumbeiywo to Dr. Bashir, Executive Secretary of IGAD Secretariat, dated 8 February 2005, **Exhibit-FE 13/8**; Facsimile from Dr. Bashir to Lt. Gen. Sumbeiywo, dated 9 February 2005, **Exhibit-FE 13/10**; see also Witness Statement of Minister Deng Alor Kuol, at p. 13, ¶76.

⁸³⁸ See Letter from Lt. Gen. Sumbeiywo to U.S. Ambassador Bellamy, dated 19 January 2005, requesting the Government of the United States to appoint an expert, **Exhibit-FE 13/6**. See also Witness Statement of Minister Deng Alor Kuol, at p. 13, ¶¶75-77.

⁸³⁹ See Letter from Lt. Gen. Sumbeiywo to UK High Commissioner Clay, dated 19 January 2005, requesting the

of the ABC proceeded without controversy or objection, with the parties collaborating closely together, with both one another and with IGAD, the U.S. and the U.K.⁸⁴⁰

500. As discussed below, the five ABC Experts were leading authorities in a range of complementary disciplines relating to Sudan and Africa.

2. The Procedures of the ABC

501. After their appointment, the ABC Experts developed the Rules of Procedure. As discussed below, these procedures were specifically tailored to the parties' particular needs and to the Abyei dispute; there were no objections by either party to any of the provisions in these instruments. Like the parties' original agreements regarding the ABC, their subsequent work to adopt mutually satisfactory procedures was a striking example of constructive joint collaboration, referred to at the time by the parties as a "partnership."⁸⁴¹

502. As noted above, Article 5.1 of the Abyei Protocol provides that "[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."⁸⁴² In turn, the Abyei Annex states that "[u]pon signature, and notwithstanding Article 5.1 of the Protocol on Abyei, there shall be established by the Parties 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."⁸⁴³ The mandate was repeated in the ABC Terms of Reference and Rules of Procedure.⁸⁴⁴

503. The parties' agreements underscored the importance of a rapid decision by the Commission and of immediate implementation of that decision. In the words of Minister Deng Alor, the parties first aimed at obtaining a decision in two years time but the "timeline was shortened in order for the ABC Report to be available before the end of the Pre-Interim Period."⁸⁴⁵ In accordance with Article 5.2 of the Abyei Protocol, the ABC was to finish its work within the first two years of the Interim Period.⁸⁴⁶ (This time period was subsequently reduced, by the parties' joint decision, to approximately four months.⁸⁴⁷)

504. The ABC Experts developed specific procedures to implement its mandate. These procedures were set forth in the "Terms of Reference" negotiated by the two parties and

UK Government to appoint an expert, **Exhibit-FE 13/5**; *see also* Letter from Ambassador Patey to Lt. Gen. Sumbeiywo, dated 3 February 2005, where the UK Government appoints Mr. Johnson as expert, **Exhibit-FE 13/7**. *See also* Witness Statement of Minister Deng Alor Kuol, at p. 13, ¶¶75-77.

⁸⁴⁰ *See for example*, Letter from the GoS State Minister and Advisory of Peace Affairs to Lt. Gen. Sumbeiywo, dated 13 January 2005, requesting that the IGAD liaise with the two parties in the appointment of the experts, **Exhibit-FE 13/3**. *See also* Witness Statement of Lt. Gen. Sumbeiywo, at p. 15-16, ¶¶77-89 Witness Statement of Minister Deng Alor Kuol, at p. 13, ¶77; Witness Statement of James Lual Deng, at p. 4, ¶18.

⁸⁴¹ ABC ToR, Preamble, **Appendix E**.

⁸⁴² Abyei Protocol, Art. 5.1, **Appendix C**.

⁸⁴³ Abyei Annex, Art. 1, **Appendix D**. The Commission's mandate is repeated in the Terms of Reference and Rules of Procedure. ABC ToR, Art. 1 ("1.1 The Abyei area is defined in the Abyei Protocol in article 1.1.2 as 'The area of the Nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905'. The ABC shall confirm this definition. 1.2. The ABC shall demarcate the area, specified above on map and on land."), **Appendix C**; ABC RoP, Art. 1 ("The work of the Commission will be guided by the principles of agreement on Abyei, the Abyei Annex, 'Understanding on Abyei Boundaries Commission' (ABC) and Terms of Reference, which includes the following mandate: 1.1 The Abyei area is defined in the Abyei Protocol in Article 1.1.2 as 'The area of the Nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.' The ABC shall confirm this definition. 1.2. The ABC shall demarcate the area specified above on map and on land."), **Appendix C**.

⁸⁴⁴ *See* ABC ToR, Art. 1.1 **Appendix E**; ABC RoP, Art. 1.1, **Appendix F**.

⁸⁴⁵ Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶95.

⁸⁴⁶ Abyei Protocol, Art. 5.2, **Appendix C**.

⁸⁴⁷ *See* Witness Statement of Minister Deng Alor Kuol, at pp. 15-16, ¶92; *see below* at paras. 644-645.

adopted on 12 March 2005 in Karen, near Nairobi⁸⁴⁸ and in the “Rules of Procedure,” prepared by the ABC Experts on 11 April 2005 and agreed to by the parties’ representatives on the Commission on the same date.⁸⁴⁹

505. Pursuant to the Abyei Annex, the GoS and SPLM/A met in Karen, near Nairobi from 10 to 12 March 2005 to draw up the Terms of Reference.⁸⁵⁰ Underscoring the uniquely collaborative character of their work, the Terms of Reference recorded that the parties were “guided by the spirit of the Comprehensive Peace Agreement and *the forthcoming partnership*.”⁸⁵¹

506. On 10 and 11 April 2005, the ABC met in Nairobi. It had been agreed that the ABC Experts would prepare Rules of Procedure for its work and present the rules to the parties for comments at this meeting.⁸⁵² The parties agreed that Ambassador Petterson would chair the Commission⁸⁵³ and that the meetings would be conducted in an “informal, yet businesslike [manner] with *a full and easy exchange of ideas, observations and suggestions*.”⁸⁵⁴ On 11 April 2005, the ABC presented the Rules of Procedure to the parties and they were adopted by the parties’ representatives on the same day.⁸⁵⁵

507. Consistent with this, the parties agreed at the same meeting that their representatives would make presentations to the ABC on 12 April, followed by questions and discussion. This agreement was consistent with Article 3 of the Abyei Annex, which provides that, during their visits to Sudan, the ABC was to “listen to presentations of the two Parties.”⁸⁵⁶ More specifically, Article 3.1 of the Terms of Reference provides that the “two parties shall submit their presentations to the ABC at its seat in Nairobi.”⁸⁵⁷

508. The parties also agreed in the Terms of Reference and Rules of Procedure to an unusual, but carefully considered, set of visits by the ABC to the Abyei Area and surrounding regions. Thus, Article 3.2 of the Terms of Reference provides that “[t]he ABC shall thereafter *travel to Sudan to listen to representatives of the people of Abyei Area and the neighbors...*,” and conduct a series of at least three public meetings in the region.⁸⁵⁸ In addition, the final Article of the Terms of Reference lays out the “Program of work” and schedule for the ABC.⁸⁵⁹

⁸⁴⁸ ABC ToR, Preamble, **Appendix E**; see also Witness Statement of James Lual Deng, at p. 5, ¶24.

⁸⁴⁹ ABC RoP, Art. 3, **Appendix F**.

⁸⁵⁰ Witness Statement of James Lual Deng, at pp. 5-7, ¶¶24-37; Witness Statement of Lt. Gen. Sumbeiywo, at p. 17, ¶¶92-93.

⁸⁵¹ ABC ToR, Preamble, **Appendix F** (emphasis added).

⁸⁵² See Abyei Annex, at Art. 4, **Appendix D**; see also Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶96; Witness Statement of James Lual Deng, at pp. 7-8, ¶¶38-42; Witness Statement of Lt. Gen. Sumbeiywo, at pp. 17-18, ¶¶96-97, 100-103.

⁸⁵³ ABC RoP, Art. 2, **Appendix F**.

⁸⁵⁴ ABC RoP, Art. 2, **Appendix F** (emphasis added); see also Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶96; Witness Statement of James Lual Deng, at pp. 5-6, 8, ¶¶27, 41.

⁸⁵⁵ See Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶96; Witness Statement of James Lual Deng, at p. 8, ¶¶42-43.

⁸⁵⁶ Abyei Annex, Art. 3, **Appendix D**.

⁸⁵⁷ ABC ToR, Art. 3.1, **Appendix E**. See also Witness Statement of Minister Deng Alor Kuol, at p. 14, ¶84; Witness Statement of James Lual Deng, at pp. 5-6, ¶27.

⁸⁵⁸ See ABC ToR, Art. 3.2, **Appendix E** (emphasis added). The Rules of Procedure provide that the parties and the IGAD will make recordings of “all oral testimonies heard.” ABC RoP, Art. 9, **Appendix F**. These transcripts were to be translated into English and provided to the ABC after approval by the parties. ABC RoP, Art. 9, **Appendix F**.

⁸⁵⁹ See ABC ToR, at p. 2 (“Program of work”), **Appendix E**. The parties also agreed that the expenses of the experts, including the technical and support staff, as well as equipment, will be borne by the international community. It was also agreed that the Government of National Unity was to bear the expenses of the two

509. Article 6 of the Rules of Procedure provides that the ABC's meetings in Abyei and its surroundings will be completed within a maximum of five days in each area, as stipulated in the Terms of Reference and a detailed schedule attached thereto.⁸⁶⁰ The Rules of Procedure 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."⁸⁶¹ The Rules of Procedure also provide that the ABC's Chairman would explain the purpose of the Commission at each meeting with the public.⁸⁶²

510. Finally, the Terms of Reference provided that "[t]he 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 that shall be presented to the Presidency in Khartoum."⁸⁶³ The Program of work, contained in the Terms of Reference, provided that "[t]he experts examine and evaluate the evidence received and prepare the final report."⁸⁶⁴ Article 13 of the Rules of Procedure then specified that, following the parties' presentations, "the experts will examine and evaluate all the material they have gathered and will prepare the final report."⁸⁶⁵ Article 14 of the Rules of Procedure added that the ABC would endeavor to reach its decision by consensus, but goes on to reiterate that "[i]f, however, an agreed position by the two sides is not achieved, the experts will have the final say."⁸⁶⁶

3. The Work of the ABC

511. Between March and July 2005, the ABC and the parties implemented the procedures set forth in the Rules of Procedure and Terms of Reference. Pursuant to the parties' agreement, the ABC's work continued to be conducted collaboratively, in the spirit of "*partnership*"⁸⁶⁷ and without any objection by either the GoS or SPLM/A during the entire course of the Commission's activities.⁸⁶⁸

512. From 14 to 20 April 2005, the ABC held 14 public meetings in the Abyei Area, and heard the formal testimony of 104 persons, of which 47 were Dinka and 57 Misseriya.⁸⁶⁹ The testimony was gathered in public and open meetings, where the witnesses made their

parties' members through the Joint National Transitional Fund. A list of the expenses of the two parties' was attached to the Terms of Reference. ABC ToR, at p. 3 ("Funding"), **Appendix E**.

⁸⁶⁰ ABC RoP, Art. 6, **Appendix F**.

⁸⁶¹ ABC RoP, Art. 7, **Appendix F**. See also Witness Statement of Minister Deng Alor Kuol, at p. 15, ¶89.

⁸⁶² ABC RoP, Art. 8, **Appendix F**.

⁸⁶³ ABC ToR, Art. 3.5, **Appendix E**. The Rules of Procedure contain comparable provisions, according to which the ABC members will return via Khartoum to Nairobi or their respective locations upon completion of the visits in the field, the experts will determine what additional documentation and/or archival materials will need to be consulted, after which the Commission will reconvene in Nairobi and the parties will make their final presentations. ABC RoP, Arts. 11-12, **Appendix F**.

⁸⁶⁴ ABC ToR, at p. 2, "Program of work", **Appendix E**.

⁸⁶⁵ ABC RoP, Arts. 12-13, **Appendix F**. The provision that the Experts would prepare the ABC Report was a development from Article 3.5 of the Terms of Reference. See Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶100; Witness Statement of James Lual Deng, at p. 9, ¶47.

⁸⁶⁶ ABC RoP, Art. 14, **Appendix F**.

⁸⁶⁷ ABC ToR, Preamble, **Appendix E**.

⁸⁶⁸ See Witness Statement of Minister Deng Alor Kuol, at pp. 13, 17-18, 21-22, ¶¶77, 103, 114, 132, 135-136; Witness Statement of James Lual Deng, at p. pp. 7, 12-13, 14, 15, ¶¶37, 60, 67-71, 78-79, 82. The only objection the GoS raised in the course of the ABC's work was related to the way the people who talked at the Agok meeting had been chosen. See Witness Statement of Minister Deng Alor Kuol, at p. 21, ¶131.

⁸⁶⁹ ABC Report, Part I, at p. 9, **Appendix B**. For transcripts of all meetings, see ABC Report, Part II, App. 4, at pp. 30-162, **Exhibit-FE 15/1**. See also Witness Statement of Minister Deng Alor Kuol, at p. 19, ¶117; Witness Statement of James Lual Deng, at p. 11, ¶63.

statements under oath, where they could hear the testimony of other witnesses and where they could be heard by a large audience of local residents and others.⁸⁷⁰

513. On 14 and 15 June, the ABC reconvened in Nairobi, Kenya.⁸⁷¹ The ABC Experts heard the parties' final presentations on 16 and 17 June 2005.⁸⁷² Both parties gave comprehensive presentations, accompanied by PowerPoint slides. At the request of the GoS, its representatives were permitted by the ABC to make a third presentation, not provided for in the Rules of Procedure or Terms of Reference, to present additional arguments and evidence to the ABC.⁸⁷³ There were no objections by either party during the course of these presentations or to the ABC Experts' conduct of the proceedings.⁸⁷⁴

514. The GoS presentation relied on evidence from a variety of sources, including information from the ABC's field visits in April 2005, maps from the relevant time periods, and historical documents.⁸⁷⁵ The SPLM/A presentation relied on similar (or the same) sources.⁸⁷⁶ As was evident from their presentations and the subsequent discussions, the GoS and SPLM/A, as well as their appointees on the Commission, were unable to reconcile their differences on the Abyei issue; as a consequence, the preparation of the ABC Report was undertaken by the five ABC Experts.⁸⁷⁷ Neither party raised any objection to the ABC Experts' mode of proceeding.⁸⁷⁸

515. During the proceedings before the ABC, neither party suggested that it would not comply with the ABC's decision. On the contrary, the head of the GoS delegation, Ambassador Dirdeiry, expressly acknowledged that the boundary defining the Abyei Area was the one "before th[e] transfer [in 1905] took place,"⁸⁷⁹ and, depending on the evidence, might *either* include "the current Abyei [lying north of the Bahr el Arab]" *or* "the one south of Bahr el Arab."⁸⁸⁰ He went on to state, on behalf of the GoS, that:

*"After defining the [Abyei Area], if it includes the current Abyei, then the referendum will be conducted there. And if it is not this one, it is the one south of Bahr el-Arab as we have presented in our document as a Government. Then the referendum and whatever other provisions in the agreement will be conducted south of the river Kiir."*⁸⁸¹

⁸⁷⁰ ABC Report, Part I, at p. 9, **Appendix B**. See also Witness Statement of James Lual Deng, at p. 11, ¶63.

⁸⁷¹ Witness Statement of Lt. Gen. Sumbeiywo, at p. 20, ¶114; see also Witness Statement of Minister Deng Alor Kuol, at pp. 22-23, ¶¶138-139, 142-143.

⁸⁷² ABC Report, Part II, App. 3, at p. 27, **Exhibit-FE 15/1**. See also GoS Final Presentation, dated 16 June 2005, **Exhibit-FE 14/18**; SPLM/A Final Presentation, dated 16 May 2005, **Exhibit-FE 14/13**; GoS Additional Presentation, dated 17 June 2005 **Exhibit-FE 14/17**; see also Witness Statement of Minister Deng Alor Kuol, at pp. 23-25, ¶¶144-155; Witness Statement of James Lual Deng, at pp. 15-17, ¶¶86-93; Witness Statement of Lt. Gen. Sumbeiywo, at p. 20, ¶115.

⁸⁷³ Witness Statement of Minister Deng Alor Kuol, at p. 24, ¶¶148-149; Witness Statement of James Lual Deng, at p. 16-17, ¶93.

⁸⁷⁴ See, e.g., Witness Statement of James Lual Deng, at p. 7-8, 11-14, 17, ¶¶37, 40, 60, 67-71, 78-79, 97.

⁸⁷⁵ ABC Report, Part II, App. 3, at p. 27, **Exhibit-FE 15/1**; GoS Final Presentation, dated 16 June 2005, **Exhibit-FE 14/18**. See also Witness Statement of Minister Deng Alor Kuol, at p. 24, ¶149; Witness Statement of James Lual Deng, at pp. 15-16, ¶¶88-91.

⁸⁷⁶ SPLM/A Final Presentation, dated 16 May 2005, **Exhibit-FE 14/13**; see also Witness Statement of Minister Deng Alor Kuol, at p. 24, ¶147; Witness Statement of James Lual Deng, at p. 16, ¶92.

⁸⁷⁷ ABC Report, Part I, at p. 9, **Appendix B**; see also Witness Statement of Minister Deng Alor Kuol, at p. 24, ¶151.

⁸⁷⁸ Witness Statement of James Lual Deng, at p. 15, ¶86.

⁸⁷⁹ ABC Report, Part II, App. 4, at p. 77, **Exhibit-FE 15/1**.

⁸⁸⁰ ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1**.

⁸⁸¹ ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1** (emphasis added). At the same meeting, Ambassador Dirdeiry stated as follows: "What we are here for is to draw boundaries that were drawn in 1905; that is saying, 100 years ago. As the Ambassador, the Chairman of this Committee, told you, before that year the Ngok were

516. In making these remarks, Ambassador Dirdeiry acknowledged that the ABC might not accept the GoS's position and might instead conclude that the Abyei Area was not limited to territory "south of the Bahr el Arab" (in Ambassador Dirdeiry's words). At the time, Ambassador Dirdeiry did not suggest that, if the Commission rejected the GoS position, the GoS would consider the ABC Report invalid. Instead, he said that the Abyei Referendum would then be held north of the Bahr el Arab River in accordance with the Abyei Protocol. Ambassador Dirdeiry's statement was a forthright recognition of the ABC's authority to interpret the parties' definition of the "Abyei Area" and of the possibility that the Commission might ultimately reject the GoS's arguments.

517. At the same time, the GoS also expressly affirmed its intention to "*fully adhere*"⁸⁸² to the decision of the ABC. Indeed, the GoS concluded its presentation by again emphasizing the "*final and binding nature of the ABC decision.*"⁸⁸³

4. The Experts' Determinations and the ABC Report

518. On the basis of the evidence and presentations that they had heard, and as contemplated by the parties' agreements,⁸⁸⁴ the five ABC Experts proceeded to draft their Report. As noted above, the Report was signed by all five experts and was unanimous, with no separate, dissenting or concurring opinions. Each of the five ABC Experts also initialed each page of Part I of the ABC Report.⁸⁸⁵

519. The ABC Report contains two principal parts. Part I is 45 pages long and consists of a summary of the experts' report and their "Final and Binding" decision, together with a detailed discussion of the ABC Experts' reasoning.⁸⁸⁶ Part II of the Report consists of five appendices, totaling 207 pages, together with four maps.

520. The main body of the ABC Report began with a "Preface" that restated the ABC's mandate, by reference to Article 5.1 of the Abyei Protocol ("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*'"⁸⁸⁷). The Report then summarized the "Experts' Report and Decision" (on pages 9 to 12) and set forth analyses of nine "Propositions" which had been advanced in the parties' presentations and/or the evidence (pages 12 to 20), as well as a series of related "Conclusions" by the Commission (pages 20 and 21). The main body of the Report then set forth the ABC's "Final and Binding Decision" (pages 21 and 22).

in Bahr el Ghazal. In 1905, they were transferred to Kordofan. *There were boundaries in 1905, before that transfer took place. We want now to know those boundaries.*" ABC Report, App. 4, at p. 77, **Exhibit-FE 15/1** (emphasis added). The GoS also argued "*that we have presented to this commission 47 documents that prove the presence of Ngok Dinka before 1905 beyond the river Bahr el-Ghazal.*" ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1** (emphasis added).

⁸⁸² ABC Report, Part II, App. 4, at p. 96, **Exhibit-FE 15/1**.

⁸⁸³ GoS Final Presentation, dated 16 June 2005, at p. 29, **Exhibit-FE 14/18**; see also Witness Statement of Minister Deng Alor Kuol, at p. 23, ¶¶144-145; Witness Statement of James Lual Deng, at p. 16, ¶¶89-91.

⁸⁸⁴ Abyei Annex, Arts. 3-4, **Appendix D**; ABC ToR, Art. 3, **Appendix E**; ABC RoP, Art. 13, **Appendix F**. See also Witness Statement of Minister Deng Alor Kuol, at p. 15, ¶91; Witness Statement of James Lual Deng, at p. 9, ¶47.

⁸⁸⁵ ABC Report, Part I, at pp. 1-45, **Appendix B**.

⁸⁸⁶ ABC Report, at Part I, **Appendix B**.

⁸⁸⁷ ABC Report, Part I, at p. 3 (quoting Abyei Protocol, Art. 5.1), **Appendix B** (emphasis added).

521. The second part of the ABC Report included Maps and Appendices. Of greatest importance was “Map 1,” which was titled “*The Abyei Area Boundaries*.” The Map delimited the ABC Experts’ definition of the Abyei Area on a map of contemporary Sudan.⁸⁸⁸

522. The ABC Report discussed the evidence (both oral testimony and documentary evidence) considered by the ABC in detail.⁸⁸⁹ Among other things, the Report addressed numerous specific documents,⁸⁹⁰ or elements of the oral testimony,⁸⁹¹ explaining the ABC Experts’ assessment and evaluation of each.

523. The Report’s Preface observed that the “two sides [had] presented their own positions concerning the mandate of the ABC and *their contrasting definitions of the area under consideration*”⁸⁹² (referring to the GoS and SPLM/A presentations described above⁸⁹³). The Report also commented that the parties and their witnesses presented “two sharply differing versions of what constitutes the Abyei Area,”⁸⁹⁴ and then summarized the parties’ positions.⁸⁹⁵

524. The Report then explained that the ABC Experts had approached the definition of the Abyei Area by seeking to determine “*as accurately as possible the area of the nine Ngok Dinka Chiefdoms as it was in 1905*.”⁸⁹⁶ In doing so, the Commission 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*.”⁸⁹⁷

525. The ABC’s Report thus considered other evidence and arguments that had been presented by the parties. In doing so, the ABC derived nine “Propositions” regarding the positions of the GoS, Misseriya, SPLM/A and Ngok Dinka,⁸⁹⁸ and analyzed each of these propositions in the light of relevant historical, ethnographic and other evidence.⁸⁹⁹ The

⁸⁸⁸ ABC Report, Part I, at p. 46, **Appendix B**.

⁸⁸⁹ For oral evidence, *see* ABC Report, Part II, App. 4. For documentary evidence, *see* ABC Report, Part II, App. 5, 6 and in App. 2, and 3, **Exhibit-FE 15/1**.

⁸⁹⁰ ABC Report, Part II, App. 5, at p. 163 (“The extracts from sources presented here [i.e. in Appendix 5] refer directly to the propositions examined and tested in the main body of the report.”), **Exhibit-FE 15/1**. *See also* ABC Report, Part I, at pp. 26-27 (“The claim made by several Misseriya witnesses that Misseriya territory extended south of the Bahr el-Arab, and that the Misseriya boundaries were with the Rek and Twich Dinka was compared with other oral testimony. This claim was not made by the informants recorded by Henderson in the 1930s or by Cunnison in the 1950s. ... The oral testimony of the Rek and Twich Dinka heard at Agok specifically rejected the Misseriya claim to have borders with them ... There are also explicit statements from local observers in 1902, 1904 and 1905 recording that the section of the Bahr el-Arab occupied by the Ngok was known either by its Dinka name, ‘Kiir’, or as the ‘Bahr el Jange [Dinka]’ (Wilkinson 1902 in Appendix 5.10, Boulnois 1904 in Appendix 5.11, Bayldon 1905 in Appendix 5.12), and that even in the early 1950s the Humr themselves referred to it as the ‘Bahr ed Deynka’ (Cunnison 1954 in Appendix 5.3)”), **Appendix B**.

⁸⁹¹ ABC Report, Part I, at pp. 30-31 (“Both the Misseriya and the Government of Sudan claim that the reason the Ngok came to Kordofan was that they were displaced from their home on the Zeraf Island in Upper Nile by floods and the Nuer invasion in the nineteenth century (Misseriya testimony, Appendix 4.1; GoS presentation, Appendix 3.1). They are confusing two separate series of events, involving two separate groups of Ngok, one now living along the Sobat in Upper Nile, and the Ngok in Kordofan. P.P, Howell, who was often cited as the source for the claim that the Ngok came to Kordofan in the nineteenth century, explicitly stated the opposite when he wrote, ‘The Ngork do not mention this Nuer invasion of their original country and it may be that they migrated earlier. It is clear too that there were Dinka living in the present country of the Ngork long before the Nuer invasions eastward started’ (Howell 1951 in Appendix 5.1.)”), **Appendix B**.

⁸⁹² ABC Report, Part I, at p. 10, **Appendix B** (emphasis added).

⁸⁹³ *See above* at paras. 513-517.

⁸⁹⁴ ABC Report, Part I, at p. 10, **Appendix B**.

⁸⁹⁵ ABC Report, Part I, at p. 11, **Appendix B**.

⁸⁹⁶ ABC Report, Part I, at p. 4, **Appendix B**.

⁸⁹⁷ ABC Report, Part I, at p. 4, **Appendix B** (emphasis added).

⁸⁹⁸ ABC Report, Part I, at pp. 24-45, **Appendix B**.

⁸⁹⁹ ABC Report, Part I, at p. 12, **Appendix B**.

propositions were generally stated as positions or conclusions advanced by one or the other of the parties.

526. The nine “Propositions” which the ABC concluded had “emerged from the GoS and SPLM/A presentations and from oral testimony”⁹⁰⁰ were:

- a. The Ngok Dinka territory originally extended to El Oddaya, and the boundary between the Ngok and Misseriya should run from Lake Keilak to Muglad.⁹⁰¹
- b. Misseriya territory originally extended south of the Bahr el Arab as far as the current Kordofan-Bahr el Ghazal border.⁹⁰²
- c. The Ngok are newcomers to the territory, having left the Zeraf Island in the Upper Nile in the 19th century, and were brought in as destitute refugees at their own request to Humr leaders.⁹⁰³
- d. The inclusion of the Abyei Area in “Dar Messeria” District is recognition that Ngok territory belongs to Dar Misseriya.⁹⁰⁴
- e. The Ngok were administered as part of the Misseriya, both in taxation and in the court system.⁹⁰⁵
- f. The Misseriya claim that specific locations north of Abyei Town (e.g., Goleh/Langar, Pawol, Dembloya/Dak Jur, Umm Bilael/Tordach, Chigei/Thigei, Lukji/Kol Yith, Lau, Nyama) have belonged to them since the time of the Turkiyya, through 1905, to the present.⁹⁰⁶
- g. 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 1905.⁹⁰⁷
- h. There was 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.⁹⁰⁸
- i. The Abyei Area is defined as the territory of Kordofan encompassed by latitude 10°35’N in the north to longitude 29°32’E in the east, and the Upper Nile, Bahr el Gazal and Darfur provincial boundaries as they were at the time of independence in 1956.⁹⁰⁹

⁹⁰⁰ ABC Report, Part I, at p. 12, **Appendix B**.

⁹⁰¹ This proposition was based on Ngok Dinka oral testimony. *See* ABC Report, Part I, at pp. 12-13, **Appendix B**.

⁹⁰² This proposition was based on Misseriya testimony. *See* ABC Report, Part I, at p. 13, **Appendix B**.

⁹⁰³ This proposition was based on Misseriya oral testimony and the GoS presentation. *See* ABC Report, Part I, at p. 14, **Appendix B**.

⁹⁰⁴ This proposition was based on Misseriya oral testimony and the GoS presentation. *See* ABC Report, Part I, at p. 15, **Appendix B**.

⁹⁰⁵ This proposition was based on Misseriya oral testimony and the GoS presentation. *See* ABC Report, Part I, at p. 15, **Appendix B**.

⁹⁰⁶ This proposition was based on Misseriya testimony. *See* ABC Report, Part I, at p. 16, **Appendix B**.

⁹⁰⁷ This proposition was based on the GoS presentation. *See* ABC Report, Part I, at p. 17, **Appendix B**.

⁹⁰⁸ This proposition was based on the Ngok oral testimony and the SPLM/A presentation. *See* ABC Report, Part I, at p. 18, **Appendix B**.

⁹⁰⁹ This proposition was based on the SPLM/A presentation. *See* ABC Report, Part I, at pp. 19-20, **Appendix B**.

527. The ABC Report tested each of the nine propositions that it had identified by reference to “analysis based on relevant historical evidence.”⁹¹⁰ For each proposition, the Report discussed both the evidence supporting and the evidence contradicting the proposition. 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”⁹¹¹ (or, as alternatively phrased in the Report, “*the territory occupied and used by the nine Ngok Dinka Chiefdoms*” in 1905).⁹¹²

528. The ABC Experts’ analysis of each of these propositions was set forth seriatim, and their conclusions were then summarized (on pages 20 and 21). In summary, the ABC Experts reached the following conclusions:

- a. In 1905, there was no clearly demarcated boundary of the area transferred from Bahr el Ghazal to Kordofan.
- b. The GoS claim that the area of the nine Ngok Dinka Chiefdoms placed under the authority of Kordofan in 1905 lay entirely south of Bahr el Arab is mistaken. It is based largely on a report by a British official who incorrectly concluded that he had reached the Bahr el Arab River when in fact he had only come to the Ragaba ez Zarga/Ngol River. For several years afterwards, maps of the region, some of which were cited by the GoS in its presentation, manifested this error.
- c. The Ngok claim that their boundary with the Misseriya should run from Lake Keilak to Muglad has no foundation.
- d. The historical record and environmental factors refute the Misseriya contention that their territory extended well to the south of the Bahr el Arab/Kiir River.
- e. Although the Misseriya have clear “secondary” (seasonal) grazing rights to specific locations north and south of Abyei Town, their allegation that they have “dominant” (permanent) rights to these places is not supported by documentary or material evidence.
- f. There is compelling evidence to support the Ngok claims to having dominant rights to areas along the Bahr el Arab/Kiir River and Ragaba ez Zarga/Ngol River and that these are long-standing claims that predated 1905.
- g. There is no substance to the Misseriya claim that because the Abyei Area was included in “Dar Misseriya” District, it belongs to the Misseriya people. The Ngok and the Humr were put under the authority of the same governor solely for reasons of administrative expediency in 1905. After that action, the Ngok retained their identity and control over local affairs and maintained a separate court system and hierarchy of chiefs.
- h. The administrative record of the Condominium period and testimony of persons familiar with the area attest to the continuity of Ngok Dinka settlements in,

⁹¹⁰ ABC Report, Part I, at p. 12, **Appendix B**.

⁹¹¹ ABC Report, Part I, at p. 4, **Appendix B**.

⁹¹² ABC Report, Part I, at p. 18 (Proposition 8), **Appendix B**.

and use of, places north of the Bahr el Arab/Kiir River between 1905 and 1965, as claimed by the Ngok and the SPLM/A.

i. The experts considered the presentation by the SPLM/A that their dominant claim lies at latitude 10°35'N, but found the evidence in support of this to be inconclusive.

j. 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.

529. Based on these conclusions, and having “duly considered, assessed, and weighed the evidence before them,”⁹¹³ 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.”⁹¹⁴ The Commission 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 Misseriya.”⁹¹⁵ The ABC then relied on local principles of land law, and their “legal principle of the equitable division of shared secondary rights,” to divide the area of shared rights between the Ngok Dinka and the Misseriya.⁹¹⁶

530. 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.” Those coordinates were then delimited on Map 1 (noted above), with the title “*Abyei Area Boundaries*.”

531. As provided for in the Abyei Annex, and consistent with Article 14 of the Rules of Procedure, the decision of the experts was “final and binding” on both parties. For the sake of clarity, this was specifically recorded in the ABC Report.⁹¹⁷ Following their decision, the ABC experts also requested the IGAD Secretariat and General Sumbeiywo to make a copy of the ABC Report publicly available in order to minimize popular misunderstandings.⁹¹⁸

5. The Government of Sudan’s Refusal to Accept the ABC Report

532. On 20 June 2005, the five ABC Experts met again with General Sumbeiywo to discuss their progress. During their meeting, they agreed that the substance of their decision should not be revealed to any person or institution before it was presented to the Sudanese Presidency.⁹¹⁹

533. The ABC Experts delivered the ABC Report to the Presidency in Khartoum, as contemplated by the parties’ agreements, on 14 July 2005.⁹²⁰ The Report was delivered after

⁹¹³ ABC Report, Part I, at p. 21, **Appendix B**.

⁹¹⁴ ABC Report, Part I, at p. 19, **Appendix B**.

⁹¹⁵ ABC Report, Part I, at p. 20, **Appendix B**.

⁹¹⁶ ABC Report, Part I, at p. 20, **Appendix B**.

⁹¹⁷ ABC Report, Part I, at pp. 3, 9 and 21, **Appendix B**.

⁹¹⁸ See Email from Dr. Johnson to IGAD Secretariat, dated 9 August 2005, **Exhibit-FE 15/4**; Letter from Prof. Muriuki to Lt. Gen. Sumbeiywo, dated 8 September 2005, **Exhibit-FE 15/5**; see also Witness Statement of Lt. Gen. Sumbeiywo, at p. 21, ¶¶123-124.

⁹¹⁹ ABC Report, Part I, at p. 5, **Appendix B**; see also Witness Statement of Lt. Gen. Sumbeiywo, at p. 20, ¶¶116, 118.

⁹²⁰ Witness Statement of Lt. Gen. Sumbeiywo, at p. 20, ¶120; Witness Statement of Minister Deng Alor Kuol, at p. 25, ¶¶152-157; Witness Statement of James Lual Deng, at pp. 17-18, ¶¶98-107.

arrangements had been made by the ABC with both the GoS and SPLM/A, as well as the 10 party-appointed members of the Commission.⁹²¹

534. The ABC Experts' presentation of the ABC Report to the Presidency occurred in the Presidential Palace in Khartoum on 14 July.⁹²² Prior to the delivery of the Report, the GoS had not complained about any of the ABC's actions, including its conduct of the ABC proceedings, its formulation of the definition of the Abyei Area during the ABC proceedings or its method of proceeding with preparation of the ABC Report.⁹²³ On the contrary, the GoS had undertaken in the Abyei Protocol and Abyei Annex and elsewhere to accept the Commission's decision as "final and binding."⁹²⁴

535. Despite these commitments, in the days following publication of the ABC Report, the GoS resiled from its previous commitments. After the ABC Experts delivered the ABC Report, the GoS concluded that it was dissatisfied with the outcome and embarked on a strategy of resistance and delay.

536. The GoS's view was publicized in the Sudanese press in the days following the presentation of the ABC Report. On 15 July 2005, the Sudan Tribune reported that "after delivery of the report, the acting Minister of Information and Communication and government spokesman, Abdul-Basit Sabdarat, said that the report will be subject to thorough study prior to taking the necessary decisions on it."⁹²⁵ On 19 July 2005, the Sudan Tribune reported that "the Khartoum government ... was still discussing the report but expressed confidence it would not unravel January's landmark deal."⁹²⁶

537. On the second anniversary of the CPA, the Sudan Tribune reported President Bashir's speech, and wrote that the "Al-Bashir said that Committee of Experts on Abyei area failed to respect its mandate. Absent any foundation in the ABC Report itself, he said, that the committee adopted the borders of 1965 contradicting the provisions of Abyei Protocol that stipulate demarcation of the borders of 1905."⁹²⁷ President Bashir again rejected the ABC Report in November 2007 by stating that "Abyei Boundaries Commission exceeded its mandate and they had no power to do so."⁹²⁸

⁹²¹ See Witness Statement of Minister Deng Alor Kuol, at p. 25, ¶¶156; Witness Statement of James Lual Deng, at pp. 17-19, ¶¶98-99.

⁹²² See Witness Statement of Minister Deng Alor Kuol, at p. 25, ¶¶153-154; Witness Statement of James Lual Deng, at p. 18, ¶¶100-107.

⁹²³ Witness Statement of Lt. Gen. Sumbeiywo, at p. 20, ¶¶121; Witness Statement of Minister Deng Alor Kuol, at pp. 17-18, 21-22, ¶¶103, 114, 132, 135-136; Witness Statement of James Lual Deng, at pp. 9, 11, 17, ¶¶49, 64, 97. The only objection the GoS raised in the course of the ABC's work was related to the way the people who talked at the Agok meeting had been chosen. See Witness Statement of Minister Deng Alor Kuol, at p. 21, ¶¶131.

⁹²⁴ See Abyei Annex, Art. 5, **Appendix D**; Abyei Protocol, Art. 5.3, **Appendix C**; ABC RoP, Art. 13, **Appendix F**.

⁹²⁵ "President Receives Report of Abyei Panel on Border Demarcation," Sudan Tribune, dated 15 July 2005, **Exhibit-FE 15/2**; see also Witness Statement of Lt. Gen. Sumbeiywo, at p. 21, ¶¶122.

⁹²⁶ "Pro-Khartoum Arabs See Red over Plans for Disputed Oil District of Abyei," Sudan Tribune, dated 19 July 2005, **Exhibit-FE 15/3**.

⁹²⁷ "SPLM Shoulders Delay in Peace Implementation – Sudan's Bashir", Sudan Tribune, dated 9 January 2007, **Exhibit-FE 15/9**.

⁹²⁸ "Sudan's Bashir reiterates opposition to Abyei report," Sudan Tribune, dated 23 November 2007, **Exhibit-FE 15/13**; see also "NCP Vows Not to Concede Abyei to South," Juba Post, dated 23 November 2007, **Exhibit-FE 15/12**; "Misseriya Say Opening of Abyei Routes Depends on South Sudan Army Redeployment," Sudan Tribune, 1 March 2008, **Exhibit-FE 16/3**.

B. *The Abyei Arbitration Agreement*

538. The GoS's refusal to implement or comply with the ABC Report continued for some three years (between mid-2005 and mid-2008). During this period, the provisions of the Comprehensive Peace Agreement with regard to the Abyei Area were denied effect by the GoS's actions, including the establishment of its special administration, the full demobilization of armed forces and local distribution of oil revenues generated from the area. This resulted in heightened tensions between the parties, which erupted into full scale violence between GoS and SPLA forces in Abyei town in May 2008,⁹²⁹ as well as more recently in December 2008.

539. Following the outbreak of fighting in May 2008, efforts were made to resolve the parties' disputes regarding the ABC Report. On 8 June 2008, the Sudanese President, Omar al-Bashir and the South Sudanese President (and Sudanese First Vice-President) Salva Kiir Mayardit signed the Abyei Road Map ("Abyei Road Map").⁹³⁰

540. The Abyei Road Map contemplated the resolution of disputes regarding the ABC Report and Abyei's boundaries through international arbitration. The Road Map also touched on the key areas of security, the return of internally displaced persons, and the establishment of an interim administration.⁹³¹ Perhaps most importantly, the Road Map stipulated that the Presidency would set up an interim administration to govern the area.⁹³²

541. The Road Map recorded the parties' agreement to refer the resolution of Abyei's boundaries to an unspecified but "professional and specialized arbitration tribunal" and to "abide by and implement" whatever findings the tribunal might make.⁹³³ The Road Map left most of the details of the arbitration, including the rules of arbitration, the designation of a professional arbitration institution, a mechanism for the selection of arbitrators, the matters to be decided, rules for arbitration proceedings, and the manner by which the arbitral tribunal would implement its decision, to be decided at a later date.⁹³⁴

542. On 21 June 2008, representatives of the National Congress Party ("NCP") and SPLM/A signed a Joint NCP-SPLM Understanding on Main Issues of the Abyei Arbitration Agreement ("Memorandum of Understanding"). This agreement provided that the arbitration would take place under the auspices of the Permanent Court of Arbitration, in The Hague, and laid out a preliminary understanding of how the arbitration would operate.⁹³⁵

⁹²⁹ See UNMIS Press Release, dated 16, 18 and 20 May 2008, available at www.unmis.org/english/releases.htm.

UNMIS.org/english/releases.htm, **Exhibit-FE 16/3a**; see also OCHA Situation Report No. 5, dated 24 May 2008, **Exhibit-FE 16/5**; OCHA Situation Report No. 22, dated 22 July 2008, **Exhibit-FE 16/12**.

⁹³⁰ *The Road Map for Return of IDPs and Implementation of Abyei Protocol* (National Congress Party/ Sudanese People's Liberation Movement) 2008, **Appendix G**; see also "Sudanese President Signs Abyei Road Map Agreement," dated 9 June 2008, **Exhibit-FE 16/8**.

⁹³¹ It provided for a newly-formed Joint Integrated Unit to secure the area, which would not include those involved in the May violence, as well as a new police force. In addition, it was agreed that IDPs could return to Abyei after these security arrangements were complete.

⁹³² *The Road Map for Return of IDPs and Implementation of Abyei Protocol* (National Congress Party/ Sudanese People's Liberation Movement) 2008, **Appendix G**; United Nations Mission in Sudan, The CPA Monitor, para. 125-26 (October 2008) available at http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_oct08.pdf (on 8 June 2008, President Al-Bashir issued Republican Decree 146 adopting the Road Map), **Exhibit-FE 16/13a**.

⁹³³ *The Road Map for Return of IDPs and Implementation of Abyei Protocol* art. 4.3 (National Congress Party/ Sudanese People's Liberation Movement) 2008, **Appendix G**.

⁹³⁴ *The Road Map for Return of IDPs and Implementation of Abyei Protocol* at Art. 4.1 (National Congress Party/ Sudanese People's Liberation Movement) 2008, **Appendix G**.

⁹³⁵ *Joint NCP-SPLM Understanding on Main Issues of the Abyei Arbitration Agreement* (National Congress

543. On 7 July 2008, the GoS and the SPLM/A signed “The Arbitration Agreement between the Government of Sudan and the Sudanese People’s Liberation Movement/Army on Delimiting Abyei Area” (“Arbitration Agreement”).⁹³⁶ This agreement expanded upon the foundations laid down by the Road Map and the Memorandum of Understanding by designating a process by which the arbitrators would be selected, specifying the operating procedure of the tribunal, allocating cost, and setting up a preliminary time frame for the arbitration proceedings.

Party/ Sudanese People’s Liberation Movement) 2008, **Exhibit-FE 16/10**.

⁹³⁶ *Arbitration Agreement between the Government of Sudan and the Sudanese People’s Liberation Movement/ Army on Delimiting Abyei Area* (Sudan/ Sudanese People’s Liberation Movement/Army) 2008, **Appendix A**.

VII. THE ABC DID NOT EXCEED ITS MANDATE

544. This Tribunal is presented, under Articles 2(a) and 2(b) of the Abyei Arbitration Agreement, with a simple and straightforward issue. Article 2(a) of the Arbitration Agreement provides that the only basis for challenging the ABC Report is subsumed by the question “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.”⁹³⁷ Only if the GoS is able to demonstrate that the ABC Experts exceeded their mandate within the meaning of Article 2(a) may the ABC Report be set aside.

545. No other basis for disregarding the ABC Report is provided for or authorized by the Arbitration Agreement. On the contrary, Article 2(b) of the Abyei Arbitration Agreement provides that, “if the Tribunal determines ... that the ABC experts did not exceed their mandate, *it shall make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report.*”⁹³⁸

546. The sole basis for disregarding the ABC Report specified in Articles 2(a) and 2(b) of the Abyei Arbitration Agreement is precisely and narrowly limited to an excess of the ABC Expert’s mandate. All other grounds for alleging nullity of, or refusing to comply with, the ABC Report are excluded by the Arbitration Agreement – including, for example, alleged errors of law or fact by the ABC Experts, objections to the ABC Experts’ procedures or the composition of the ABC, and other grounds sometimes suggested historically as bases for findings of nullity of adjudicative decisions.

547. Applying Article 2(a), there is no conceivable basis for claiming an excess of mandate by the ABC. Instead, what the GoS seeks to do in this arbitration is to relitigate, in a different forum, the issues already considered and unanimously resolved by the ABC Experts following proceedings involving extensive submissions, carefully tailored procedures and intensive fact finding.

548. There are additional considerations, which also warrant discussion. These considerations underscore the vital public importance of upholding the ABC Report and lend compelling support to the conclusion that the ABC Experts did not exceed their mandate.

549. Long-standing authority from both international and national legal systems holds that, as a general matter, arbitral awards and similar adjudicatory decisions are presumptively final, and entitled to *res judicata* effect. International decisions and commentary affirm the peculiar importance of this principle of presumptive finality with regard to boundary determinations, where considerations of international stability underscore the rationales for principles of *res judicata* and finality.

550. It is in the light of these deeply-rooted policies that the GoS’s attempt to relitigate the ABC Experts’ decision regarding the Abyei Area’s boundaries must be seen – with the grave disfavor that such efforts have consistently been regarded in all developed legal systems.

551. Additionally, the GoS’s effort to challenge the ABC Report must also be seen in the context of a series of generally applicable rules for addressing issues of excess of mandate

⁹³⁷ Abyei Arbitration Agreement, Art. 2(a), **Appendix A**.

⁹³⁸ Abyei Arbitration Agreement, Art. 2(b), **Appendix A** (emphasis added).

and related questions. These rules are common to developed international and national legal systems, and constitute well-settled general principles of law fully applicable in these proceedings:

- a. First, finding an excess of mandate is an *exceptional conclusion*, as to which the party refusing to comply with a decision bears a *heavy burden of proof*.
- b. Second, equally well-settled international and national authority holds that any excess of authority must be “*manifest*,” “*glaring*,” “*flagrant*” and unambiguous. An excess of authority does not arise from debatable or complex circumstances, where reasonable minds might differ, but only in extreme and clear-cut cases.
- c. Third, it is also clear that *errors of law or treaty interpretation*, or of fact and evidentiary findings, *are not grounds for finding an excess of mandate*. These are errors of substance, and not an excess of the decision-maker’s mandate.

552. As already discussed, the present case is sufficiently clear-cut that there is no need to rely on the allocation of burdens of proof or requirements that an excess of mandate be “glaring” or “manifest.” Nonetheless, the existence and applicability of these rules further demonstrate the fundamental lack of substance to the GoS’s legal position in these proceedings.

553. Finally, although again not necessary for a decision, it is also clear that by accepting the terms of the Abyei Protocol, the Abyei Annex and the Comprehensive Peace Agreement the GoS excluded itself from raising any challenges to the finality of the ABC Report, including its putative excess of mandate claim. That is because, as discussed below, the GoS agreed that the ABC’s decision would be “*final and binding*.” In the context of the legal regime established by the Comprehensive Peace Agreement, these commitments left no room for any challenge to the ABC Report. Even if the GoS’s excess of mandate claims were not specious, they would be excluded by the parties’ previous agreements.

554. Additionally, the GoS also may not raise its putative excess of mandate claim because the Government did not raise any objections based upon an alleged excess of mandate during the proceedings before the Commission. On the contrary, the GoS expressly committed itself to implement the ABC’s decision even if it rejected the Government’s position. It is well-settled, under both international and national legal principles, that an excess of mandate claim must be raised at the earliest possible opportunity, and cannot be reserved until after a litigant has unsuccessfully contested the merits of the parties’ dispute.

A. *The ABC Experts Fulfilled Their Mandate to Define and Delimit the Abyei Area*

555. The language of the ABC’s mandate is clear and unambiguous. That mandate called for a jointly established and expert decision-maker – the Abyei Boundaries Commission – to “define and demarcate” the “Abyei Area,” which was defined in the Comprehensive Peace Agreement as “the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.” The parties also agreed that the ABC’s decision defining and demarcating the Abyei Area would be “final and binding.”

556. The ABC was constituted jointly, and without objection, by the SPLM/A and GoS; the Commission was composed of leading African and other experts in the complementary

disciplines of the history, culture, law and politics of Sudan and Africa. The ABC Experts then conducted remarkably intensive proceedings, using fact finding and other procedures that had been jointly established and carefully tailored by the parties themselves. Throughout the ABC's work, the parties collaborated, without objection, in what they termed a "partnership," to implement those procedures.

557. Thereafter, in a unanimous and carefully reasoned report, the ABC fulfilled its mandate in full accordance with the Comprehensive Peace Agreement by defining and delimiting the Abyei Area. The ABC Report was exhaustively researched and included, both in its main body and attached Appendices, expert historical, ethnographic, cultural and other conclusions. The Report concluded by setting forth, in clear and unambiguous terms, the ABC Experts' unanimous definition and delimitation of the Abyei Area, including on Map 1 which delimited the "***Abyei Area Boundaries***" and was attached to that Report.⁹³⁹

558. This was precisely what the ABC Experts had been mandated to do.

1. The ABC Experts' Mandate Was to "Define and Demarcate the Area of the Nine Ngok Dinka Chiefdoms Transferred to Kordofan in 1905. Referred to Herein as Abyei Area"

559. As discussed elsewhere, resolution of the status of the Abyei Area was central to the Comprehensive Peace Agreement between the GoS and SPLM/A.⁹⁴⁰ As a consequence, the Comprehensive Peace Agreement contained several separate parts relating to the Abyei Area, including the Abyei Protocol and the Abyei Appendix. These instruments were negotiated and drafted over a 10 month period in 2004, during which the parties worked together collaboratively to establish a basis for resolving their disputes over the Abyei Area.

560. As finally agreed, the Abyei Protocol, Abyei Annex and Terms of Reference set forth both an agreement between the parties on the definition of the Abyei Area (together with related agreements concerning its future status and governance) and a procedural mechanism for resolving disputes concerning that agreement. The dispute resolution mechanism adopted by the parties was specifically tailored to suit their particular needs and dispute: it provided for the selection of distinguished experts in Sudanese and African history, culture and politics to conduct a fact finding procedure that included extensive local meetings to hear live witness testimony in the Abyei Area, a number of site visits and independent archival research.

561. The parties also agreed that the ABC's decision would be "final and binding," without possibility for any appeal or other challenge. They repeatedly and specifically reaffirmed that commitment during the course of the ABC's work, including at the end of the ABC proceedings in their final presentations to the Commission.

- a) The Abyei Protocol

562. Central to the parties' agreement regarding the Abyei Area was the Abyei Protocol, which forms an integral part of the Comprehensive Peace Agreement.⁹⁴¹ The Abyei Protocol

⁹³⁹ **Map 10** (*Abyei Area Boundaries: Map I*, Abyei Boundaries Commission, 2005).

⁹⁴⁰ See above at paras. 5, 540, 495 and below at paras. 566, 742, 761.

⁹⁴¹ Comprehensive Peace Agreement, Chapter IV, at p. 218, **Exhibit-FE 13/1**. See also Comprehensive Peace Agreement, Chapeau, at p. xii ("The CPA shall be comprised of the texts of the Protocols and Agreements already signed, together with this Chapeau..."), **Exhibit-FE 13/1**.

provided the basis for a detailed and carefully constructed agreement between the GoS and SPLM/A with regard to the Abyei Area.

563. Article 1 of the Abyei Protocol set out the “*Principles of Agreement on Abyei*.” These principles provided the central substantive terms of the parties’ agreement regarding the Abyei Area, including, critically, a definition of the “Abyei Area” (in Article 1.1.2). The GoS submissions to the ABC correctly described this definition of the Abyei Area as “key to the settlement” and “the most difficult and painstaking exercise of the whole peace process.”⁹⁴²

564. Specifically, Article 1.1 of the Abyei Protocol provided:

“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*.”⁹⁴³

The Abyei Protocol also recorded the parties’ commitment “to adopt these Principles as the basis for the resolution of Abyei Conflict.”⁹⁴⁴

565. Articles 2, 3 and 4 of the Abyei Protocol then elaborated the parties’ agreement regarding the future administration (Article 2), financial status (Article 3) and governance (Article 4) of the Abyei Area. Additional terms of the parties’ agreement concerning the Abyei Area’s future were set out in Articles 6, 7 and 8, which among other things, contained provisions regarding residents of the Abyei Area (Article 6), security arrangements (Article 7) and, critically, referendums regarding the future of the Abyei Area and South Sudan (Article 8).

566. As discussed elsewhere, these provisions regarding the future status of the Abyei Area were central to resolution of the parties’ broader conflict in Sudan, as well as of decisive importance to the inhabitants of the Abyei Area itself.⁹⁴⁵ As also discussed elsewhere, the implementation of these provisions required prompt and final resolution of all disputes about the parties’ agreement on the geographic scope of the Abyei Area (in Article 1.1.2 of the Abyei Protocol).⁹⁴⁶

567. The Abyei Protocol therefore went on in Article 5, under the heading “*Determination of Geographic Boundaries*,” to provide a dispute resolution mechanism for implementing the Protocol’s substantive definition of the Abyei Area. That dispute resolution mechanism was necessary because the parties disagreed over the territorial consequences of their agreement, in Article 1.1.2 of the Abyei Protocol (also quoted above), that the Abyei Area “*is defined as the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.*”⁹⁴⁷

⁹⁴² GoS First Presentation, dated 12 April 2005, at p. 7, **Exhibit-FE 14/2**.

⁹⁴³ Abyei Protocol, Art. 1.1, **Appendix C** (emphasis added).

⁹⁴⁴ Abyei Protocol, at p. 2, footnote to heading “Principles of Agreement on Abyei,” **Appendix C**.

⁹⁴⁵ See above at paras. 450, 495, 559 and below at paras. 742, 761.

⁹⁴⁶ See below at paras. 740-741.

⁹⁴⁷ Abyei Protocol, Art. 1.1.2, **Appendix C**.

568. The parties agreed that their dispute concerning the definition of the Abyei Area be resolved through a specially tailored mechanism, designed to provide a highly expert decision-maker with a combination of complementary expertises and broad access to relevant information. Specifically, the parties agreed in Article 5.1 to the establishment of a specialized boundary commission, whose mandate was as follows:

“[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.*”⁹⁴⁸

569. The parties also collaborated together in designing procedures for the Commission. Thus, Article 5 of the Abyei Protocol prescribed basic principles regarding the composition and timetable of the ABC. Article 5.2 provided that the ABC’s members would be selected by the parties and would include “experts, representatives of the local communities and the local administration.”⁹⁴⁹ That directive reflected the parties’ mutual conviction that individuals with extensive expertise and local knowledge of Africa and Sudan, as well as the Abyei Area itself, were essential to a satisfactory and just resolution of their dispute.⁹⁵⁰

570. Articles 5.2 and 5.3 of the Abyei Protocol also reflected the parties’ agreement that the process for resolving disputes regarding the geographic boundaries of the Abyei Area should be settled promptly and definitively. Thus, Article 5.2 provided that the ABC “shall finish its work within the first two years of the Interim Period,” while Article 5.3 requires that, as soon as the ABC Report was presented to the Presidency, it “*shall* take necessary action to put the special administrative status of Abyei Area into *immediate effect*.”⁹⁵¹ As discussed below, the SPLM/A and GoS agreed to these provisions because of the vital importance to the Comprehensive Peace Agreement of a prompt and final determination of the Abyei Area’s geographic territory.⁹⁵²

571. In sum, the Abyei Protocol set forth a comprehensive and carefully negotiated basis for resolution of disagreements between the SPLM/A and GoS regarding the Abyei Area. The Protocol contained both an agreement by the parties defining the geographic scope of the Abyei Area (in Article 1.1.2) and the terms of the future status of the Abyei Area (in Article 2, 3, 4 and 6, 7, 8). Equally important, Article 5 of the Abyei Protocol established a carefully designed adjudicative mechanism – the Abyei Boundaries Commission – for considering and resolving the parties’ disputes regarding the geographic scope of their definition of the Abyei Area.

b) The Abyei Annex

572. The Abyei Annex, titled “Understanding on the Abyei Boundaries Commission,” elaborated on aspects of the Abyei Protocol.⁹⁵³ Entered into seven months after the Abyei Protocol, on 17 December 2004, the Annex reaffirmed the definition of the Abyei Area contained in the Abyei Protocol, as well as the ABC’s mandate. The Annex also set forth a

⁹⁴⁸ Abyei Protocol, Art. 5.1, **Appendix C** (emphasis added).

⁹⁴⁹ Abyei Protocol, Art. 5.2, **Appendix C**.

⁹⁵⁰ Witness Statement of Lt. Gen. Sumbeiywo, at p. 13, ¶¶64; Witness Statement of Minister Deng Alor Kuol, at p. 12, ¶¶69-71.

⁹⁵¹ Abyei Protocol, Art. 5.3, **Appendix C** (emphasis added).

⁹⁵² See below at paras. 740-741, 820-826.

⁹⁵³ The Abyei Annex also forms an integral part of the Comprehensive Peace Agreement. See Comprehensive Peace Agreement, Chapter IV, at p. 63, **Exhibit-FE 13/1**.

number of further agreements, which had been developed between the parties, regarding the composition and adjudicative procedures of the ABC.

573. Mirroring Article 5.1 of the Protocol, Article 1 of the Abyei Annex reaffirms the parties' agreement regarding the territorial scope of the Abyei Area and the ABC's mandate regarding that agreement. In particular, Article 1 confirms that "there shall be established by the Parties 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.*"⁹⁵⁴

574. Article 2 of the Abyei Annex then prescribed additional terms regarding the composition and procedures of the ABC, which were jointly developed by the parties and precisely tailored to their needs and the Abyei dispute. In particular, Article 2 provides an appointment mechanism for the Commission, allowing each party to select representatives on the ABC, including from the existing administrations of the Abyei Area, the Misseriya and the neighboring Dinka tribes.⁹⁵⁵ Additionally, Article 2.2 provided for the parties to obtain the nomination of "*five impartial experts knowledgeable in history, geography and any other relevant expertise*" for the ABC.⁹⁵⁶

575. As discussed above, the provisions of the Abyei Annex (and the Terms of Reference, as discussed below) regarding constitution of the Commission ensured that the ABC included both appointees of the parties with intimate familiarity with the Abyei Area and preeminent experts, including particularly African experts, in a range of complementary expertises, including Sudanese history, geography, culture and ethnography.⁹⁵⁷ These provisions produced a body – the ABC – with unique experience and expertise in those specific disciplines that the parties deemed essential to resolving their dispute regarding the Abyei Area.

576. As detailed elsewhere, Articles 3 and 4 of the Abyei Annex also set forth additional adjudicative procedures for the Commission, which the parties had jointly developed to address the particular circumstances of the ABC's work,⁹⁵⁸ while also providing for a more rapid decision by the Commission than originally contemplated.⁹⁵⁹ The procedures agreed by the parties in the Abyei Annex included provisions for the Commission to "*listen to representatives of the people of Abyei Area and the neighbours,*" as well to hear presentations by the parties.⁹⁶⁰ They also provided for the ABC to conduct independent archival research into available materials.⁹⁶¹

577. The Abyei Annex also reiterated the parties' shared interest in a definitive and speedy decision, which was considered essential to the parties' broader commitments to the peace process. Elaborating on Article 5.3 of the Abyei Protocol (requiring that the ABC Report be given "immediate effect"), Article 5 of the Annex provided that the ABC Report "*shall be final and binding* on the parties."⁹⁶² This provision was essential in light of the role played

⁹⁵⁴ Abyei Annex, Art. 1, **Appendix D** (emphasis added).

⁹⁵⁵ Abyei Annex, Arts. 2.1, 2.3, 2.4 and 2.5, **Appendix D**.

⁹⁵⁶ Abyei Annex, Art. 2.2, **Appendix D**.

⁹⁵⁷ See above at para. 498.

⁹⁵⁸ Abyei Annex, Arts. 3-4, **Appendix D**; see above at paras. 491, 508.

⁹⁵⁹ See Witness Statement of Minister Deng Alor Kuol, at pp. 15-16, ¶92. See also above at para. 503 and below at para. 800.

⁹⁶⁰ Abyei Annex, Art. 3, **Appendix D**.

⁹⁶¹ Abyei Annex, Art. 4, **Appendix D**.

⁹⁶² Abyei Annex, Art. 5, **Appendix D** (emphasis added).

by the ABC's decision as to the scope of the Abyei Area in the ongoing implementation of the Comprehensive Peace Agreement (and, particularly, the holding of the Abyei Referendum and the administration of the Abyei Area).⁹⁶³

c) Terms of Reference

578. Pursuant to the Abyei Protocol and Abyei Annex, the parties jointly drafted and agreed, on 12 March 2005, to the Terms of Reference. As detailed in the Preamble to the Terms of Reference, this instrument reflected “the spirit of the Comprehensive Peace Agreement and the *forthcoming partnership*” between the parties to the ABC process.⁹⁶⁴

579. Although in part aspirational, the parties' reference in the Terms of Reference to their “*forthcoming partnership*” accurately reflected their previous achievements in designing a dispute resolution process tailored to resolving their dispute over the Abyei Area. As discussed above, for two warring parties to have worked together in the spirit of “partnership” to develop collaboratively a dispute resolution mechanism was remarkable.⁹⁶⁵ The parties' commitment to a “forthcoming partnership” also reflected their expectations regarding future collaboration in implementing that process – expectations which, as discussed below, were fully realized until shortly after the ABC Experts delivered their Report.⁹⁶⁶

580. The first Article of the Terms of Reference reaffirmed the ABC's mandate (under the heading “*Mandate*”). Article 1.1 reiterates that “[t]he Abyei Area is defined in the Abyei Protocol in article 1.1.2 as ‘*The area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905*,’”⁹⁶⁷ quoting verbatim the substantive definition of the Abyei Area in the “General Principles” of Article 1.1.2 of the Abyei Protocol (discussed above). Article 1.1 of the Terms of Reference then went on to provide that the “ABC *shall confirm this definition*.”⁹⁶⁸

581. The remainder of the Terms of Reference further elaborated on the procedures for the ABC, prescribing in greater detail a specialized set of adjudicative procedures tailored to the requirements of the parties' dispute. Among other things, the Terms of Reference provided for the parties' appointments of members of the ABC (Article 2.1), and for resolution of disputes regarding appointments (Article 2.1) and replacement of ABC members that withdrew (Article 2.2).⁹⁶⁹

582. The parties also provided in the Terms of Reference (and Rules of Procedure) for an unusual, but carefully considered, set of visits by the ABC to the Abyei Area and surrounding regions. These visits were demanding and onerous, but designed to permit the Commission to hear first-hand the oral testimony of local residents, as well as to explain the ABC's mandate to representatives of the local populations.

583. Thus, Article 3.2 of the Terms of Reference provides that the “ABC shall thereafter *travel to Sudan to listen to representatives of the people of Abyei Area and the neighbors*,” and conduct the following meetings:

⁹⁶³ See above at para. 9 and below at paras. 739-741.

⁹⁶⁴ ABC ToR, Preamble, **Appendix E** (emphasis added).

⁹⁶⁵ See above at paras. 505, 511.

⁹⁶⁶ See above at paras. 535-537 and below at paras. 659-661.

⁹⁶⁷ ABC ToR, Art. 1.1, **Appendix E** (emphasis added).

⁹⁶⁸ ABC ToR, Art. 1.1, **Appendix E** (emphasis added).

⁹⁶⁹ ABC ToR, Arts. 2.1 and 2.2, **Appendix E**.

“A) The ABC shall conduct one meeting in Abyei Town with 54 representatives of the nine Ngok Dinka Chiefdoms (five from each plus nine chiefs); (B) One meeting in Muglad Town with 45 Misseriya representatives (25 from Muglad sub tribes, 15 from Fulla and five from Lagawa), however the ABC shall make field visits to (Dambaloya/Dak Jur), (Pawol/Fawol), (Abugazala/Mabek) etc.; (C) One meeting to be held in Agok with 30 representatives of the neighbors of Abyei to the South (Twic, Gogrial West, Aweil East, Biemnhum and Panarou), which shall be represented by six each.”⁹⁷⁰

584. Article 3.5 of the Terms of Reference provided that the ABC was to “prepare their *final report* that shall be presented to the Presidency in Khartoum.”⁹⁷¹ Likewise, the “Program of work” for the ABC, as well as detailing their schedule, provided that “the experts [would] present in the presence of the whole membership of the ABC their *final report* to the Presidency.”⁹⁷² The “Program of work” and schedule for the ABC embodied the parties’ ongoing involvement in ensuring that the ABC received a wide range of information, tailored to the decision-making process before the Commission.⁹⁷³

d) Rules of Procedure

585. Finally, pursuant to the instruments outlined above, the parties and the ABC negotiated and drafted the Rules of Procedure, which were agreed to on 11 April 2005. Continuing to reflect the parties’ partnership in designing their own dispute resolution mechanism, the Rules of Procedure were adopted by “*consensus*.”⁹⁷⁴

586. The Rules of Procedure again reaffirmed the definition of the Abyei Area, set forth in the Abyei Protocol, and the ABC Experts’ mandate to give effect to that definition. The Rules of Procedure also set forth yet more detailed elaborations, again jointly-developed with the parties to suit their particular desires and needs, of the procedures for the ABC’s work.

587. Article 1 of the Rules of Procedure provided that “[t]he work of the Commission will be guided by the principles of agreement on Abyei, the Abyei Annex, ‘Understanding on Abyei Boundaries Commission’ (ABC) and Terms of Reference,”⁹⁷⁵ and then repeats verbatim the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol: “*The Abyei area is defined in the Abyei Protocol in Article 1.1.2 as ‘The area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.’*”⁹⁷⁶

588. The parties also agreed in the Rules of Procedure that one of the ABC Experts (Ambassador Petterson) would chair the ABC⁹⁷⁷ and that the meetings would be conducted in an “informal, yet businesslike [manner] with *a full and easy exchange of ideas, observations and suggestions*.”⁹⁷⁸ The parties’ evident purpose was to ensure maximum opportunities to

⁹⁷⁰ ABC ToR, Art. 3.2, **Appendix E**.

⁹⁷¹ ABC ToR, Art. 3.5, **Appendix E** (emphasis added).

⁹⁷² ABC ToR, at p. 3 (“Program of work”), **Appendix E**.

⁹⁷³ ABC ToR, at p. 2 (“Program of work”), **Appendix E**. The parties also agreed that the expenses of the experts, including the technical and support staff, as well as equipment, will be borne by the international community. It was also agreed that the Government of National Unity was to bear the expenses of the two parties’ members through the Joint National Transitional Fund. A list of the expenses of the two parties’ was attached to the Terms of Reference. See ABC ToR, at p. 3, **Appendix F**.

⁹⁷⁴ ABC RoP, Art. 3, **Appendix F**.

⁹⁷⁵ ABC RoP, Art. 1, **Appendix F**.

⁹⁷⁶ ABC RoP, Art. 1, **Appendix F**.

⁹⁷⁷ ABC RoP, Art. 2, **Appendix F**.

⁹⁷⁸ ABC RoP, Art. 2, **Appendix F** (emphasis added).

communicate and discuss their understandings of the issues and the evidence before the Commission.⁹⁷⁹

589. Article 6 of the Rules of Procedure provided that the ABC's meetings in Abyei and its surroundings would be completed within a maximum of five days in each area, as stipulated in the Terms of Reference and a detailed schedule attached thereto.⁹⁸⁰ The Rules also guaranteed 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."⁹⁸¹ Again, these provisions were designed to ensure the maximum possible access by the ABC's members to all relevant information regarding the Abyei Area.

590. The parties' agreements addressed a number of other aspects of the ABC's procedures, tailoring them to the fact finding and issues which the parties regarded relevant to the Commission's task. Thus, Articles 3.3 to 3.5 of the Terms of Reference provided that while in the Abyei Area, the ABC was to "identify, examine, and visit some sites of historical significance (ruins, tombs, rivers, villages, lakes etc)."⁹⁸² Article 10 of the Rules of Procedure provides similarly 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."⁹⁸³ Thereafter, the experts were to "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 research and scientific analysis."⁹⁸⁴ Again, the parties jointly developed and agreed upon a set of procedures aimed at ensuring that the maximum amount of factual and other information was available to the Commission.

591. The Rules of Procedure go on to provide that, after conducting their investigations,⁹⁸⁵ "the experts will examine and evaluate all the material they have gathered and will prepare the final report."⁹⁸⁶ The Rules of Procedure also provide in Article 14 that "[t]he Commission will endeavor 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."⁹⁸⁷ This reflected the parties' desire for a final decision, if no consensus decision could be achieved by the Commission's experts on Sudanese history, politics, law and ethnography.

2. The Parties Collaboratively Constituted the ABC

592. As discussed above, the Abyei Annex provided that the ABC was to consist of 15 members, selected in collaboration between the parties, with a particular emphasis on individuals with demonstrated expertise in African and Sudanese history, ethnography and culture. Under the parties' agreement, the Commission was to include a representative of each party, selected by that party.⁹⁸⁸ The ABC would also include four members from the present two administrations of Abyei Area (each party to appoint two of these members).⁹⁸⁹

⁹⁷⁹ See Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶95; Witness Statement of James Lual Deng, at p. 7, ¶41.

⁹⁸⁰ ABC RoP, Art. 6, **Appendix F**.

⁹⁸¹ ABC RoP, Art. 7, **Appendix F**.

⁹⁸² ABC ToR, Art. 3.3, **Appendix E**.

⁹⁸³ ABC RoP, Art. 10, **Appendix F**.

⁹⁸⁴ ABC ToR, Art. 3.4, **Appendix E**.

⁹⁸⁵ ABC RoP, Arts. 4-12, **Appendix F**.

⁹⁸⁶ ABC RoP, Art. 13, **Appendix F**. The provision that the Experts would prepare the ABC Report was a development from Article 3.5 of the Terms of Reference. See Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶100; Witness Statement of James Lual Deng, at p. 9, ¶47.

⁹⁸⁷ ABC RoP, Art. 14, **Appendix F**.

⁹⁸⁸ Abyei Annex, Art. 2.1, **Appendix D**.

⁹⁸⁹ Abyei Annex, Art. 2.3, **Appendix D**.

Finally, the GoS would appoint two members from the Misseriya⁹⁹⁰ and the SPLM/A would appoint two people from Dinka tribes located south of Abyei Area.⁹⁹¹

593. These provisions of the Abyei Annex gave both parties the opportunity to select members of the ABC, including individuals with particular local knowledge and experience relating to the Abyei region and Sudan. Among other things, this gave the parties confidence that the Commission would be exposed intensively to the widest range of factual and historical information regarding the Abyei dispute.

594. The Abyei Annex also provided for the U.S., the U.K. and the IGAD to appoint the five ABC Experts, who were to be knowledgeable in African and Sudanese history, geography, ethnography, law and other relevant disciplines. The Terms of Reference included a mechanism for the IGAD to resolve disputes as to the composition of the Commission (a mechanism which never had to be invoked by any party).⁹⁹²

595. Pursuant to the provisions of the Abyei Annex, the 15 members of the Commission were selected by the parties and by the IGAD,⁹⁹³ the U.S.⁹⁹⁴ and the U.K.⁹⁹⁵ The constitution of the ABC proceeded without controversy or objection, with the parties collaborating closely together, with both one another and with IGAD, the U.S. and the U.K.⁹⁹⁶

596. Pursuant to the Annex, the U.S. appointed former U.S. Ambassador Donald Petterson to the Commission.⁹⁹⁷ Ambassador Petterson began his career in the U.S. Foreign Service in 1961 and served over the next 30 years in Zanzibar, Nigeria, Sierra Leone, South Africa, Zimbabwe, Sudan, Somalia and Tanzania – as U.S. Ambassador in the last three. He was U.S. Ambassador to Sudan from 1992 to 1995. He has authored an account of his tenure in Khartoum titled *Inside Sudan: Political Islam, Conflict, and Catastrophe*. After his retirement, he was called back into the Foreign Service to head the U.S. embassy in Liberia.

597. Dr. Douglas H. Johnson was the U.K. nominated member of the ABC. Dr. Johnson has taught history at St. Antony's College at Oxford University and has some 40 years of research experience on Sudan.⁹⁹⁸ He served as Assistant Director for Archives in the Southern Regional Government and has edited five volumes of historical documents on Sudan, including the Sudan volume of the British Documents on the End of Empire series.

⁹⁹⁰ Abyei Annex, Art. 2.4, **Appendix D**.

⁹⁹¹ Abyei Annex, Art. 2.5, **Appendix D**.

⁹⁹² ABC ToR, Art. 2.1, **Appendix E**.

⁹⁹³ See Letter from Lt. Gen. Sumbeiywo to Dr. Bashir, Executive Secretary of IGAD Secretariat, dated 19 January 2005, requesting the IGAD Secretariat, in consultation with GoS and SPLM/A to appoint three experts, **Exhibit-FE 13/4**; Letter from Lt. Gen. Sumbeiywo to Dr. Bashir, Executive Secretary of IGAD Secretariat, dated 8 February 2005, **Exhibit-FE 13/8**; Facsimile from Dr. Bashir to Lt. Gen. Sumbeiywo, dated 9 February 2005, **Exhibit-FE 13/10**.

⁹⁹⁴ See Letter from Lt. Gen. Sumbeiywo to U.S. Ambassador Bellamy, dated 19 January 2005, requesting the Government of the U.S. to appoint an expert, **Exhibit-FE 13/6**.

⁹⁹⁵ See Letter from Lt. Gen. Sumbeiywo to UK High Commissioner Clay, dated 19 January 2005, requesting the UK Government to appoint an expert, **Exhibit-FE 13/5**; see also Letter from Ambassador Patey to Lt. Gen. Sumbeiywo, dated 3 February 2005, in which the UK Government appoints Mr. Johnson as expert, **Exhibit-FE 13/7**.

⁹⁹⁶ See, e.g., Letter from the GoS State Minister and Advisory of Peace Affairs to Lt. Gen. Sumbeiywo, dated 13 January 2005, requesting that the IGAD liaise with the two parties in the appointment of the experts, **Exhibit-FE 13/3**.

⁹⁹⁷ The ABC later agreed at its meeting on 10 April 2005 that the proceedings would be chaired by Ambassador Petterson. ABC RoP, Art. 2, **Appendix F**; see also Witness Statement of Minister Deng Alor Kuol, at p. 16, ¶95.

⁹⁹⁸ See Curriculum Vitae of Douglas Hamilton Johnson, as submitted to IGAD and attached to Letter from Ambassador Patey to Lt. Gen. Sumbeiywo, dated 3 February 2005, **Exhibit-FE 13/7**.

He is the author of *Nuer Prophets*⁹⁹⁹ and *The Root Causes of Sudan's Civil Wars*. He has also co-edited a number of other works and has authored some 50 articles. Dr. Johnson sits on the Advisory Board of Sudan Open Archive and is commissioning editor of James Currey Publishers, a leading academic publisher in Africa.¹⁰⁰⁰

598. As provided for by the parties' agreement in the Abyei Annex, the three remaining ABC Experts were appointed by the IGAD.¹⁰⁰¹ The IGAD selected Professor Godfrey Muriuki,¹⁰⁰² an historian from Kenya, Dr. Kassahun Berhanu,¹⁰⁰³ a political scientist from Ethiopia and Professor Shadrack Gutto,¹⁰⁰⁴ a lawyer and land rights expert from South Africa. All of these appointees were distinguished African academics, with specialized and unique expertise in African history, politics, law and culture.¹⁰⁰⁵

599. Professor Godfrey Muriuki is Professor of African History at the University of Nairobi.¹⁰⁰⁶ He is a pre-eminent African historian and one of only 10 historians who was offered life membership in the Historical Association of Great Britain when it celebrated its centennial. Professor Muriuki wrote his PhD thesis at the University of London, subsequently published as *A History of the Kikuyu, 1500-1900* by Oxford University Press in 1974. His publications also include *The Historiography of East Africa*, edited by D.I. Ray, P. Shinnite and D. Williams, Tantalus Research Ltd., Vancouver, Canada (1979).

600. Professor Berhanu is Professor of Political Science at the Addis Ababa University and holds a PhD in political science from the Free University of Amsterdam. He is one of Africa's leading political scientists, and has carried out research on governance and decentralization, refugees, resettlement, ethnic and social conflict, democratization, electoral processes and civil society organization. His publications include *Party Politics and Political Culture in Ethiopia* (2003), *Ethnicity and Social Conflicts in Ethiopia* (2001) and *Democratization in Late-Twentieth Century Africa: Coping with Uncertainty* (1988). Dr. Berhanu is the former Chair of the Department of Political Science and International Relations at the University of Addis Ababa in Ethiopia, and a leading member of the Organization of Social Science Research in Eastern and Southern Africa.¹⁰⁰⁷

601. Professor Shadrack Gutto holds an LLB (Hons) from the University of Nairobi, Kenya; a Master of Arts and Diplomacy from the Fletcher School of Law and Diplomacy at Tufts University; and a PhD in Sociology of Human Rights Law from Lund University in Sweden. From 1978 to 1982, Professor Gutto was a lecturer and research fellow at the Faculty of Law and Institute of Development Studies at the University of Nairobi, and subsequently headed the Land Rights Research Programme at the University of

⁹⁹⁹ This work was awarded the Royal Anthropological Institute's Amaury Talbot Prize for African Anthropology.

¹⁰⁰⁰ See Curriculum Vitae of Douglas Hamilton Johnson, as submitted to IGAD, and attached to Letter from Ambassador Patey to Lt. Gen. Sumbeiywo, dated 3 February 2005, **Exhibit-FE 13/7**.

¹⁰⁰¹ See Correspondence related to appointment: Letter from Lt. Gen. Sumbeiywo to Dr. Bashir, Executive Secretary of IGAD Secretariat, dated 8 February 2005, **Exhibit-FE 13/8**; Facsimile from Dr. Bashir to Lt. Gen. Sumbeiywo, dated 9 February 2005, **Exhibit-FE 13/10**.

¹⁰⁰² See Letter from Lt. Gen. Sumbeiywo to Prof. Muriuki, dated 18 March 2005, **Exhibit-FE 13/17**.

¹⁰⁰³ See Letter from Lt. Gen. Sumbeiywo to Dr. Berhanu, dated 18 March 2005, **Exhibit-FE 13/15**.

¹⁰⁰⁴ Curriculum Vitae of Prof. Shadrack B. Gutto, as attached to Consultancy Agreement between IGAD Secretariat on Peace in Southern Sudan and Professor Shadrack Billy Otworu Gutto, dated 16 May 2005, **Exhibit-FE 14/12**. Prof. Gutto joined the Commission in May, after another potential expert Prof. Khezi Prah had declined the appointment.

¹⁰⁰⁵ See Witness Statement of James Lual Deng, at pp. 4-5, ¶22.

¹⁰⁰⁶ See Curriculum Vitae of Professor Godfrey Muriuki as attached to Consultancy Agreement between IGAD Secretariat on Peace in Southern Sudan and Professor Godfrey Muriuki, dated 7 April 2005, **Exhibit-FE 13/21**.

¹⁰⁰⁷ Curriculum Vitae of Prof. Berhanu, as attached to Consultancy Agreement between IGAD Secretariat on Peace in Southern Sudan and Dr. Kassahun Berhanu, dated 7 April 2005, **Exhibit-FE 13/22**.

Witwatersrand. Since June 2003, he has been a Professor and Chair of African Renaissance Studies and Director of the postgraduate Centre for African Renaissance Studies at the University of South Africa and since 2008, a Professor Extraordinaire at the Faculty of Humanities at Tshwane University of Technology. He has published widely on subjects of regional and international, legal and political economy in cross-discipline professional and academic journals.¹⁰⁰⁸

602. The GoS appointed Ambassador Dirdeiry Mohamed Ahmed (“Ambassador Dirdeiry”) as the representative of the Government of Sudan, Mr. Zakaria Atem and Mr. Ahmed Assalih Soloha as representatives of the administration in the Abyei area and Mr. Abdul Rasoul El-Nur and Mr. Amhed Abdalla Adam as representatives of the Misseriya.¹⁰⁰⁹

603. The SPLM/A appointed Cdr. Deng Alor Kuol (“Deng Alor”), Cdr. Victor Akok Anai, Lt. Col. James Lual Deng, Cdr. Deng Arop Kuol and Lt. Col. James Ajing Path.¹⁰¹⁰ Deng Alor was the SPLM/A representative on the Commission. Deng Arop and James Ajing Path represented the administration of the Abyei area, whereas Victor Akok Anai was the representative of the Twic Dinka and James Lual Deng the representative of the Rek Dinka.¹⁰¹¹ In the same letter with which the SPLM informed the GoS of its appointments, it expressed its appreciation for GoS’s appointments.¹⁰¹²

604. The five ABC Experts comprised a highly impressive set of experts in a range of complementary disciplines, including African, and particularly Sudanese, history, politics, law and ethnography. Together, the five ABC Experts provided nearly 150 years of professional experience and involvement in Sudan and, more generally, Africa. Their professional accomplishments are described in greater detail above and in their attached resumes.¹⁰¹³

605. It bears emphasis that, by the parties’ agreement, three of the ABC Experts were selected by the IGAD, the regional African institution chosen and trusted by the parties to oversee their negotiations of the Comprehensive Peace Agreement and the ABC process. The three ABC Experts selected by the IGAD were themselves African in nationality, heritage and professional experience.

606. It also bears emphasis that neither party raised any objection or challenge to any of the five ABC Experts or the other members of the Commission. Neither when the ABC’s members were appointed, nor at any time thereafter, did either the GoS or the SPLM/A suggest in any way that any of the members was unsuited, under-qualified, biased, or otherwise inappropriate for service on the ABC.

¹⁰⁰⁸ See Curriculum Vitae of Prof. Shadrack B. Gutto, as attached to Consultancy Agreement between IGAD Secretariat on Peace in Southern Sudan and Professor Shadrack Billy Otworu Gutto, dated 16 May 2005, **Exhibit-FE 14/12**.

¹⁰⁰⁹ See Letter from the GoS State Minister at the Peace Advisory, Mr. Idris Mohamed Abdelgadir to Cdr Nhial Deng Nhial Leader of the SPLM Delegation, copying Lt. Gen. Sumbeiywo, dated 19 February 2005, **Exhibit-FE 13/11**; Witness Statement of Lt. Gen. Sumbeiywo, at p. 17, ¶90; see also Witness Statement of Minister Deng Alor Kuol, at p. 14, ¶80; Witness Statement of James Lual Deng, at p. 4, ¶19.

¹⁰¹⁰ See Letter from Cdr. Nhial Deng Nhial to Mr. Idris Mohammed Abdelgadir, copying Lt. Gen. Sumbeiywo, dated 27 February 2005, **Exhibit-FE 13/12**; Witness Statement of Lt. Gen. Sumbeiywo, at p. 17, ¶90; see also Witness Statement of Minister Deng Alor Kuol, at pp. 13-14, ¶¶78-79; Witness Statement of James Lual Deng, at p. 4, ¶¶20-21.

¹⁰¹¹ See Witness Statement of Minister Deng Alor Kuol, at pp. 13-14, ¶79; Witness Statement of James Lual Deng, at p. 4, ¶20.

¹⁰¹² See Letter from Cdr. Nhial Deng Nhial to Mr. Idris Mohammed Abdelgadir, copying Lt. Gen. Sumbeiywo, dated 27 February 2005, **Exhibit-FE 13/12**.

¹⁰¹³ See above at paras. 597-601.

3. The ABC Experts and the Parties Collaboratively Implemented the Procedural Steps Set Forth in the Terms of Reference and Rules of Procedure

607. Between April and June 2005, the parties and the ABC jointly implemented the procedural steps set forth in the Terms of Reference and Rules of Procedure. This was both a remarkable and an intensive procedure. In particular, the proceedings conducted by the ABC and the parties were collaborative and in the nature of the envisaged “*partnership*.”¹⁰¹⁴ the ABC proceedings entailed the parties working closely with the Commission and with one another to arrange transport (including into areas of recent armed conflict), public meetings and witness testimony (including with groups of recent combatants), site inspections and extensive presentations by the parties.¹⁰¹⁵

608. As discussed above, the ABC devoted an extraordinary amount of time to its work, with the ABC Experts immersing themselves intensively in the history, ethnography and other aspects of the issues before them. That included making arduous visits to the Abyei Area and surrounding regions and spending extensive periods of time with the SPLM/A and GoS delegations, the Ngok Dinka, and the Misseriya and other neighboring tribes.

609. The ABC approached its mandate by having the GoS and SPLM/A members of the ABC submit the two parties’ preliminary presentations to the ABC Experts on 11 and 12 April 2005.¹⁰¹⁶ Ambassador Dirdeiry conducted the presentation of the GoS, while Deng Alor did so on behalf of the SPLM/A.¹⁰¹⁷

610. As contemplated by the ABC Rules of Procedure,¹⁰¹⁸ the ABC next flew to Khartoum (on 13 April 2005) and on to Abyei town in the heart of the Abyei region (on 14 April 2005).¹⁰¹⁹ Over the ensuing six days, the ABC heard testimony from a large number of local residents in Abyei town and in areas to the south and northwest, including in Agok and Muglad respectively.¹⁰²⁰ The meetings were generally attended by all members of the ABC, including in particular Ambassador Dirdeiry and Deng Alor.¹⁰²¹

611. Among other things, as discussed above, the Commission conducted a number of open, public meetings in eleven separate locations in and around the Abyei Area, including: Abyei town,¹⁰²² Langar [Arabic: Goleh],¹⁰²³ Pawol [Arabic: Fauwel],¹⁰²⁴ Dakjur [Arabic:

¹⁰¹⁴ See above at paras. 511, 556.

¹⁰¹⁵ See also Witness Statement of Lt. Gen. Sumbeiywo, at p. 18, ¶107.

¹⁰¹⁶ See ABC Report, Part II, App. 3, at p. 27, **Exhibit-FE 15/1**; see also Witness Statement of Minister Deng Alor Kuol, at pp. 17-18, ¶104-114; Witness Statement of James Lual Deng, at pp. 9-11, ¶¶50-60.

¹⁰¹⁷ ABC Report, Part II, App. 3, at p. 27, **Exhibit-FE 15/1**. See also GoS First Presentation, dated 11 April 2005, **Exhibit-FE 14/2**; First SPLM Presentation, dated 10 April 2005, **Exhibit-FE 14/1**; Witness Statement of Minister Deng Alor Kuol, at pp. 17-18, ¶¶104, 110; Witness Statement of James Lual Deng, at pp. 9-10, ¶¶50, 55.

¹⁰¹⁸ ABC RoP, Art. 5, **Appendix F**.

¹⁰¹⁹ ABC Report, Part I, at p. 3, **Appendix B**; see also Witness Statement of Minister Deng Alor Kuol, at p. 18, ¶115; Witness Statement of James Lual Deng, at p. 11, ¶61.

¹⁰²⁰ ABC Report, Part I, at p. 3, **Appendix B**. For records of the meetings held between 14-18 April 2005, see ABC Report, Part II, App. 4, at pp. 30-147, **Exhibit-FE 15/1**; see also Witness Statement of Minister Deng Alor Kuol, at p. 19, ¶117; Witness Statement of James Lual Deng, at p. 11, ¶62.

¹⁰²¹ The ABC representatives of the GoS and SPLM participated in all witness meetings, except the Khartoum meetings held on 21 April 2005, 6 and 8 May 2005, which were agreed to by the ABC Experts at the request of people not having participated in the meetings agreed to by the parties. Professor Gutto participated in all meetings after he had been appointed a Commission member on 16 May 2005. See, e.g., ABC Report, Part II, App. 4, at pp. 46, 76, 78, 140, **Exhibit-FE 15/1**; see also Witness Statement of Paramount Chief Kuol Deng Kuol Arop, at p. 10, ¶47; Witness Statement of James Lual Deng, at p. 11, ¶65 (“The meetings were generally attended by all the members of the ABC, including the leaders of both the SPLM/A and GoS delegations.”).

¹⁰²² See ABC Report, Part II, App. 4, at pp. 33-36, **Exhibit-FE 15/1**.

Dembaloya],¹⁰²⁵ Lau,¹⁰²⁶ Tordach [Arabic: Umm Bilael],¹⁰²⁷ Chigei/Thigei,¹⁰²⁸ Kol Yith [Arabic: Lukji] and¹⁰²⁹ Agok (in SPLM/A territory),¹⁰³⁰ Muglad town (in Misseriya territory).¹⁰³¹ Chigei/Thigei,¹⁰³² and Lukji/Kol Yith.¹⁰³³ The ABC also heard testimony from Ngok and Twic Dinka representatives in Khartoum.¹⁰³⁴ In total, and as contemplated by the parties' agreements, the ABC heard live witness testimony from 104 people, of which 47 were Dinka and 57 Misseriya,¹⁰³⁵ in addition to which the ABC Experts heard the testimony of 21 Dinka in Khartoum.¹⁰³⁶

612. The ABC followed the same general procedure at each of the meetings, tailored to the demands of particular locations: the Chairman and/or other members of the Commission summarized the mandate of the ABC and then gave the representatives of the GoS and SPLM/A an opportunity to address the attendees. Thereafter, local witnesses gave statements under oath. In seven meetings held in and around Abyei town, in Agok and in Muglad town, the ABC afforded the public time to ask questions and seek clarifications, which were simultaneously translated into Arabic, Dinka or English, depending on the audience.¹⁰³⁷

613. Working in collaboration with the parties, the ABC afforded both the parties' representatives and residents of the region opportunities to be heard beyond what had been specified in the Terms of Reference and Rules of Procedure.¹⁰³⁸ The ABC eventually traveled to several sites not originally specified by the parties (including specifically Lau, Langar [Arabic: Goleh], Tordach [Arabic: Umm Bilael], Kol Yith [Arabic: Lukji], and Chigei/Thigei).¹⁰³⁹ The Commission also conducted an extra meeting in Abyei town (on 15 April) specifically in order to hear testimony from Misseriya and other supporters of the GoS position.¹⁰⁴⁰ There were no objections during any of these various meetings by either of the parties to any of the procedures or actions of the ABC.¹⁰⁴¹

¹⁰²³ See ABC Report, Part II, App. 4, at pp. 36-39, **Exhibit-FE 15/1**.

¹⁰²⁴ See ABC Report, Part II, App. 4, at pp. 39-41, **Exhibit-FE 15/1**.

¹⁰²⁵ See ABC Report, Part II, App. 4, at pp. 41-44, **Exhibit-FE 15/1**.

¹⁰²⁶ See ABC Report, Part II, App. 4, at pp. 44-47, **Exhibit-FE 15/1**.

¹⁰²⁷ See ABC Report, Part II, App. 4, at pp. 47-53, **Exhibit-FE 15/1**.

¹⁰²⁸ See ABC Report, Part II, App. 4, at pp. 53-54, **Exhibit-FE 15/1**.

¹⁰²⁹ See ABC Report, Part II, App. 4, at pp. 55-57, **Exhibit-FE 15/1**.

¹⁰³⁰ See ABC Report, Part II, App. 4, at pp. 57-79, **Exhibit-FE 15/1**.

¹⁰³¹ See ABC Report, Part II, App. 4, at pp. 79-111, **Exhibit-FE 15/1**.

¹⁰³² See ABC Report, Part II, App. 4, at pp. 53-54, **Exhibit-FE 15/1**.

¹⁰³³ See ABC Report, Part II, App. 4, at pp. 55-57, **Exhibit-FE 15/1**.

¹⁰³⁴ ABC Report, Part I, at p. 10, **Appendix B**; ABC Report, Part II, App. 4, at p. 30, **Exhibit-FE 15/1**.

¹⁰³⁵ ABC Report, Part I, at p. 10, **Appendix B**, ABC Report, Part II, App. 4, at p. 30, **Exhibit-FE 15/1**.

¹⁰³⁶ ABC Report, Part I, at p. 10, **Appendix B**, ABC Report, Part II, App. 4, at p. 30, **Exhibit-FE 15/1**.

¹⁰³⁷ ABC Report, Part I, at pp. 10-12, **Appendix B**. As noted above, the proceedings at each of the meetings conducted by the ABC were recorded *verbatim*. ABC Report, Part II, App. 4, at p. 30, **Exhibit-FE 15/1**.

¹⁰³⁸ See Witness Statement of Minister Deng Alor Kuol, at pp. 16, 22, ¶¶98, 136; Witness Statement of Paramount Chief Kuol Deng Kuol Arop, at p. 10, ¶51 ("Later the ABC members got in a helicopter and visited some of these [Misseriya] cattle camps even though they were not specified in the ABC's Terms of Reference") and at p. 10, ¶52 ("The Ngok Dinka decided beforehand that each chiefdom would meet and decide who would represent them. Several pro-Government of Sudan Dinka that did not coordinate their arrival to Abyei town with us were upset with the ABC that they were not being allowed to speak. The ABC members decided to meet with these pro-Government of Sudan individuals separately in the evening. I was not at that meeting.") The SPLM/A had originally also proposed visits to several further sites, but the GoS representatives objected and the visits were ultimately not conducted. See Witness Statement of Minister Deng Alor Kuol, at p. 19, ¶116.

¹⁰³⁹ ABC Report, Part I, at p. 34, **Appendix B**. The Terms of Reference only identified Dambaloya/Dak Jur, Pawol/Fawol and Abugazala/Mabek as sites to be visited. See ABC ToR, Art. 3.2(b), **Appendix E**.

¹⁰⁴⁰ ABC Report, Part II, App. 4, at p. 34, **Exhibit-FE 15/1**. The witnesses heard were: Ahmed Muhammad Bakai; a number of pro-GoS group members, including: Juma Bashir Deng Kuot; James Ajing; Ahmed Dudiang; Rahman Ismail Kher. See also Witness Statement of Minister Deng Alor Kuol, at p. 20, ¶127; Witness Statement of Paramount Chief Kuol Deng Kuol Arop, at p. 10, ¶51 ("Later the ABC members got in a helicopter and visited some of these [Misseriya] cattle camps even though they were not specified in the ABC's

614. On 21 April 2005, after conducting meetings in and around the Abyei Area and in Muglad, the ABC traveled to Khartoum, where it conducted, in accordance with Article 7 of the ABC Terms of Reference, further interviews requested by the Ngok and Twic Dinka.¹⁰⁴² In particular, the ABC heard the testimony of Justin Deng, the former administrator of the Abyei Area.¹⁰⁴³ The meeting was attended by other Ngok Dinka, including Charles Deng, Dr. Kuol Arop Kuol, Monyiang Deng Kuol, Kuol Deng, Bullabek Alor and Biong Riang.¹⁰⁴⁴

615. As contemplated by the ABC Rules of Procedure, the testimony of witnesses at the public meetings before the ABC was tape-recorded and transcribed for use by the Commission. Insofar as logistically possible, transcripts of the testimony were attached to the ABC Report as Appendix 4.¹⁰⁴⁵ The ABC Experts also took notes from the witness interviews, which were deposited with the IGAD in Nairobi, Kenya.¹⁰⁴⁶ The ABC Experts also provided the other Commission members, who did not attend the Khartoum interviews with the transcripts of these interviews.¹⁰⁴⁷

616. At no point during any of the meetings in or around the Abyei Area were any objections or protests raised by either of the parties regarding the procedures or actions of the ABC. No representative of the GoS, and no resident of Abyei, made any suggestion that the ABC's procedures were inappropriate or that the Commission was exceeding or not fulfilling its mandate. On the contrary a number of witnesses expressed their gratitude for the work the ABC was undertaking.¹⁰⁴⁸

617. It bears emphasis that the hearing of the oral testimony in open, public meetings and the inspection of the Abyei Area and associated towns, shrines and other sites was an ambitious undertaking (on which the parties had agreed¹⁰⁴⁹ and as to which they collaborated in implementing). In broad terms, a 15-member Commission was transported into a remote

Terms of Reference.”)

¹⁰⁴¹ See Witness Statement of Minister Deng Alor Kuol, at pp. 17, 18, 21, 22, ¶¶114, 132, 135, 136; Witness Statement of James Lual Deng, at pp. 9, 11, 17, ¶¶49, 64, 97.

¹⁰⁴² ABC Report, Part II, App. 4, at pp. 148 *et seq.*, **Exhibit-FE 15/1**; *see also* Witness Statement of Minister Deng Alor Kuol, at p. 22, ¶136; Witness Statement of James Lual Deng, at p. 14, ¶79.

¹⁰⁴³ ABC Report, Part II, App. 4, at pp. 148-149, **Exhibit-FE 15/1**.

¹⁰⁴⁴ ABC Report, Part II, App. 4, at p. 148, **Exhibit-FE 15/1**. The hearing of the Ngok Dinka continued on 6 May 2005 in Khartoum, where the ABC heard the testimonies of further Ngok Dinka (below). ABC Report, Part II, App. 4, at p. 149 *et seq.*, **Appendix B**. The witnesses heard were: Mijak Kuot Kur (Achaak); Peter Nyuat Agok Bol (Alei); Chor Deng Akounon (Mareng); Deng Aru (Anyiel); Deng Chier Agoth Akuei Alor (Abyor); Majith Deng Mading (Diil). Twich Dinka were heard on 8 May 2005, *see* ABC Report, Part II, App. 4, at p. 156 *et seq.*, **Exhibit-FE 15/1**.

¹⁰⁴⁵ *See* ABC Report, Part II, App. 4, at pp. 30-162, **Exhibit-FE 15/1**.

¹⁰⁴⁶ Abyei Border Commission, *Notes on Testimony Obtained in Field Visits*, dated 25 April 2005, **Exhibit-FE 14/6**. These notes later became part of the ABC Report. *See* ABC Report, Part II, App. 4, at p. 30 *et seq.*, **Appendix B**.

¹⁰⁴⁷ *See* ABC Report, Part II, App. 4, at pp. 148-158, **Exhibit-FE 15/1**. *See also* Witness Statement of Minister Deng Alor Kuol, at p. 22, ¶136; Witness Statement of James Lual Deng, at p. 14, ¶80.

¹⁰⁴⁸ *See* ABC Report, Part II, App. 4, at p. 33, (Ahmed Muhammad Bakai, Humr, Mezaghna: “I thank you a lot. We want you to solve our problem and we thank Ali Osman and Dr. John Garang de Mabiior and President Omar El Bashir. And these days after the peace agreement we can now sleep because we want to rest. We do not want more problems. I swear that the Misseriya and Ngok are brothers. Nothing will divide us, even if they go to the South. We shall never leave them; we shall stay in one place because since we were created, we were created together. Nothing will divide us.”) **Exhibit-FE 15/1**; ABC Report, Part II, App. 4, at p. 53 (Mahan Azoza: “We thank you very much for coming here. We thank our brothers the Sudanese and our brothers who are coming from outside Sudan. And we are very much thankful to those who made peace, both the Government of Sudan and the SPLM.”) **Exhibit-FE 15/1**; ABC Report, Part II, App. 4, at p. 63 (John Ajang Deng: “I am really very happy that you have called us so that we come and tell you this. ... I am very happy. I thank you. ... I thank you very much.”), **Exhibit-FE 15/1**; ABC Report, Part II, App. 4, at p. 127 (Zacharia Atem: “I thank the Chairman of the ABC and the experts.”), **Exhibit-FE 15/11**.

¹⁰⁴⁹ *See above* at paras. 582-583, 589-590.

area of Sudan which is difficult to access at the best of times.¹⁰⁵⁰ The difficulties of that task were made materially greater by the fact that the area was visited only months after a two decade long civil war had devastated the region.

618. In these conditions, the ABC then met in person with some 104 local inhabitants, many of whom had recently been engaged in brutal armed conflict with one another. Complicating matters, and pursuant to the parties' directions, the ABC heard testimony in open public meetings attended by large numbers of local residents.¹⁰⁵¹

619. It also bears emphasis that, with the parties' assistance and collaboration, the ABC went beyond the Program of work outlined in the Terms of Reference and Rules of Procedure, in order to hear more evidence and visit more sites than originally contemplated. The work of the Commission during its visits to and around the Abyei Area is described in the witness statements of Minister Deng Alor and James Lual Deng.¹⁰⁵² Those statements, and the documentary record, describe the exceptional efforts by the ABC, working together with the parties, to garner the maximum amount of information possible about the Abyei Area.

620. The ABC's fact finding was, in the annals of international procedural innovation,¹⁰⁵³ both ambitious and remarkable. At the same time, the ABC's public hearing of oral testimony served vitally-important purposes, which the parties considered essential to the Commission's role. This process brought the ABC Experts face to face, in person, with the residents of the Abyei Area, able to assess both individual and group credibility. Despite formidable logistical obstacles and not insubstantial risks, the Commission was able to gain a uniquely valuable view of the parties and their evidence by reason of the procedural format which the parties had designed.

621. After conducting these meetings in Sudan, as contemplated by the parties' agreements, the ABC Experts examined historical records relevant to the issues before them.¹⁰⁵⁴ On 27 April 2005, the ABC Experts returned to Khartoum and for the next two weeks they examined historical documents at the Sudan National Records Office.¹⁰⁵⁵ They also reviewed maps at the Sudan National Survey Authority and additional documents at the University of Khartoum library.¹⁰⁵⁶

622. In order for the ABC Experts to review the necessary documents, the IGAD Secretariat requested the GoS to facilitate the ABC Experts' work by, for example, waiving

¹⁰⁵⁰ These difficulties are discussed above. *See above* at paras. 582, 610-611.

¹⁰⁵¹ A majority of the oral evidence was provided to the ABC in translation, which presented its own challenges. ABC Report, Part II, App. 4, at p. 33, **Exhibit-FE 15/1**. It is for example clear from the ABC Report that the translators had to be changed at times. *See, e.g.*, ABC Report, Part II, App. 4, at p. 72, **Exhibit-FE 15/1**.

¹⁰⁵² *See* Witness Statement of Minister Deng Alor Kuol, at pp. 18-22, ¶¶115-137; Witness Statement of James Lual Deng, at pp. 11-17, ¶¶62-97.

¹⁰⁵³ J. Crook, *Symposium: Human Right and the Law of War: New Role for the World Court?*, 1 Nw. U. J. Int'l Hum. Rts., *23 (2003) ("The Court also has rather rudimentary procedures for presenting and assessing disputed evidence in cases with complicated disputed facts."), **Exhibit-LE 1/4**; R. Goldstone, R. Hamilton, *Bosnia v. Serbia: Lessons From The Encounter Of The International Court Of Justice With The International Criminal Tribunal For The Former Yugoslavia* L.J.I.L., 21(1), 95 (2008), **Exhibit-LE 1/5**; R. Teitelbaum, *Recent fact-finding developments at the International Court of Justice* L.P.I.C.T. 2007, 6(1), 119 ("[t]he International Court of Justice is poorly equipped for handling complex facts"), **Exhibit-LE 1/6**; D. Sandifer, *Evidence Before International Tribunals*, 22 (1975) ("The difficulties in obtaining accurate and authentic evidence is the bane of the work of boundary arbitration tribunals."), **Exhibit-LE 1/7**.

¹⁰⁵⁴ ABC Report, Part I, at pp. 4 and 11, **Appendix B**.

¹⁰⁵⁵ ABC Report, Part I, at p. 4, **Appendix B**.

¹⁰⁵⁶ ABC Report, Part I, at p. 4, **Appendix B**.

restrictions on a number of files.¹⁰⁵⁷ The IGAD Secretariat also requested assistance from sponsoring governments and wrote to the Swiss government in order to obtain a cartographer to work together with the ABC Experts¹⁰⁵⁸ and found a contractor to work under the supervision of the ABC Experts.¹⁰⁵⁹ Throughout their work, the ABC Experts stayed in close contact with the IGAD Secretariat in order to obtain access to materials and resources that they required.¹⁰⁶⁰

623. On 12 May 2005, the five ABC Experts met with General Sumbeiywo to report on their progress and request the services of a professional cartographer.¹⁰⁶¹ Thereafter, Ambassador Petterson (ABC Chairman), Dr. Johnson and Professor Muriuki traveled to England.¹⁰⁶² Between 17 and 27 May 2005, the three experts visited Oxford University, where they examined documents at the Rhodes House Library and documents and maps at the Bodleian Library.¹⁰⁶³ The three experts also traveled to Durham to review documents and maps at the Sudan Archive of the University of Durham.¹⁰⁶⁴ While Ambassador Petterson, Professor Muriuki and Dr. Johnson were performing research in the United Kingdom, Professors Berhanu and Gutto undertook further research in Addis Ababa and Pretoria, respectively.¹⁰⁶⁵

624. Prior to arriving in Sudan, on 8 April 2005, Dr. Johnson conducted an interview with Michael and Anne Tibbs in the United Kingdom.¹⁰⁶⁶ Mr. Tibbs was the last British District Commissioner of the Dar Misseriya District, where he and his wife had lived from 1951 to 1954.¹⁰⁶⁷ The Tibbs were interviewed again on 21 May 2005 by Ambassador Petterson, Professor Muriuki and Dr. Johnson.¹⁰⁶⁸ During the same trip, the ABC experts interviewed Professor Ian Cunnison, author of *Baggara Arabs*, in Hull, on 22 May 2005.¹⁰⁶⁹ Professor Cunnison lived for approximately two years in the camps of one of the Humriya tribe in the early 1950s and was widely acknowledged as a leading expert on the Misseriya.¹⁰⁷⁰

625. Finally, the ABC Experts heard the GoS's and SPLM/A's final presentations on 16 and 17 June 2005.¹⁰⁷¹ At the request of the GoS, the ABC Experts permitted additional presentations, beyond those provided for in the parties' previous procedural arrangements.¹⁰⁷²

¹⁰⁵⁷ See Letter from Lt. Gen. Sumbeiywo to The Ambassador of Sudan in Nairobi, dated 26 April 2005, **Exhibit-FE 14/8**. The IGAD Secretariat requested the GoS to give the experts access to the following documents: "Palace Papers (PP), 1900-1906; Cairo Intelligence (Cairint); Intelligence (Intel) especially the Sudan Intelligence Reports; Civil Secretary (Civsec), Dahkhliya I 112 (Historical and Ethnographic), Kordofan Province (KP); Bahr el-Ghazal Province (BGP); Aweil District, and any other relevant documents as may arise". The IGAD also requested a separate working room for the experts and assistance from the Sudan Survey Department.

¹⁰⁵⁸ See Letter from Lt. Gen. Sumbeiywo to Swiss Ambassador Combernous, dated 3 May 2005, **Exhibit-FE 14/9**.

¹⁰⁵⁹ See Contract Between IGAD Secretariat and Tourist Maps Ltd, dated 11 July 2005 for map drawing services, **Exhibit-FE 14/23a**.

¹⁰⁶⁰ See, e.g., Email from Prof. Berhanu to F. Keiru, IGAD Secretariat, dated 6 May 2005, **Exhibit-FE 14/10**.

¹⁰⁶¹ ABC Report, Part I, at p. 4, **Appendix B**.

¹⁰⁶² See Email from Dr. Johnson to IGAD Secretariat, dated 25 May 2005, **Exhibit-FE 14/16**.

¹⁰⁶³ ABC Report, Part I, at p. 4, **Appendix B**.

¹⁰⁶⁴ ABC Report, Part I, at pp. 4-5, **Appendix B**.

¹⁰⁶⁵ ABC Report, Part I, at p. 5, **Appendix B**.

¹⁰⁶⁶ ABC Report, Part II, App. 4, at pp. 158-160, **Exhibit-FE 15/1**.

¹⁰⁶⁷ ABC Report, Part II, App. 4, at p. 158, **Exhibit-FE 15/1**. Mr. and Mrs. Tibbs authored memoirs entitled *A Sudan Sunset* in 1999. See generally M. Tibbs & A. Tibbs, *A Sudan Sunset* (1999), **Exhibit-FE 8/17**.

¹⁰⁶⁸ ABC Report, Part II, App. 4, at p. 159, **Exhibit-FE 15/1**.

¹⁰⁶⁹ ABC Report, Part II, App. 4, at p. 160, **Exhibit-FE 15/1**.

¹⁰⁷⁰ I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* vi (1966), **Exhibit-FE 4/16**.

¹⁰⁷¹ ABC Report, Part II, App. 3, at p. 27, **Exhibit-FE 15/1**. See also GoS Final Presentation, dated 16 June 2005, **Exhibit-FE 14/18**; SPLM/A Final Presentation, dated 14-16 June 2005, **Exhibit-FE 14/13**.

¹⁰⁷² See Witness Statement of Minister Deng Alor Kuol, at p. 24, ¶148.

As with the other proceedings before the ABC, there were no objections by either party during the course of these presentations or to the ABC Experts' conduct of the proceedings.

4. The ABC Experts Repeatedly Explained their Understanding of the Parties' Definition of "Abyei Area," Without Any Suggestion by the GoS that this Definition Exceeded the ABC's Mandate or that the ABC Lacked Authority to Adopt this Definition

626. Throughout the ABC's proceedings, both parties made full use of numerous opportunities to present their cases to the ABC in both oral hearings and multiple meetings with the public in and around the Abyei Area. During the course of these proceedings, the parties heard the ABC Experts repeatedly explain their understanding of the parties' agreements, and particularly, the definition of "Abyei Area" contained in Article 1.1.2 of the Abyei Protocol. None of the GoS representatives objected to the ABC Experts' statements, or attempted to correct them, but instead they all repeatedly and specifically affirmed that the ABC had the power to interpret the definition of the "Abyei Area" and that the ABC's decision would be final and binding.

627. Among other things, the ABC Rules of Procedure provided that the Chairman should "explain the purpose of the Commission [at each meeting with the public] noting that the said purpose is limited to defining and demarcating the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905."¹⁰⁷³ Consistent with this provision, one member of the ABC explained the Commission's purpose at each of the various meetings.¹⁰⁷⁴

628. At the ABC's first meeting on 14 April 2005 (in Abyei town), Dr. Johnson explained, at Ambassador Petterson's invitation, that:

"The Peace Agreement between the Government of Sudan and SPLM made a special provision for Abyei. ... The Peace Agreement, that was mentioned, speaks specifically about the nine sections of the Ngok Dinka. The Peace Agreement refers to *the Abyei area that was occupied by the nine sections of the Ngok Dinka*."¹⁰⁷⁵

629. There was no disagreement with this explanation of the parties' agreements. There was no suggestion by the GoS or the SPLM/A that Dr. Johnson's description of the Abyei Protocol was inaccurate or incomplete, and no suggestion that the ABC was not entitled to interpret the parties' definition of the term "Abyei Area" in the course of its work.

630. The ABC Experts subsequently reiterated their understanding of the parties' definition of the Abyei Area in the Abyei Protocol (and elsewhere) on multiple occasions:

a. At the meeting on 16 April 2005 in Dembloya, Ambassador Petterson stated: "They have explained to you about the Peace Agreement and our part is a small part – *to determine the boundaries of the nine Ngok Dinka Chiefdoms as they existed 100 years ago*."¹⁰⁷⁶ There was no disagreement from any of the GoS members of the ABC or GoS representatives at the meeting.

¹⁰⁷³ ABC RoP, Art. 8, **Appendix F**.

¹⁰⁷⁴ The transcript of each of these meetings appears in the text of the ABC Report at Appendix 4. ABC Report, Part II, App. 4, **Exhibit-FE 15/1**.

¹⁰⁷⁵ ABC Report, Part II, App. 4, at p. 129, **Exhibit-FE 15/1** (emphasis added).

¹⁰⁷⁶ ABC Report, Part II, App. 4, at p. 41, **Exhibit-FE 15/1** (emphasis added).

b. At the meeting in Umm Baleal on 17 April 2005, Professor Muriuki explained that the ABC was set up “because during the negotiations, the two groups could not agree on what to do about Abyei. ... ***Our purpose is to decide on the boundaries that existed in 1905 between the Misseriya and Ngok Dinka.***”¹⁰⁷⁷ Again, there was no disagreement from any of the GoS members of the ABC or GoS representatives at the meeting.

c. At the meeting in Muglad also on 17 April 2005, Ambassador Petterson explained that “[our job is solely to] define and to demarcate ***the area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan from Bahr el-Ghazal province in 1905.***”¹⁰⁷⁸ Once more, there was no disagreement from any of the GoS members of the ABC or GoS representatives at the meeting.

d. At the meeting in Agok on 18 April 2005, Ambassador Petterson again stated that it was the mandate of the ABC 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, we, the members of the Commission, will examine historical records and documents and we shall listen to the representatives of the people of the Abyei Area and the neighbours. ... Again, the mandate of the Abyei Boundaries Commission is only, is solely to define and demarcate the Abyei Area.”¹⁰⁷⁹ As on other occasions, there was no disagreement with that statement by either party.

631. As already noted, at no point during the ABC’s work did the GoS or SPLM/A object to the ABC’s statements regarding the definition of the Abyei Area or question the Commission’s right to interpret the Abyei Protocol. Rather, the GoS and the SPLM/A proceeded without objection or protest, to present evidence and argument about the extent of the territory used by the nine Ngok Dinka Chiefdoms in 1905.

632. Thus, in the SPLM/A’s opening presentation, it argued that the “Abyei area as stipulated in the Protocol is the ***homeland of the Ngok Dinka, comprising nine sections of Abior, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mareng and Man-nyuar.***”¹⁰⁸⁰ Similarly, the SPLM/A observed that “the formation of the Abyei Boundaries Commission (ABC) [was] to demarcate the boundaries of the Ngok Dinka area.”¹⁰⁸¹

633. The SPLM/A also argued in its subsequent presentations that “what we are demanding of this peace is ***to define the Ngok boundaries during [the time of 1905, during the time of Arop Biong].***”¹⁰⁸² The final presentation given by SPLM/A to the ABC on 16 June 2005 repeated that “the Abyei area as stipulated in the Abyei Protocol is ***the homeland of the Ngok Dinka***, comprising nine sections of Abior, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mareng and Man-nyuar.”¹⁰⁸³

634. For its part, the GoS representatives took varying positions regarding the meaning of Article 1.1.2’s definition of the Abyei Area, but repeatedly acknowledged the ABC’s right –

¹⁰⁷⁷ ABC Report, Part II, App. 4, at pp. 52-53, **Exhibit-FE 15/1** (emphasis added).

¹⁰⁷⁸ ABC Report, Part II, App. 4, at p. 79, **Exhibit-FE 15/1** (emphasis added).

¹⁰⁷⁹ ABC Report, Part II, App. 4, at p. 58, **Exhibit-FE 15/1** (emphasis added).

¹⁰⁸⁰ SPLM Preliminary Presentation, dated 10 April 2005, at p. 3, **Exhibit-FE 14/1** (emphasis added).

¹⁰⁸¹ SPLM Preliminary Presentation, dated 10 April 2005, at p. 7, **Exhibit-FE 14/1**.

¹⁰⁸² ABC Report, Part II, App. 4, at p. 78, **Exhibit-FE 15/1** (emphasis added).

¹⁰⁸³ SPLM Final Presentation, dated 16 June 2005, at p. 18, **Exhibit-FE 14/13**.

and responsibility – to interpret that definition. At the ABC’s first meeting on 14 April 2005 in Abyei Town, Zacharia Atem, one of the GoS representatives on the ABC, commented:

“We have one main thing to determine, the point about 1905. This is what we want to determine – *which place in 1905 was taken from Bahr El-Ghazal to Kordofan. ... we are here to determine the area that the Ngok occupied before being transferred to Kordofan in 1905.*”¹⁰⁸⁴

635. Similarly, the opening presentation by the GoS argued variously that the ABC should “*only [be] concerned with the area of the nine Ngok Dinka Chiefdoms*”¹⁰⁸⁵ and that the “concerned area was a southern area transferred to the north in 1905; i.e. it is not any area that was in Kordofan before 1905.”¹⁰⁸⁶ While far from clear, the GoS’s basic position was apparently that, as a factual matter, the Ngok Dinka had only resided south of the Kiir/Bahr el Arab River, in the Province of Bahr el Ghazal prior to 1905, and therefore that the Abyei Area would only involve territory south of the Kiir/Bahr el Arab river.

636. More fundamentally, throughout the ABC’s work, the GoS repeatedly acknowledged the Commission’s right – and responsibility – to interpret the definition of the “Abyei Area” which was included in Article 1.1.2 of the Abyei Protocol. Thus, in its final presentation, the GoS announced its view of “[w]hat the ABC Shall Do,” being to “[d]efine the nine Ngok Dinka Chiefdom[’]s territory transferred to Kordofan in 1905” and “[d]emarcate that definition on land.”¹⁰⁸⁷ As discussed below, that is precisely what the ABC Report did.¹⁰⁸⁸

637. The GoS’s final presentation also identified a variety of things that “the ABC Shall Not Do,” including “*renegotiation,*” “*equitable compromise,*” “*invent a new parameter other than yardstick of the year 1905,*” and deal with “*other aspects of the settlement.*”¹⁰⁸⁹ Notably absent from that list was any suggestion that the ABC lacked the power to interpret Article 1.1.2 of the Abyei Protocol or to apply that definition to the evidentiary record. In particular, the GoS never hinted during the ABC’s proceedings that it considered that the Commission would exceed its mandate by adopting the definition which the ABC’s members had repeatedly and unambiguously referred to during the Commission’s various meetings (quoted above¹⁰⁹⁰).

638. On the contrary, the GoS explicitly conceded that the ABC would be fully entitled to adopt an interpretation of the definition of the Abyei Area which differed from that which the GoS representatives advanced. Thus, at the ABC’s 18 April meeting in Agok, the GoS delegation acknowledged in unambiguous terms that the Abyei Area might include territories both north and south of the Kiir/Bahr el Arab (which the GoS claimed as the 1905 border of Kordofan).¹⁰⁹¹

¹⁰⁸⁴ ABC Report, Part II, App. 4, at pp. 127-128, **Exhibit-FE 15/1** (emphasis added). Indeed, this remark prompted Ambassador Petterson to comment “I would like the opportunity to respond to a point that our colleague has just made *that we do not quite agree with,*” and to invite Dr. Johnson to clarify the ABC’s understanding of the definition of Abyei Area. As discussed above, like the ABC’s other explanations, Dr. Johnson described the Abyei Area as “*the Abyei area that was occupied by the nine sections of the Ngok Dinka.*” See ABC Report, Part II, App. 4, at p. 129, **Exhibit-FE 15/1**.

¹⁰⁸⁵ GoS First Presentation, dated 10 April 2005, at p. 7, **Exhibit-FE 14/2**.

¹⁰⁸⁶ GoS First Presentation, dated 10 April 2005, at p. 7, **Exhibit-FE 14/2**.

¹⁰⁸⁷ GoS First Presentation, dated 10 April 2005, at p. 52, **Exhibit-FE 14/2**.

¹⁰⁸⁸ See below at paras. 643-661.

¹⁰⁸⁹ GoS First Presentation, dated 10 April 2005, at p. 52, **Exhibit-FE 14/2**. Of course, there is no possible basis for suggesting that the ABC did any of these things.

¹⁰⁹⁰ See above at paras. 628-630.

¹⁰⁹¹ ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1**.

639. In particular, during the ABC's meeting on 18 April 2005, Ambassador Dirdeiry said that the boundary defining the Abyei Area was the one "before th[e] transfer [in 1905] took place."¹⁰⁹² He pointed out the next day in Muglad that, depending on the ABC Experts' conclusions, the Abyei Area might *either* include "the current Abyei [lying north of the Bahr el Arab]" *or* "the one south of Bahr el Arab."¹⁰⁹³ Ambassador Dirdeiry went on to state in full that:

*"After defining the [Abyei Area], if it includes the current Abyei, then the referendum will be conducted there. And if it is not this one, it is the one south of Bahr el-Arab as we have presented in our document as a Government. Then the referendum and whatever other provisions in the agreement will be conducted south of the river Kiir."*¹⁰⁹⁴

640. Ambassador Dirdeiry could hardly have more clearly acknowledged the ABC's authority to interpret the parties' definition of the "Abyei Area." Equally, he could hardly have more clearly acknowledged that the ABC might not ultimately accept the GoS's position and might conclude that the Abyei Area was not limited to territory "south of the Bahr el Arab" (which the GoS identified as the Kordofan/Bahr el Ghazal boundary in 1905). In that event, however, Ambassador Dirdeiry did not hint that the ABC would have exceeded its mandate, but on the contrary said in terms that the Abyei Referendum would then be held north of the Kiir/Bahr el Arab.

641. Similarly, at the conclusion of the GoS's final presentation to the Commission, the Government's representatives made the following, very specific and repeated acknowledgements of the ABC's authority:

"And finally, the fact that the ABC decision is final and binding was in fact, emphasized very, very much by us there, by Deng, by myself, ... and by everybody who helped. ... [W]e want them to be very clear about that fact. And that once the decision is reached, we have to accept it and welcome it. What you are doing is to collect the information from them to bring the archives to the knowledge of our learned experts and then [your decision] will be final and binding and everybody shall accept it. ... When a decision is agreed and accepted beforehand it has to be final and binding, [and 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. Because you should have the confidence in those people and you should respect it knowing that it will be taken on completely impartial grounds. Those in fact, are very, very important reminders. ... With those few words, Mr. Chairman, I'm coming to the conclusion of the Government of Sudan presentation, of the final presentation on the Abyei Commission and we are very much hopeful that the material which you 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.

¹⁰⁹² ABC Report, Part II, App. 4, at p. 77, **Exhibit-FE 15/1**.

¹⁰⁹³ ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1**.

¹⁰⁹⁴ ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1** (emphasis added). *See also* Witness Statement of Minister Deng Alor Kuol, at p. 21 ¶133. At the same meeting, Ambassador Dirdeiry stated as follows "What we are here for is to draw boundaries that were drawn in 1905; that is saying, 100 years ago. As the Ambassador, the Chairman of this Committee, told you, before that year, the Ngok were in Bahr el Ghazal. In 1905, they were transferred to Kordofan. *There were boundaries in 1905, before that transfer took place. We want now to know those boundaries.*" ABC Report, Part II, App. 4, at p. 77, **Exhibit-FE 15/1** (emphasis added). The GoS also argued "*that we have presented to this commission 47 documents that prove the presence of Ngok Dinka before 1905 beyond the river Bahr el-Ghazal.*" ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1**.

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. Thank you very much, Mr. Chairman.”¹⁰⁹⁵

642. The GoS’s statements, made at the conclusion of the highly collaborative procedures before the ABC, were explicit and unambiguous. There was no hint of complaint about the ABC’s procedures or conduct of the proceedings and no suggestion of any excess of mandate by the Commission. Rather, precisely as the parties had agreed, in the Abyei Protocol and Abyei Annex, the GoS again specifically committed itself at the conclusion of the presentations to the Commission to respect and implement the ABC Report.

5. The ABC Report Indisputably “Defined and Demarcated the Area of the Nine Ngok Dinka Chiefdoms Transferred to Kordofan in 1905, Referred to herein as Abyei Area”

643. Having heard the parties’ presentations, the ABC Experts prepared their final Report. When it was completed, on 14 July 2005, the Report was a substantial document. 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 Report was signed and initialed by each of the five ABC Experts, who had been selected by the IGAD (Ambassador Petterson, Professor Muriuki, Professor Kassahun, Dr. Johnson and Professor Gutto). The Report was unanimous and there were neither concurring nor dissenting opinions.

644. The ABC Experts completed their Report and delivered it to the Presidency (on 14 July 2005) within the timeframe contemplated by the parties’ agreements. As with the ABC’s other work, the parties had provided for an ambitious schedule, allowing the Commission some three months (from mid-May 2004 to mid-July 2004) to complete their deliberations and prepare their Report.¹⁰⁹⁶ Nonetheless, the ABC completed its work, on schedule and without any complaint by either party regarding its activities and progress.

645. As a general matter, the ABC Report was a carefully reasoned, erudite and impressive work. It provided an expert analysis of southern Sudanese history and ethnography, drawing on the deep and complementary experiences of the Commission’s members. The Report also drew on a wide range of archival materials, oral testimony from the inhabitants of the Abyei Area (which the ABC Experts had all heard first-hand) and the ABC Experts’ visits to a variety of sites in the Abyei Area itself. Even putting aside the fact that the Report had been prepared in barely three months, as the parties had requested, the Commission’s work was an erudite and careful scholarly product.

646. The main body of the ABC Report began with a Preface that restated the ABC’s mandate, by reference to Article 5.1 of the Abyei Protocol (“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*”¹⁰⁹⁷). The Report then summarized the Experts’ Report and Decision (on pages 9 to 12) and 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).

¹⁰⁹⁵ Extract transcript from IGAD Tape Recordings, dated 16 June 2005, **Exhibit-FE 14/21** (emphasis added).

¹⁰⁹⁶ See above at para. 503.

¹⁰⁹⁷ ABC Report, Part I, at p. 3 (quoting Abyei Protocol, Art. 5.1), **Appendix B** (emphasis added).

647. Attached to the ABC Report was a series of Maps and Appendices. Of most importance was “Map 1,” which was titled “*The Abyei Area Boundaries*.” The Map delimited the ABC Experts’ definition of the Abyei Area, as defined in Article 1.1.2 of the Abyei Protocol (as “the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905”).¹⁰⁹⁸

648. The ABC Report noted, in its Preface, that the “two sides [had] presented their own positions concerning the mandate of the ABC and their contrasting definitions of the area under consideration”¹⁰⁹⁹ (referring to the presentations described above¹¹⁰⁰). The Report also noted that the parties and their witnesses presented “two sharply differing versions of what constitutes the Abyei Area.”¹¹⁰¹ The ABC Report 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 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*.”¹¹⁰²

649. The ABC’s Report then proceeded to address the issues that had been presented to the Commission by the parties. The ABC Experts’ interpretation and application of the definition of the Abyei Area (as set forth in Article 1.1.2 of the Abyei Protocol) was explained, with a wealth of historical and factual detail, in the body of the Report.

650. The Commission’s treatment of the definition of the Abyei Area elaborated on the explanations of the definition of the Abyei Area that the ABC Experts had provided, without objection from the parties, during the preceding months. As discussed above, 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*,”¹¹⁰³ “*the boundaries of the nine Dinka Chiefdoms as they existed 100 years ago*,”¹¹⁰⁴ and “*the area of the nine Ngok Dinka Chiefdoms, which were transferred to Kordofan Province from Bahr El Ghazal Province in 1905*.”¹¹⁰⁵

651. Consistent with these formulations, the ABC Report explained, in its Preface and elsewhere, that the Commission had sought “to determine as accurately as possible *the area of the nine Ngok Dinka Chiefdoms as it was in 1905*.”¹¹⁰⁶ In doing so, the Commission observed that “[n]o map exists showing the area inhabited by the Ngok Dinka in 1905” and

¹⁰⁹⁸ Abyei Protocol, Art. 1.1.2, **Appendix C**.

¹⁰⁹⁹ ABC Report, Part I, at p. 10, **Appendix B**.

¹¹⁰⁰ See above at paras. 632-637.

¹¹⁰¹ ABC Report, Part I, at p. 10, **Appendix B**.

¹¹⁰² ABC Report, Part I, at p. 11, **Appendix B** (emphasis added).

¹¹⁰³ ABC Report, Part II, App. 4, at pp. 155-156, **Exhibit-FE 15/1**.

¹¹⁰⁴ ABC Report, Part II, App. 4, at p. 41, **Exhibit-FE 15/1**.

¹¹⁰⁵ ABC Report, Part II, App. 4, at p. 58, **Exhibit-FE 15/1**.

¹¹⁰⁶ ABC Report, Part I, at p. 4, **Appendix B** (emphasis added).

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.”¹¹⁰⁷

652. As a consequence, in their Report, the ABC Experts went on to address nine separate Propositions which they concluded had “emerged from the GoS and SPLM/A presentations and from the oral testimony.”¹¹⁰⁸ As discussed in greater detail above, these included Propositions regarding the “Ngok Dinka territory” (Proposition 1), “the current Kordofan-Bahr el Ghazal border” (Proposition 2), the “inclusion of the Abyei Area in ‘Dar Messeria’ District” (Proposition 4), the ownership of locations north of “Abyei Town” (Proposition 6), the “area affected by the 1905 decision of the Condominium authorities to administer the Ngok Dinka as part of Kordofan” (Proposition 7), the “territory occupied and used by the nine Ngok Dinka Chiefdoms” (Proposition 8) and a geographical definition of the “Abyei Area” presented by the SPLM/A (Proposition 9).¹¹⁰⁹

653. The Report tested each of the nine Propositions that it had identified by reference to “analysis based on relevant historical evidence.”¹¹¹⁰ 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*”¹¹¹¹ (or, as alternatively phrased in the Report, “the *territory occupied and used by the nine Ngok Dinka Chiefdoms*”).¹¹¹² The ABC Experts’ analysis of each of these Propositions was set forth seriatim, and their conclusions were then summarized (on pages 20 and 21).

654. Also important were the ABC Report’s five Appendices. The Appendices provided further historical and other detail regarding the ABC Experts’ analysis, as well as (largely-complete) transcripts of the witness testimony given at a number of the public meetings before the Commission. Among other things, the Appendices included evidence regarding historical land rights and land use in Sudan (Appendix 2), the ABC Experts’ summaries of the GoS and SPLM/A opening and closing presentations and their positions on the evidence in general (Appendix 3), transcripts of all 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).

655. The ABC Experts’ responses to the nine Propositions (noted above) which it identified provided a deductive resolution of what constituted the Abyei Area. That resolution rejected both parties’ 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 defined geographic areas, while also using one another’s territories, particularly during seasonal migrations.¹¹¹³

656. 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

¹¹⁰⁷ ABC Report, Part I, at p. 4, **Appendix B**.

¹¹⁰⁸ ABC Report, Part I, at p. 12, **Appendix B**.

¹¹⁰⁹ See above at paras. 526-527.

¹¹¹⁰ ABC Report, Part I, at p. 12, **Appendix B**.

¹¹¹¹ ABC Report, Part I, at p. 4, **Appendix B**.

¹¹¹² ABC Report, Part I, at p. 18 (Proposition 8), **Appendix B** (emphasis added).

¹¹¹³ ABC Report, Part I, at pp. 18-20, **Appendix B**; ABC Report, Part II, App. 2, at pp. 21-26, **Exhibit-FE 15/1**.

“secondary rights.”¹¹¹⁴ The Commission 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.”¹¹¹⁵ The ABC Report then relied on local principles of land law, and their “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.¹¹¹⁶

657. 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.”¹¹¹⁷ Those coordinates were then implemented on Map 1 (noted above), with the title “*Abyei Area Boundaries*.”¹¹¹⁸

658. The Commission also directed that the northern and eastern boundaries of the Abyei Area were to be physically “identified and demarcated by a survey team comprising three professional surveyors: one nominated by the National Government of Sudan, one nominated by the Government of the Southern Sudan, and one international surveyor nominated by the IGAD.”¹¹¹⁹ The ABC also provided that “[t]he presidency shall send the nominations for this team to IGAD for final approval by the international experts.”¹¹²⁰

659. As discussed above, the ABC delivered its Report to the Presidency of Sudan, as contemplated by the parties’ agreements, on 14 July 2005.¹¹²¹ Prior to the Commission’s delivery of its Report, the GoS had not complained about any of the ABC’s actions, including its conduct of the ABC proceedings and its formulation of the definition of the Abyei Area. On the contrary, as discussed above, the GoS had repeatedly undertaken to accept the Commission’s decision as “final and binding” and to put it into “immediate effect.”¹¹²²

660. Despite these commitments, in the days following publication of the ABC Report, the GoS resiled from its previous commitments. After the ABC Experts delivered the ABC Report, the GoS embarked on a strategy of resistance and delay.

661. Despite its negotiation of and agreement to the Abyei Protocol, the Abyei Annex, the Terms of Reference and Rules of Procedure, despite its active participation (without objection) in the work of the ABC, and despite its repeated assurances during the ABC proceedings, the GoS refused to accept the Experts’ decision or to implement the Report. The GoS spoke first in the press about the need to “study” the Report before implementation,¹¹²³ and eventually moved to statements by President Al-Bashir that the ABC Report “had no value to them [the NCP]”¹¹²⁴ and that the ABC Experts should “sponge their report in water and drink it.”¹¹²⁵

¹¹¹⁴ ABC Report, Part I, at p. 21-22, **Appendix B**.

¹¹¹⁵ ABC Report, Part I, at p. 20, **Appendix B**.

¹¹¹⁶ ABC Report, Part I, at p. 20, **Appendix B**.

¹¹¹⁷ ABC Report, Part I, at p. 21, **Appendix B**.

¹¹¹⁸ ABC Report, Part I, at p. 46, **Appendix B**.

¹¹¹⁹ ABC Report, Part I, at p. 22, **Appendix B**.

¹¹²⁰ ABC Report, Part I, at p. 22, **Appendix B**.

¹¹²¹ See above at paras. 533-534.

¹¹²² See above at paras. 517, 641.

¹¹²³ “President Receives Report of Abyei Panel on Border Demarcation,” Sudan Tribune, dated 15 July 2005.

Exhibit-FE 15/2; see also Witness Statement of Lt. Gen. Sumbeiywo, at p. 21, ¶121.

¹¹²⁴ “Misseriya Say Opening of Abyei Routes Depends on South Sudan Army Redeployment,” Sudan Tribune, 1 March 2008, **Exhibit-FE 16/3**.

¹¹²⁵ “NCP Vows Not to Concede Abyei to South”, dated 23 November 2007, Juba Post, available at www.sudantribune.com/spip.php?article25277 (statement made while addressing the 18th anniversary of the

B. There is No Conceivable Basis for Denying Effect to the ABC Report under the Abyei Arbitration Agreement

662. There is no conceivable basis for the GoS's after the fact objections to the ABC Experts' decision. The GoS's refusal to honor its commitments to implement that ABC Report is opportunism, aimed at delaying realization of the Ngok Dinkas' entitlement to self-determination and at trying to relitigate the substance of the Commission's decision in another forum. That is a fundamentally wrongful course of action.

663. The Abyei Arbitration Agreement provides only a single, narrowly defined basis for denying effect to the ABC Report: if, and only if, the ABC Experts "exceeded their mandate" under the parties' agreements concerning the definition of the Abyei Area may the Report be set aside. No other basis for challenging the ABC Report is permitted.

664. The GoS's purported objections to the ABC Report – however they ultimately may be articulated by its counsel in these proceedings – have no basis in the language of the parties' past agreements or their conduct before the ABC. On the contrary, the texts of the Abyei Protocol, the Abyei Annex, the Terms of Reference and the Rules of Procedure all make it clear that the ABC Experts in no way exceeded their mandate and instead did precisely what that mandate provided for them to do: that is, to define and demarcate the Abyei Area in light of the parties' definition of that territory in Article 1.1.2 of the Abyei Protocol. That is a simple and complete answer to the GoS's after the fact objections.

1. The Sole Basis for Denying Effect to the ABC Experts' Report is an "Excess of Mandate" Under Article 2(a) of the Abyei Arbitration Agreement

665. The sole basis under Articles 2(a) and 2(b) of the Abyei Arbitration Agreement for denying effect to the ABC Experts' Report is an "excess of mandate."¹¹²⁶ More specifically, Article 2(a) of the Arbitration Agreement provides that the only basis for challenging the ABC Report is presented by the question "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.'"¹¹²⁷

666. No other ground for disregarding the ABC Report is provided for or authorized by the Abyei Arbitration Agreement. On the contrary, Article 2(b) of the Arbitration Agreement provides that, "if the Tribunal determines ... that the ABC experts did not exceed their mandate, it shall make a declaration to that effect and issue an award for the full and immediate implementation of the ABC Report."¹¹²⁸

667. The basis for disregarding the ABC Report specified in Articles 2(a) and 2(b) of the Arbitration Agreement is precisely and narrowly limited to an excess of the ABC Experts' mandate. All other grounds for alleging nullity of, or refusing to comply with, the ABC Report were excluded by the Agreement – including, for example, errors of law or fact by the ABC Experts, objections to the ABC Experts' procedures or the composition of the ABC, and

National popular Forces in Wad al-Madeni), **Exhibit-FE 15/12**; see also "Abyei: Sudan's 'Kashmir,'" dated 28 January 2008, Sudan Tribune, available at www.sudantribune.com/spip.php?article26024, **Exhibit-FE 16/2**.

¹¹²⁶ Abyei Arbitration Agreement, Arts. 2(a) and 2(b), **Appendix A**.

¹¹²⁷ Abyei Arbitration Agreement, Art. 2(a), **Appendix A**.

¹¹²⁸ Abyei Arbitration Agreement, Art. 2(b), **Appendix A**.

other grounds sometimes suggested historically as bases for findings of nullity of adjudicative decisions.

668. The question of what constitutes an “excess of mandate” under the Abyei Arbitration Agreement is a matter of construing the parties’ agreement. It is a question of interpreting the text of Articles 2(a) and 2(b) of the Agreement, in the light of the language of the Agreement and the parties’ circumstances and intentions.

669. The Arbitration Agreement should be interpreted in accordance with general principles of law, in the same manner as a treaty or other contractual instrument. In accordance with general principles of customary international law, as reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms and in light of the treaty’s object and purpose.¹¹²⁹ Interpretation must be based primarily on the language of the treaty,¹¹³⁰ with supplementary recourse in cases of ambiguity to the preparatory work of the treaty and the circumstances of its conclusion.¹¹³¹

670. The same approach to the task of contractual interpretation is adopted, applying general principles of law, in developed national legal systems. Thus, the UNIDROIT Principles of International Commercial Contracts provide that contracts are to be interpreted

¹¹²⁹ *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6, 21 *et seq.* (I.C.J.), **Exhibit-LE 1/8**; see also *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, [1999] I.C.J. Rep. 1045, 1060. (I.C.J.), **Exhibit-LE 1/9**; 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, ... (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 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**.

¹¹³⁰ *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6, 22 (I.C.J.), **Exhibit-LE 1/8**; *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J. Rep. 176, 189 (I.C.J.), **Exhibit-LE 1/11**; *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Preliminary Objections)*, [1961] I.C.J. Rep. 17, 32 (I.C.J.), **Exhibit-LE 2/1**; Third Report on the Law of Treaties, Sir Humphry Waldock, Special Reporter, [*Yearbook of the International Law Commission* II, 55] (1964) (“Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the *normal sense of the words and with other parts of the text, and in such a way that reason and a meaning can be attributed to every part of the text.*”), **Exhibit-LE 2/2** (emphasis added); P. Daillier & A. Pellet, *Droit International Public*, ¶169 (7th ed. 2002) L.G.D.J. (“*The text is the object of the interpretation*”; it is also the element that best reflects the contracting parties’ intentions. ...”), **Exhibit-LE 2/3** (emphasis added); I. Seidl-Hohenveldern & T. Stein, *Völkerrecht*, ¶¶334-335 (10th ed. 2000) (“Art. 31 of the Vienna Convention stipulates the general principle that treaty is to be interpreted bona fide *according to the common understanding of its wording in its context, and in the light of the treaty’s purpose.*”), **Exhibit-LE 2/4** (emphasis added).

¹¹³¹ *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6, 22 (I.C.J.), **Exhibit-LE 1/8**; Vienna Convention on the Law of Treaties 1969, Art. 32, **Exhibit-LE 1/10**; *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, [1988] I.C.J. Rep. 69, 85, 89 (I.C.J.), **Exhibit-LE 2/5**; *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia) (Preliminary Objections)*, [1992] I.C.J. 240, 247 *et seq.* (I.C.J.), **Exhibit-LE 2/6**; P. Daillier & A. Pellet, *Droit International Public*, ¶169 (7th ed. 2002). (“No treaty interpretation can be undertaken without due regard to the circumstances, and to other norms, when these [norms] also apply to the same social realities. ... This is formulated in Article 32 of the Vienna Convention, which includes amongst its “supplementary means of interpretation”, the *travaux préparatoires* as well as the circumstances in which the treaty was concluded.”), **Exhibit-LE 2/3** (emphasis added); I. Seidl-Hohenveldern & T. Stein, *Völkerrecht*, ¶357 (10th ed. 2000) (“If in principle, we decide in favor of the true parties’ intention as basis for interpretation ..., *we still need to answer the question how to determine the true parties’ intention in doubtful cases. The most important means to do so are the preparatory materials (travaux préparatoires), i.e. exchange of notes, drafts, protocols, etc., which indicate the growth of a treaty.*”), **Exhibit-LE 2/4** (emphasis added).

in accordance with the common intention of the parties.¹¹³² In order to ascertain that intent, recourse may be had, among other things, to the language of the parties' agreement, any preliminary negotiations and the conduct of the parties.¹¹³³ Other developed jurisdictions adopt similar approaches to issues of contractual interpretation.¹¹³⁴

671. Preliminarily, the term “excess of mandate” is to be interpreted in light of the parties' deliberate choice narrowly to limit the grounds for disregarding the ABC Experts' determination. The parties might have agreed that the ABC Report could be challenged on additional grounds of nullity that have historically been suggested in other international contexts (see below¹¹³⁵). Or, the Arbitration Agreement might have been drafted to provide that the Tribunal should consider more broadly whether the ABC Experts' decision was a nullity, or was flawed by an essential error of law, or had been reached through irregular or unfair procedures.¹¹³⁶ Alternatively, the parties might have agreed to permit any of the grounds for challenging an arbitral award under Article 30 of the Draft ILC Convention on Arbitral Procedure (see below¹¹³⁷) or Article V(1) of the New York Convention (see below¹¹³⁸) to be raised.

672. The parties did not take any of these approaches. Instead, they agreed that the ABC Report could be set aside only if the ABC Experts “*exceeded their mandate*” within the meaning of Articles 2(a) and 2(b) of the Arbitration Agreement.

673. As discussed below, an “excess of mandate” under Article 2(a) of the Arbitration Agreement is a narrow and exceptional circumstance. Specifically, an excess of mandate under Article 2(a) would arise only where the ABC Experts decided disputes falling outside the category of disputes submitted for its resolution.¹¹³⁹ Only in those circumstances, where

¹¹³² UNIDROIT Principles of International Commercial Contracts, Art. 4.1, **Exhibit-LE 2/7**.

¹¹³³ UNIDROIT Principles of International Commercial Contracts, Art. 4.3, **Exhibit-LE 2/7**.

¹¹³⁴ R. Bollenberger, in H. Koziol *et al.* (eds.), *ABGB*, §914, ¶5 (2005) (“The purpose of the basic contractual interpretation is to determine the parties' intention. The basis for this is the literal sense according to common understanding. It is only the wording of an agreement that is decisive if no different intention can be assessed. **However, one has to consider all circumstances which accompanied the conclusion of the contract.**”), **Exhibit-LE 3/1** (emphasis added); H. Heinrichs, in O. Palandt (ed.), *Bürgerliches Gesetzbuch*, §133, ¶¶15-17 (67th ed. 2008) (“After interpretation of the literal sense, in a second step, **one has to include the accompanying circumstances in the interpretation, as far as they allow conclusions as to the declaration's meaning. Those accompanying circumstances could notably be aa) Preliminary negotiations ... bb) Parties' statements ...**”), **Exhibit-LE 3/2** (emphasis added); *Restatement (Second) of Contracts* §202 (1981) (“**Words and other conduct are interpreted in the light of all the circumstances.** . . . In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position [the parties] occupied at the time the contract was made. **When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances. . . . The circumstances for this purpose include the entire situation, as it appeared to the parties . . .**”), **Exhibit-LE 3/3** (emphasis added); French Civil Code, Art. 1156 (“One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms.”), **Exhibit-LE 3/4**; P. Malaurie et L. Aynès, *Les obligations*, Defrénois, ¶772 (2004) (“When the judge is seeking to establish the intention of the parties, he can take into consideration **all relevant circumstances, notably those which are related to the period before the signature of the contract . . .**”), **Exhibit-LE 3/5** (emphasis added).

¹¹³⁵ See below at paras. 686-689, 772-774.

¹¹³⁶ See below at paras. 771-791.

¹¹³⁷ See below at paras. 706-707.

¹¹³⁸ See below at para. 709.

¹¹³⁹ Some authorities have held that an excess of authority occurs when a tribunal fails to decide matters submitted to it (so-called *infra petita*). English Arbitration Act, 1996, §68(2)(d) (providing that parties to an arbitration may challenge an award where there was a “failure by the tribunal to deal with all the issues that were put to it”), **Exhibit-LE 3/6**; Swiss Law on Private International Law, Art. 190(2)(c), **Exhibit-LE 3/7**; Italian Code of Civil Procedure, Art. 829(4), **Exhibit-LE 3/8**; 1966 European Uniform Law on Arbitration, Art. 25(2)(e) (award subject to annulment “if the arbitral tribunal has omitted to make an award in respect of one or more points of the dispute”), **Exhibit-LE 3/9**. See also E. Gaillard & J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, ¶¶1629-1630 (1999), **Exhibit-LE 3/10**. It is doubtful that the concept of *infra petita* is covered by Articles 2(a) and 2(b) of the Abyei Arbitration Agreement (which refer

the ABC Experts decided a controversy or dispute which was not within the scope of their jurisdiction under the Abyei Protocol and Abyei Appendix, would an excess of mandate potentially arise.

2. There is No Conceivable Basis for Suggesting that the ABC Experts Committed an “Excess of Mandate” Under Article 2(a) of the Abyei Arbitration Agreement

674. There is no conceivable basis for suggesting that the ABC Experts committed any “excess of mandate” under Article 2(a) of the Arbitration Agreement. As discussed above, this is a single, narrow exception to the finality of the ABC Report and there is no serious basis for concluding that this exception could apply in this case.

675. Preliminarily, there has been no suggestion that the Abyei Protocol and Abyei Annex were null and void or inoperative. The GoS has not suggested that it or its representatives lacked capacity or authority to conclude these agreements, nor that the agreements suffered from either formal or substantive defects. In any event, such suggestions would be frivolous: the parties clearly concluded binding agreements submitting a defined category of disputes regarding the Abyei Area to the ABC. The relevant inquiry is therefore whether the ABC Experts exceeded their mandate and not whether they had any valid mandate at all.

676. The question whether the ABC Experts committed an “excess of mandate” requires attention to the terms of Article 2(a) of the Arbitration Agreement. As discussed above, that language of the parties’ agreement is, under the rules of contract interpretation in all developed legal systems, vital to any interpretation of the Agreement.¹¹⁴⁰

677. The relevant inquiry under the Arbitration Agreement is whether the ABC exceeded its mandate as set forth in Article 2(a). In particular, a single, clearly articulated and carefully-defined basis for challenging the ABC Report is identified in Article 2(c). Specifically, the parties agreed in Article 2(a) that the decisive issue for this Tribunal was “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.*”¹¹⁴¹

678. 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. Simply stated, an excess of mandate under Article 2(a) may only be claimed if the ABC Experts “*decid[ed] upon that which was not in fact submitted to them.*”¹¹⁴²

only to an “excess of mandate,” not a putative failure to fully complete a mandate). In any event, there is no suggestion that the concept has any application in the present case.

¹¹⁴⁰ See above at paras. 665-673.

¹¹⁴¹ Abyei Arbitration Agreement, Art. 2(a), **Appendix A** (emphasis added).

¹¹⁴² *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, available at www.un.org, **Exhibit-LE 1/1** referring to E. de Vattel, *Le droit des gens*, 1758 ed. Vol. 1, sect. 329 (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); *Nordell Int’l Res., Ltd. v. Triton Indonesia, Inc.*, 1993 WL 280169 at *8 (9th Cir. 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)

679. To the same effect, 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.*”¹¹⁴³ Or, phrased slightly differently, “[t]his defect is . . . the exceeding of the powers fixed by the compromis or *the decision of matters not submitted to the arbitrators.* . . . [A]n excess of jurisdiction occurs when the arbitrators *exceed the mission given them.*”¹¹⁴⁴

680. This conclusion regarding the meaning of an “excess of mandate” is confirmed by the specific language of Article 2(a). As drafted by the parties, Article 2(a) addresses an “excess of mandate” by reference to the dispute or category of disputes that the ABC Experts were charged with resolving under the Abyei Protocol and other agreements: “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.’**”¹¹⁴⁵

681. As provided by the parties in Article 2(a), an excess of mandate is to be defined by reference to that category of disputes that the parties submitted to the ABC (“*their mandate which is . . .*”). The relevant issue under Article 2(a) is whether the ABC Experts decided matters falling outside that category of disputes.

682. There is no serious basis for claiming any such excess of mandate in this case. The ABC Experts clearly defined the “Abyei Area,” by reference to their interpretation of the parties’ agreement regarding that Area in Article 1.1.2 of the Abyei Protocol; the ABC Experts did not decide the geographic boundaries of other Sudanese territories or provinces (e.g., Darfur or Red Sea), nor did they do something other than “defini[ng]” and “delimit[ing]” the Abyei Area (e.g., granting mineral rights or awarding damages).

683. On the contrary, there can be no doubt that the ABC Report addressed – in very careful and learned detail – the precise question of the geographical scope of the Abyei Area. Thus, as detailed above, the ABC Report specifically referred to the Commission’s mandate under Article 5.1 of the Abyei Protocol “*to define and demarcate the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.*”¹¹⁴⁶ The Report then explained how the ABC defined the Abyei Area – being “*the area of the nine Ngok Dinka chiefdoms as it was in 1905*”¹¹⁴⁷ or (to the same effect) “*the territory occupied and used by the nine Ngok Dinka chiefdoms*”¹¹⁴⁸ – and, in comprehensive and impressive detail, what the historical and other

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**; A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 248 (2004) (“*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.”), **Exhibit-LE 4/2** (emphasis added).

¹¹⁴³ 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**.

¹¹⁴⁴ K. Carlston, *The Process of International Arbitration*, 82-83 (1946, reprinted 1972), **Exhibit-LE 1/3** (emphasis added).

¹¹⁴⁵ Abyei Arbitration Agreement, Art. 2(a), **Appendix A** (emphasis added).

¹¹⁴⁶ ABC Report, Part I, at p. 3 (quoting Abyei Protocol, Art. 5.1), **Appendix B**. See above at paras. 518-531, 568-569.

¹¹⁴⁷ ABC Report, Part I, at p. 4, **Appendix B**.

¹¹⁴⁸ ABC Report, Part I, at p. 18 (Proposition 8), **Appendix B**.

evidence demonstrated concerning the territory of the nine Ngok Dinka Chiefdoms in 1905.¹¹⁴⁹

684. The ABC Report concluded with the ABC Experts' "Final and Binding Decision" (pages 21 and 22), which set forth specific latitudinal lines defining the Abyei Area's geographic scope. Attached to the ABC Report was a series of Maps and Appendices. Of most importance was "Map 1," which was titled "*The Abyei Area Boundaries*," which delimited the ABC's definition of the Abyei Area on a contemporary map of Southern Sudan.

685. Any suggestion that the ABC Experts' definition and delimitation of the Abyei Area somehow exceeded the territorial scope of the issues they were mandated to resolve, or did something other than define and delimit the Abyei Area, is specious. That is, no doubt, why the GoS has not so far attempted to provide any comprehensible articulation for how such a result might be supported. In any event, however, the ABC Report makes it unmistakably clear – both in its reasoning, its "Final and Binding Decision" and its Map 1 – that the ABC Experts did exactly what they were mandated to do in defining and delimiting the Abyei Area.

686. Although not relevant in this case, claims of excess of authority have sometimes involved alleged geographical excesses, where a tribunal makes an award of territory not requested by a party. In the context of international boundary disputes, the rule of *ultra petita* has been stated as follows:

*"A tribunal is obliged, in principle, to delineate a boundary which is not in excess of the lines claimed by the disputing states. A delineation which goes beyond the line claimed by either disputing state would be null and void to the extent of the divergence. ... This restriction is inherent in the judicial and arbitral process and in more cases than not, it is an implied term of the arbitral proceedings."*¹¹⁵⁰

687. Any suggestion that the ABC Experts' definition and delimitation of the Abyei Area somehow exceeded the geographical claims advanced by the two parties would also be specious. Here, the ABC Experts considered both parties' claims in detail (see, inter alia, "GoS and SPLM/A Positions" (page 11 and the summary set forth above¹¹⁵¹) and Propositions 3, 4, 5, 7 (for GoS) and Propositions 8 and 9 (for SPLM/A)). Ultimately, the ABC Experts delimited a boundary that gave neither party the full extent of what it sought and that instead drew a line that lay between the two parties' claims: "It should be emphasised that in reaching their decision the experts did not accept or reject either the GoS or the SPLM/A final positions,"¹¹⁵² and instead "used both positions as points of departure."¹¹⁵³

¹¹⁴⁹ See above at paras. 645-658; ABC Report, Part I, at pp. 24-45, **Appendix B**.

¹¹⁵⁰ 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, 296 (1999), **Exhibit-LE 1/2** (emphasis added); see also D. Prager, *Procedural Developments at the International Court of Justice* 3 *Law & Practice Int'l Courts and Tribunals* 125, 131 (2004) ("The rule [of non *ultra petita*] ensures that the Court does not exceed the jurisdictional confines spelled out by the parties in their final submissions."), **Exhibit-LE 4/3**; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, 529 (1986) ("The *non ultra petita* rule is not only an evitable corollary – indeed, virtually a part of the general principle of the consent of the parties as the basis of international jurisdiction – it is also a necessary rule for without it the consent principle itself could constantly be circumvented."), **Exhibit-LE 4/4**.

¹¹⁵¹ See above at paras. 518-531, 648-649.

¹¹⁵² ABC Report, Part I, at p. 9, **Appendix B**.

¹¹⁵³ ABC Report, Part I, at p. 9, **Appendix B**.

688. Thus, the latitudinal boundary of the Abyei Area drawn on Map 1 established a territory that extended further north than the GoS claimed, but that was further south than the SPLM/A contended. There is, accordingly, no conceivable basis for any claim that the ABC Experts exceeded the geographical claims of one (or both) of the parties.

689. A final variation of an excess of authority claim, also not relevant here, arguably arises when a tribunal proceeds to make its decision in a manner forbidden by the parties' agreement. Thus, in the *North Eastern Boundary* case,¹¹⁵⁴ the arbitrator's delimitation of the disputed boundary by way of a line not contended for by either of the parties, was an "excess of power" because the arbitrator had been mandated only to decide between the two lines argued for by Canada and the United States.¹¹⁵⁵

690. No such limitations exist in the present case. The ABC Experts were not limited to choosing between the GoS or the SPLM/A positions, nor forbidden from considering particular factors or criteria. On the contrary, the various ABC Experts were hand-picked to have the expertise and experience, and provided with the parties' cooperation and resources, enabling them to delimit the area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905. Similarly, the ABC Experts were authorized to "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."¹¹⁵⁶

691. At bottom, the ABC Experts did precisely what they were mandated to do – delimiting the Abyei Area by reference to the parties' agreement in the Comprehensive Peace Agreement, Abyei Protocol and Abyei Annex. The ABC Report took into account no forbidden considerations, and adopted no forbidden decision, precisely because the parties imposed no such limitations on the work of the ABC Experts.

C. The GoS's Claim that the ABC Exceeded Its Mandate Contradicts Well-Settled Principles of Finality and is Subject to the Most Demanding Standards of Proof

692. The foregoing discussion is a complete answer to the decisive issue before this Tribunal. The ABC Experts did not exceed their mandate within the meaning of Articles 2(a) and 2(b) of the Abyei Arbitration Agreement, and on the contrary produced an expert and carefully reasoned Report that fully complied with the ABC's mandate. As noted above, that is a simple end to what should be a simple matter.

693. There are nonetheless additional considerations, which also warrant discussion for the sake of completeness. These considerations underscore the vital public and international importance of upholding the ABC Report. The same considerations also underscore the exceptional character of the GoS's legal claims regarding the Report and subject the GoS's claims to the most demanding standards of proof.

¹¹⁵⁴ *The North Eastern Boundary Arbitration Under the Convention of September 29, 1827, Arbitral Award of 10 January 1831*, 1 Moore Int. Arb 119, 133, 134 (1831), **Exhibit-LE 4/5**.

¹¹⁵⁵ M. Shaw, *International Law* 957 (5th ed. 2003), **Exhibit-LE 4/6**; K. Kaikobad, *Interpretation and Revision of International Boundary Decisions*, 71 (2007), **Exhibit-LE 4/7**; K. Carlston, *The Process of International Arbitration*, 205 (1946, reprinted 1972), **Exhibit-LE 1/3** (emphasis added); *Note from the Argentine Minister for Foreign Affairs to the Chilean Ambassador in Buenos Aires (25 January 1978)*, 52 I.L.R. 268, 271 ("The Court gives its opinion on questions in dispute which were not submitted to arbitration") appearing at Annex 5 of the *Arbitral Award of 18 February 1977 ("The Beagle Channel Case")*, 52 I.L.R. 227 (1978), **Exhibit-LE 4/8**.

¹¹⁵⁶ Abyei Annex, Art. 4, **Appendix D**. The same freedom was reiterated in Art. 3.4 of the Abyei Terms of Reference. See ABC ToR, Art. 3.4, **Appendix E**.

694. It bears repetition that the position of the GoS strikes deep at the foundations of the Comprehensive Peace Agreement and, more broadly, at fundamental principles of the contemporary international legal system. The GoS and SPLM/A consensually designed a specialized, highly constructive dispute resolution mechanism, for the purpose of settling a long-standing and bitter conflict; thereafter, the parties cooperatively worked together under difficult circumstances to implement their jointly agreed dispute resolution mechanism. 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.

695. In these circumstances, permitting the GoS to resile from its promise to treat the ABC Report as “final and binding” and entitled to “immediate effect” would gravely jeopardize the parties’ broader peace agreement. It would also undermine the efficacy and legitimacy of both these and other parties’ commitments to consensual and collaborative mechanisms for resolving their disputes. That result would be particularly unfortunate given the collaborative and constructive character of the Abyei Protocol and the parties’ other agreements.

696. First, accepting the GoS’s position would contradict long-standing principles of international and national law. Those principles affirm the critical public interests in the finality of adjudicative decisions, particularly in the context of boundary determinations, and the good faith fulfillment, *pacta sunt servanda*, of international commitments. It is no overstatement to regard these interests as fundamental to contemporary systems of international and national law.

697. Even if a challenge to the finality of the ABC Report were permitted by the parties’ agreements (which, as discussed in Part VII(D) below, it is not), generally applicable principles of finality require treating the GoS’s excess of mandate claim as an unusual exception, which contradicts important policies regarding the finality and security of adjudicated boundary decisions. In the light of these policies, the GoS’s attempt to relitigate the ABC Expert’s decision regarding the Abyei Area’s boundaries must be seen with grave disfavor and skepticism – like that which all such efforts have consistently been regarded in developed legal systems.

698. Second, both international and national legal systems recognize a series of generally applicable rules for addressing issues of excess of mandate and related questions. Although the clarity of the present case renders reliance on these principles unnecessary, they nonetheless underscore the importance of giving full and immediate effect to the ABC Report and the difficulty of demonstrating an excess of mandate.

699. As discussed below, these generally applicable rules include:

- 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 “manifest,” “flagrant” and “glaring”; and
- c. errors of law or treaty interpretation, or of fact, are not grounds for finding an excess of mandate.

Although not necessary to a decision in this case, these rules further demonstrate the utter lack of substance underlying the GoS's position in these proceedings.

1. All Developed Legal Systems Accord Adjudicative Determinations Final and Binding Effect, Particularly with Regard to Boundary Determinations

700. All developed legal systems – both international and national – recognize the principle that arbitral awards and other adjudicative determinations are presumptively entitled to final and binding effect. These principles of finality and *res judicata* are at the foundation of any developed legal regime, and are essential to the integrity and fairness of the legal process. They have particular importance in the context of boundary determinations, where interests in stability and security are implicated with peculiar force.

a) Arbitral Awards and Similar Adjudicative Determinations Are Presumptively Entitled to Final and Binding Effect in Developed Legal Systems

701. Numerous authorities, from a range of national and international contexts, emphasize the importance attached to the finality of judgments, awards and other adjudicative decisions. As also discussed below, the presumptive finality of such decisions may, in exceptional cases, be set aside on a limited number of specifically defined grounds. Nonetheless, the importance that attaches to principles of finality and *res judicata* ensures that these grounds remain narrowly limited and rarely invoked exceptions.

702. The presumptive finality of arbitral awards and similar adjudicative determinations has been uniformly recognized in international conventions in widely differing contexts, including state-to-state and commercial settings. Thus:

a. Articles 54 and 81 of the Hague Conventions on the Pacific Settlement of Disputes 1899 and 1907 provide that “The award, duly pronounced and notified to the agents of the parties at variance, ***puts an end to the dispute definitively and without appeal***” and “The Award, duly pronounced and notified to the agents of the parties, ***settles the dispute definitively and without appeal.***”¹¹⁵⁷

b. Article 26 of the International Law Commission Draft Convention on Arbitral Procedure (“Draft ILC Convention on Arbitral Procedure”) provides that “***The award is binding upon the parties. when it is rendered. It must be carried out in good faith.***”¹¹⁵⁸

c. Article III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) provides that “***Each Contracting State shall recognize arbitral awards as binding and enforce them ...***”¹¹⁵⁹

¹¹⁵⁷ See also Hague Conventions on the Pacific Settlement of Disputes 1899 and 1907, Arts. 31 and 37 respectively (“This Act implies the undertaking of the parties to submit loyally to the Award”; “Recourse to arbitration implies ***an engagement to submit in good faith to the Award.***”), **Exhibit-LE 4/9** (emphasis added).

¹¹⁵⁸ Draft ILC Convention on Arbitral Procedure, Art. 26, **Exhibit-LE 5/7**.

¹¹⁵⁹ New York Convention, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III, **Exhibit-LE 5/1**.

703. Principles of finality and *res judicata* do not mean – in the absence of some contrary agreement between the parties (as was the case here, discussed below¹¹⁶⁰) – that an award or other adjudicative decision may never be challenged. As discussed below, general principles of international and national law permit awards and other adjudicative decisions to be challenged on a limited number of specifically defined bases of nullity or invalidity.¹¹⁶¹ Even in cases where they are available, however, these grounds are exceptional circumstances, which are rarely invoked and whose applicability must be established by the party seeking to set a presumptively valid decision aside.¹¹⁶²

704. Thus, Article 25 of the Institut de Droit International’s 1875 *Projet de Règlement pour la procédure arbitrale internationale* set forth the basic rule of finality of arbitral awards,¹¹⁶³ subject in Article 27 to only four specific grounds for claiming the nullity of such awards: (a) nullity of the ‘compromis’; (b) excess of mandate (*excès de pouvoir*); (c) proven corruption; or (d) essential error.¹¹⁶⁴ No other bases for nullity were included in Article 27.

705. The exceptions listed in Article 27 of the *Projet de Règlement pour la procédure arbitrale internationale* are separate and exceptional categories of nullity. “Essential error” is different from “corruption,” “excess of mandate” and “nullity of the compromis”; that is evident from Article 27’s separate listing of four grounds, any one of which may result in nullity, rather than only a single ground, for the nullity of an arbitral award. This approach reflected the objective of safeguarding the finality of arbitral awards, by excluding any general right of appeal or revision, and instead singling out only specifically defined and limited exceptions to the finality of an award.¹¹⁶⁵

706. Similarly, the Draft ILC Convention on Arbitral Procedure mandates the presumptive finality of arbitral awards (in Article 26, as discussed above¹¹⁶⁶) and then prescribes only a

¹¹⁶⁰ As discussed below, the Abyei Protocol and Abyei Appendix excluded any ground for challenging the ABC Report. See below at paras. 796-807. In any event, the Abyei Arbitration Agreement permits only a single potential ground (“excess of mandate”) for challenging the ABC Report. See above at paras. 665-673.

¹¹⁶¹ See below at paras. 704-709.

¹¹⁶² See below at paras. 746-770.

¹¹⁶³ *Projet de Règlement pour la procédure arbitrale, Session de la Haye de 28, 30 et 31 Août 1875*, 7 Rev. de Droit Int’l et de Législation Comparée 276, 282 (1875) (“The award duly rendered decides, within the scope of its authority, the dispute between the parties.”), **Exhibit-LE 5/2**. Article 25 was based on Goldschmidt’s original draft Section 30 which read: “The award duly rendered (§§24 to 29) decides within the scope of its authority, the dispute between the parties.” The final *projet* deleted the reference to the §§24-29, but otherwise Article 25 of the final *projet* adopted Section 30 in its entirety. See Goldschmidt, *Projet de Règlement pour la procédure arbitrale internationale*, 6 Rev. de Droit Int’l et de Législation Comparée 421, 446 (1874), **Exhibit-LE 5/3**. See also M. Reisman, *Nullity and Revision* 32 (1946), **Exhibit-LE 5/4**; K. Carlston, *The Process of International Arbitration*, 214 (1946, reprinted 1972), **Exhibit-LE 1/3**.

¹¹⁶⁴ *Projet de Règlement pour la procédure arbitrale, Session de la Haye de 28, 30 et 31 Août 1875*, 7 Rev. de Droit Int’l et de Législation Comparée 276, 282 (1875) (“Article 27: The arbitral award is null in the event of a null arbitration agreement, or of excess of power, or of proven corruption of one of the arbitrators, or of essential error.”), **Exhibit-LE 5/2**. See also G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* 700, 703 et seq. (1986), **Exhibit-LE 5/5**; M. Reisman, *Nullity and Revision*, 31-34 (1971), **Exhibit-LE 5/4**; K. Carlston, *The Process of International Arbitration*, 214 (1946, reprinted 1972), **Exhibit-LE 1/3**.

¹¹⁶⁵ K. Kaikobad, *Interpretation and Revision of International Boundary Decisions*, 303 (2007) (“[P]rovisions on revision and interpretation have been ‘couched and placed in the Statute [of the ICJ] in such a way as to emphasise the exceptional nature of [such] proceedings, as possibly impairing the stability of the jural relations established by the *res judicata*.”), **Exhibit-LE 4/7** (emphasis added); *Hall Street Assoc., LLC v. Mattel, Inc.*, 128 S.Ct. 1396, 1405 (U.S. S.Ct. 2008) (referring to the separately defined and exclusive grounds for vacatur which the Federal Arbitration Act provides and stating: “[They] substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render ... arbitration merely a prelude to a more cumbersome ... judicial review process ... and bring arbitration theory to grief in post-arbitration process.”), **Exhibit-LE 5/6** (emphasis added).

¹¹⁶⁶ See above at paras. 701-702 and below at para. 830; Draft ILC Convention on Arbitral Procedure, Art. 26 (“The award is binding upon the parties when it is rendered. It must be carried out in good faith.”), **Exhibit-LE**

limited, carefully-defined list of exceptional grounds of nullity of an arbitral award. Thus, Article 30 of the Draft ILC Convention 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 award.¹¹⁶⁷

707. Again, these are separate grounds for nullity. Rather than prescribing a single, general basis for nullity, or a general right of appeal or review, the Draft ILC Convention set out only specifically defined and exceptional bases for findings of nullity. This serves to enhance the finality of adjudicative decisions, ensuring that the decision-maker’s actions and rulings are not subject to challenge for substantive disagreements or procedural judgments, but only for specific, narrow and exceptional reasons. This is explained by the ILC’s Commentary, which explains that the Draft ILC Convention adopts the point of view that “*only a limited number of grounds for nullity should be recognized.*”¹¹⁶⁸ This approach again implements the powerful policies favoring the presumptive finality of arbitral awards and other adjudicative decisions (discussed above and below).¹¹⁶⁹

708. Likewise, international commentary identifies separate and distinct grounds for claims of nullity of arbitral awards and other adjudicative decisions. Thus, one authority concludes that a claim to nullity can be brought on the following grounds: “[a] Nullity due to a void or invalid compromis; [b] Nullity based on *excès de pouvoir* in line with the ancient maxim *arbiter nihil extra compromissum facere potest*; [c] Corruption of the arbitrator; and [d] Nullity based on essential or manifest error on the part of the arbitrator, especially when such error was induced by the fraudulent conduct of one of the parties.”¹¹⁷⁰ Once more, these are distinct, narrowly defined and exceptional bases for alleging the nullity of a decision, rather than some sort of general right of appeal or substantive review.

709. The same approach applies under Article V of the New York Convention and Article 5 of the Inter-American Convention. Both Conventions provide that an award may be denied recognition only if one of a limited number of specifically defined exceptions to the presumptive validity of an award applies.¹¹⁷¹

5/7.

¹¹⁶⁷ The Commentary on the Draft ILC Convention drawn up at the ILC’s Fifth Session provides that “an award rendered in violation of such fundamental principles is not binding upon the parties.” *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, **Exhibit-LE 1/1**. See also K. Kaikobad, *Interpretation and Revision of International Boundary Decisions 305 et seq.* (2007) (“From an objective point of view, if a judgment is demonstrably flawed, for example by bribery or the prejudice of one or more members of the tribunal, or proved to be flawed by application of the *nemo iudex in sua causa* maxim, then there would be little or no hesitation to accept, in principle, the notion of nullity of the decision”), **Exhibit-LE 4/7**.

¹¹⁶⁸ *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. 107, available at www.un.org, **Exhibit-LE 1/1**.

¹¹⁶⁹ See above at paras. 696-697 and below at paras. 710-715.

¹¹⁷⁰ Reisman & Pulkowski, *Nullity in International Law* in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* ¶13 (2008), available at www.mpepil.com, **Exhibit-LE 5/8**. See also A. Verdross & B. Simma, *Universelles Völkerrecht*, ¶1325 (3rd ed. 1984) (“An arbitral award exceeding the tribunal’s competence is null. Equally acknowledged as grounds for nullity are the void or invalid arbitration agreement or compromis [except for the cases of forum prorogatorum mentioned above], the improper constitution of the tribunal, the evident corruption, and the violation of central procedural principles.”), **Exhibit-LE 5/9**.

¹¹⁷¹ New York Convention, Art. V, **Exhibit-LE 5/1**; Inter-American Convention, Art. 5, **Exhibit-LE 5/10**. It is clear that the grounds for potential non-recognition of an award set out in Article V of the New York Convention (and Inter-American Convention) are separate and distinct. A denial of an opportunity to be heard (under Article V(1)(b) of the New York Convention) differs from a violation of the parties’ agreed arbitral

710. International judicial, arbitral and other authorities are emphatic in requiring the finality of adjudicative determinations.¹¹⁷² The decision in *Orinoco Steamship Company Case (United States v. Venezuela)* is representative. There, the tribunal declared that “[i]t is in the interest of peace and the development of the institution of International Arbitration, so essential to the well-being of nations, that on principle, ... **a decision be accepted, respected, and carried out by the Parties without any reservation.**”¹¹⁷³

711. These principles are vitally important to the international legal system. In the *Final Award in the Trail Smelter Case*,¹¹⁷⁴ the tribunal declared:

“[t]hat the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law. **If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.**”¹¹⁷⁵

procedures (under Article V(1)(d) of the Convention) and that both grounds differ from an excess of mandate under Article V(1)(c) of the Convention. See, e.g., A. van den Berg, *The New York Arbitration Convention of 1958*, 265 (1981) (“... the grounds mentioned in Article V are exhaustive. Enforcement may be refused “only if” the party against whom the award is invoked is able to prove **one of the grounds** listed in Article V(1)” and “Article V employ[s] a permissive rather than mandatory language: enforcement “may be” refused. ... the Court still has a discretion to overrule the defence and grant the enforcement of the award.”), **Exhibit-LE 5/11**; J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration*, ¶26-65(2003), (“The obligation on a national court to recognise and enforce arbitration awards as provided in Article III New York Convention is subject to limited exceptions. Recognition and enforcement may be refused only if the party against whom enforcement is sought can show **one of the exclusive grounds**”), **Exhibit-LE 5/12**.

¹¹⁷² See *Effect of awards of compensation made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954*, [1954] I.C.J. Rep. 47, 53 (I.C.J.) (***res judicata* is “well-established and generally recognized principle of law”**), **Exhibit-LE 5/13**; *Request for Interpretation of the Judgment of 11 June 1998 in the Land and Maritime Boundary Case between Cameroon and Nigeria (Cameroon v. Nigeria)*, [1999] I.C.J. Rep. 31, 36, 39, 40, 83 (I.C.J.), **Exhibit-LE 5/14**; *Interpretation of Judgments Nos. 7 and 8 concerning the Case of the Factory at Chorzów, Judgment No. 11 of 16 December 1927*, PCIJ Series A, No. 13 and Dissenting Opinion of Judge Anzilotti, PCIJ Series A, No. 13, 27 (P.C.I.J. 1927) (***res judicata* is one of the “general principles of law recognized by civilized nations”**), **Exhibit-LE 7/1**; *The Pious Fund of the Californias (United States of America v. Mexico)*, Award in Permanent Court of Arbitration (22 May 1902), 2 Am. J. Int’l L. 893, 900 (1908) (“this rule [of *res judicata*] applies not only to the judgments of tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the *compromis*”), **Exhibit-LE 7/2**; *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960 (Honduras v. Nicaragua)*, [1960] I.C.J. Rep. 192, 213 *et seq.* (I.C.J.), **Exhibit-LE 7/3**; *Judgment of 30 June 1977, Delimitation of the Continental Shelf (United Kingdom v. France)*, XVIII R.I.A.A. 271, 295 (“**well settled that in international proceedings the authority of *res judicata* ... attaches**”), **Exhibit-LE 7/4**; *Case concerning the Société Commerciale de Belgique Case, Judgment of 15 June 1939*, PCIJ Series A/B, No. 78, 160, at p. 175 (P.C.I.J. 1939) (“Recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of that award are definitive and obligatory.”), **Exhibit-LE 8/1**; *Waste Mgt. Inc. v. Mexico, Decision on Jurisdiction, ICSID Case No. ARB(AF)/00/3 (NAFTA)*, 41 IL.M. 1315, ¶39 (2002) (“**There is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38(I)(c) of the Statute of the International Court of Justice**”), **Exhibit-LE 8/2**; *Dissenting Opinion of Torres Bernárdez, in Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar and Bahrain)*, [2001] I.C.J. Rep. 40, 364 (I.C.J.) (“*Res judicata* is precisely a notion of procedural law intrinsically linked to the form adopted by the procedure and decision concerned and the jurisdictional character of the organ adopting it.”), **Exhibit-LE 6/1**; *Geneva Arbitration*, 4 Papers Relating to the Treaty of Washington 544 (1872) (while the British arbitrator in the *Geneva Arbitration* dissented from the award, he nevertheless expressed the expectation that **the award would be accepted by “the British people ... with the submission and respect which is due to the decision of a tribunal by whose award it has freely consented to abide**”), quoted after K. Carlston, *The Process of International Arbitration*, 205 (1946, reprinted 1972), **Exhibit-LE 1/3** (emphasis added).

¹¹⁷³ *Arbitral Award of 25 October 1910, Orinoco Steamship Co. Case (“United States v. Venezuela”)*, XI U.N.R.I.A.A. 227, 238 (2006). The same authority emphasized the importance that “a decision be accepted, respected, and carried out by the Parties without any reservation, as it is laid down in Article 81 of the Pacific Settlement of International Disputes of October 18th 1907 ...” **Exhibit-LE 8/3**.

¹¹⁷⁴ *Final Awards of 16 April 1938 and 11 March 1941, (“Trail Smelter Case”)*, III U.N.R.I.A.A. 1905 (2006), **Exhibit-LE 8/4**.

¹¹⁷⁵ *Final Awards of 16 April 1938 and 11 March 1941, (“Trail Smelter Case”)*, III U.N.R.I.A.A. 1905, 1950 (2006), **Exhibit-8/4** (emphasis added).

712. Similarly, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the ICJ confirmed the policies underlying principles of *res judicata* as follows:

“Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. . . . Secondly, ***it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. . . . Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.***”¹¹⁷⁶

713. Commentary on international law also affirms the principle that adjudicative decisions are presumptively entitled to final and binding effect. In the words of one leading international commentator, citing the classic formulation in the *Trail Smelter Case*, *res judicata* “***is an essential and settled rule of international law,***”¹¹⁷⁷ resting on compelling policies:

“If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, ***it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.***”¹¹⁷⁸

714. Or, as another authority puts it:

“The concept of *res judicata* can be described as a consequence of the principle of finality, which seems to form the basis of any adjudication system. ***Without the notion of res judicata, no dispute could ever be resolved efficiently, and parties would be tempted to resubmit their claims in the same or a different forum, with all the tactical manoeuvring that opponents see as dilatory tactics.***”¹¹⁷⁹

¹¹⁷⁶ *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] I.C.J. Rep. 1, 44 (I.C.J.), **Exhibit-LE 8/5** (emphasis added).

¹¹⁷⁷ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 336 (1953, reprint 2006), **Exhibit-LE 8/6**.

¹¹⁷⁸ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 336 (1953, reprint 2006), **Exhibit-LE 8/6** (emphasis added). See also K. Kaikobad, *Interpretation and Revision of International Boundary Decisions*, 303 (2007) (“[P]rovisions on revision and interpretation have been ‘couched and placed in the Statute [of the ICJ] in such a way as to emphasise the exceptional nature of [such] proceedings, as possibly impairing the stability of the jural relations established by the *res judicata*.’”), **Exhibit-LE 4/7** (emphasis added); K. Carlston, *The Process of International Arbitration* 205 (1946, reprinted 1972), **Exhibit-LE 1/3**; M. Shaw, *International Law* 956 (5th ed. 2003) (“***Once an arbitral award has been made, it is final and binding upon the parties***, but in certain circumstances the award itself may be regarded as a nullity.”), **Exhibit-LE 4/6** (emphasis added); K. Oellers-Frahm, *Revision of Judgments of International Courts and Tribunals*, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* ¶1 (2008), available at www.mpepil.com (“***International judgments are, as a rule, final and without appeal and thus gain res judicata effect when delivered*** This fact contributes to ensuring the stability of international legal relations.”), **Exhibit-LE 9/1** (emphasis added); A. Verdross & B. Simma, *Universelles Völkerrecht*, ¶1325 (3rd ed. 1984) (“***With its pronouncement, an Arbitral Award has res judicata effect and is final***, unless the arbitration agreement or the compromis provides for its appealability.”), **Exhibit-LE 5/9B** (emphasis added).

¹¹⁷⁹ F. Kremslehner, *Lis pendens and res judicata in International Commercial Arbitration*, Austrian Arbitration Yearbook 2007, 127, 128 (2007), **Exhibit-LE 9/2** (emphasis added). See also L. Rosenberg, K. Schwab & P. Gottwald, *Zivilprozessrecht* §150, ¶1 (16th ed. 2004) (“***Legal peace between the parties requires that every litigation finds its an end; consideration for the courts requires that they are not being burdened with what already has been decided***: preserving their integrity requires that conflicting decisions are avoided. This purpose is most completely satisfied by virtue of the prohibition to re-litigate and re-consider and by binding the

715. Similarly, another leading commentator concludes that “[t]he importance of the *res judicata* rule to domestic legal systems and to the international community *[cannot] be exaggerated*,” going on to emphasize: “Suffice it to say that *legal systems, municipal and international, would be in considerable chaos if this rule did not exist*.”¹¹⁸⁰

b) Principles of Finality and *Res Judicata* Apply with Particular Force to Boundary Determinations

716. The principles of finality and *res judicata* outlined above have special weight in the context of boundary determinations and settlements. In particular, international authorities uniformly affirm the peculiar importance of considerations of international stability, as well as more broadly-applicable rationales for principles of finality, in the context of boundary determinations.

717. International commentary emphasizes the particular importance of finality with regard to boundary demarcations. One author concludes that it is “*fundamental*” to apply *res judicata* to preclude the “reopening of issues conclusively settled between the litigating parties” in the context of boundary disputes.¹¹⁸¹ Elsewhere, the same author observes that the principle of the finality and stability of borders is “*one of the more fundamental and important precepts in the corpus of rules relating to boundaries* and that, to some extent, it is a doctrine in the general principles of international law.”¹¹⁸²

718. Similarly, the work of the Permanent Court of International Justice has been characterized in the context of boundary disputes as based on “*principles of finality, stability and effectiveness*.”¹¹⁸³ Another author concludes that: “[I]egal and other considerations dictate a *principle of finality and stability*...”¹¹⁸⁴

parties to the decision.”), **Exhibit-LE 9/3** (emphasis added); G. Sanders, *Rethinking Arbitral Preclusion*, 24 *Law & Pol’y Int’l Bus.* 101, 110 *et seq.* (1992-1993) (“*Res judicata expresses the public policy of economizing judicial resources as well as the resources of the parties.*”), **Exhibit-LE 9/4**; H. Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 *U.C.L.A. L. Rev.* 44, 58 (1962) (“*The doctrine of res judicata serves the socially desirable purpose of promoting certainty and avoiding duplication of litigation, harassing both the courts and the individual litigants. Although the public interest that the courts not be overburdened has on occasion been stressed as the doctrine’s primary consideration, it would seem that that aspect of the policy that seeks to prevent duplication of litigation that is unfair and harassing to the individual litigants, constitutes its basic rationale.*”), **Exhibit-LE 9/5** (emphasis added).

¹¹⁸⁰ K. Kaikobad, *Interpretation and Revision of International Boundary Decisions* 330 (2007), **Exhibit-LE 4/7** (emphasis added).

¹¹⁸¹ K. Kaikobad, *Interpretation and Revision of International Boundary Decisions* 143 (2007), **Exhibit-LE 4/7**.

¹¹⁸² K. Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, 54 *B.Y.I.L.* 119, 120 (1984), **Exhibit-LE 9/6** (emphasis added). *See also* J. Müller & L. Wildhaber, *Praxis des Völkerrechts* 319 (3rd ed. 2008) (“*In the context of boundary determinations, the principle of stability has gained particular legal significance, independent of the principle of pacta sunt servanda.*”), **Exhibit-LE 9/7** (emphasis added); P. Daillier & A. Pellet, *Droit International Public*, ¶299 (7th ed. 2002) (“*The establishment of a border shall be binding for the future.*”), **Exhibit-LE 2/3**. *See also* Dutheil de la Rochère, *Les Procédures de Règlement des Différends Frontaliers*, in A. Pedone, *La Frontière, Colloque de Poitiers, Société Française pour le Droit International* 112, 115-116 (1978) (“The intangibility question and the need for stable and final solutions, are frequently developed in the preamble of boundary delimitation treaties, and in border delimitation arbitral proceedings. It also appears with great clarity in declarations of arbitrators and judges. ... *the search for stable and definitive borders appears to be a fundamental principle of settling boundary disputes.*”), **Exhibit-LE 9/8** (emphasis added).

¹¹⁸³ H. Lauterpacht, *The Development of International Law by the International Court*, 241 (1958), **Exhibit-LE 9/9**, referring to the decision of the PCIJ in the *Case Concerning the Legal Status of Eastern Greenland, Judgment of 5 April 1933*, PCIJ Series A/B, No. 53, 22 (P.C.I.J. 1933), **Exhibit-LE 9/9**.

¹¹⁸⁴ I. Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia* 1015 *et seq.* (1979), **Exhibit-LE 9/10** (emphasis added). *See also* J. Combacau & S. Sur, *Droit International Public* 423 (8th ed. 2008) (“essentially what States say that they want, first and foremost, and, what they are seeking to do when they have

719. The reasons for the particular importance of finality and *res judicata* in the context of boundary determinations are clear. In the words of a leading commentary, “**one of the primary objects of boundary settlement is ‘to achieve stability and finality.’**”¹¹⁸⁵ Similarly, “the solemn character of the operation [of delimiting a border] reflects **a legal stability concern**, powerful enough to separate the determination of borders from the fate of the treaties which established them.”¹¹⁸⁶

720. Likewise, a distinguished author explains, rightly, that “[t]he delimitation of the territory of a State must be both complete and final. ... The stability and the final character of a border are often brought back to the fundamental concern of legal certainty, and is a principle underpinning the international legal order, as it does in all other legal orders.”¹¹⁸⁷ Another author underscores the fundamental importance of “the rule of law ... that **a boundary established in accordance with the law attains a compelling degree of continuity and finality.**”¹¹⁸⁸ Some authorities regard the stability of international boundaries as a mandatory rule of international law:

“international practice confirms that ... the stability of boundaries is elevated to the level of a fundamental norm, and why not even, a mandatory norm, of international law.”¹¹⁸⁹

721. In addition to commentary, international judicial and arbitral decisions have also emphasized the importance of principles of finality and *res judicata* in the context of boundary determinations. Thus, in the *Laguna del Desierto* case, the tribunal declared that it

concluded at border delimitation treaty, is to establish a “stable and final” border; the remainder, that is, whether the border goes through here rather than there, being of relatively less importance.”), **Exhibit-LE 9/11**; D. Bardonnet, *Les frontières terrestres et la relativité de leur tracé*, 1976 Hague Recueil 25 and 27 (1983) (“From a legal point of view it is equally essential, and **international case law attaches considerable importance to the characteristics of continuity and permanence of territorial boundaries. ... It is the essence of a boundary to claim to result from the fundamental requirements of stability and permanence.**”), **Exhibit-LE 9/12** (emphasis added).

¹¹⁸⁵ H. Lauterpacht, *Oppenheim’s International Law 667 et seq.* (9th ed. 1992) (citing *Temple of Preah Vihear Case*, [1962] I.C.J. Rep. 6, 34 (I.C.J.), **Exhibit-LE 9/13**. See also *Request for Interpretation of the Judgment of 11 June 1998 in the Land and Maritime Boundary Case between Cameroon and Nigeria (Cameroon v. Nigeria)*, [1999] I.C.J. Rep. 31, 36 (I.C.J.) (“The question of the admissibility of requests for interpretation of the Court’s judgments needs particular attention because of the need to avoid impairing the finality, and delaying the implementation, of these judgments. **It is not without reason that Article 60 of the Statute lays down, in the first place, that judgments are ‘final and without appeal’.** ... **The language and structure of Article 60 reflect the primacy of the principle of res judicata. That principle must be maintained.**”), **Exhibit-LE 5/14** (emphasis added); *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, [2001] I.C.J. Rep. 40 (I.C.J.), **Exhibit-LE 6/1**; D. Bardonnet, *Les frontières terrestres et la relativité de leur tracé*, 1976 Hague Recueil 25 and 27 (1983) (“**The delimitation of a territory of a State must be at the same time both complete and final. ... It is the essence of a boundary to claim to result from the fundamental requirements of stability and permanence.**”), **Exhibit-LE 9/12**.

¹¹⁸⁶ P. Daillier & A. Pellet, *Droit International Public*, ¶299 (7th ed. 2002), **Exhibit-LE 2/3** (emphasis added).

¹¹⁸⁷ P.-M. Dupuy, *Droit International Public*, ¶47 (9th ed. 2008), **Exhibit-LE 10/1** (emphasis added). See also D. Bardonnet, *Les frontières terrestres et la relativité de leur tracé*, 1976 Hague Recueil, Vol. 153, 25 and 27 (1983) (“The delimitation of a territory of a State must be at the same time both complete and final. From a geopolitical point of view, this double requirement meets an indisputable need, in order to ensure the defense of the fundamental interests of the State. **From a legal point of view it is equally essential, and international case law attaches considerable importance to the characteristics of continuity and permanence of territorial boundaries. ... It is the essence of a boundary to claim to result from the fundamental requirements of stability and permanence.**”), **Exhibit-LE 9/12** (emphasis added); *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, [1986] I.C.J. Rep. 554, 565 (I.C.J.) (“[the] obvious purpose [of uti possidetis] is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”), **Exhibit-LE 10/2** (emphasis added).

¹¹⁸⁸ Kaikobad, *Some Observations on the Doctrine of Continuity and Finality of Boundaries*, 54 B.Y.I.L. 119 (1984), **Exhibit-LE 9/6** (emphasis added).

¹¹⁸⁹ C. Blumann, *Frontières et Limites*, “La Frontière” in *La Frontière* in A. Pedone, *La Frontière, Colloque de Poitiers, Société Française pour le Droit International* 13 & 71 (1978), **Exhibit-LE 10/3** (emphasis added).

was a “*fundamental rule of the law of Nations*” that “[a] judgment having the authority of *res judicata* is judicially binding on the parties to the dispute.”¹¹⁹⁰

722. To the same effect is the ICJ’s judgment in *Temple of Preah Vihear Case*.¹¹⁹¹ There, in the leading modern statement on the issue, the Court said:

“In general, *when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality*. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious.”¹¹⁹²

723. The Court again referred to this principle in the *Aegean Sea Continental Shelf* case where it held that:

“Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the *same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances*.”¹¹⁹³

Similarly, in the *Libya/Chad* case the ICJ summarized its jurisprudence: “Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of stability of boundaries, the importance of which has been repeatedly emphasized by the Court.”¹¹⁹⁴

724. The decision of the *ad hoc* tribunal in *Dubai v. Sharjah* also affirmed the importance of considerations of finality in boundary disputes, both generally and with particular force in the context of adjudicative decisions.¹¹⁹⁵ Among other things, the tribunal’s award emphasized the importance of “the *principle of the stability of boundaries*,” observing that:

“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.”¹¹⁹⁶

¹¹⁹⁰ *The Laguna del Desierto Award*, 113 I.L.R. 1, 43 *et seq.* (1999) (tribunal also held that “[t]he force of an international judgment as *res judicata* relates primarily to its operative part (*dispositif*), that is to say that part in which the tribunal rules on the dispute and establishes the rights and obligations of the parties ... jurisprudence has likewise accepted that propositions contained in the grounds of judgment (“considerations”) which constitute necessary logical antecedents to the operative part have the same binding force as the latter.”),

Exhibit-LE 3/12.

¹¹⁹¹ *Temple of Preah Vihear Case*, [1962] I.C.J. Rep. 6 (I.C.J.), **Exhibit-LE 10/4.**

¹¹⁹² *Temple of Preah Vihear Case*, [1962] I.C.J. Rep. 6, 34 (I.C.J.), **Exhibit-LE 10/4** (emphasis added).

¹¹⁹³ *Case concerning the Aegean Sea Continental Shelf (Greece v. Turkey)*, [1978] I.C.J. Rep. 3 *et seq.* (I.C.J.), **Exhibit-LE 10/5** (emphasis added).

¹¹⁹⁴ *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] I.C.J. Rep. 6, 37 (I.C.J.), **Exhibit-LE 1/8** (emphasis added).

¹¹⁹⁵ *Award of 19 October 1981, Dubai v. Sharjah*, 91 I.L.R. 543 (1981), **Exhibit-LE 11/1.**

¹¹⁹⁶ *Award of 19 October 1981, Dubai v. Sharjah*, 91 I.L.R. 543, 578 (1981). Among other things, the tribunal emphasized “*the principle of the stability of boundaries, the importance of which was recognised by the International Court of Justice* in the *Case concerning the Temple of Preah Vihear* (1962). ... The same principle is recognised in Article 62 of the Vienna Convention on the Law of Treaties, 1969 (Cmnd. 4818), which provides that a fundamental change of circumstances cannot be put forward as a ground for putting an end to a treaty, when the treaty is one establishing a boundary.” **Exhibit-LE 11/1.** See also Vienna Convention on the Law of Treaties 1969, Art. 62(2) (“2. *A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; ...*”), **Exhibit-LE 1/10.** The correlation between territorial disputes and armed conflict is frequently noted. P. Huth,

Applying these considerations, the *Dubai v. Sharjah* tribunal concluded that:

“except in a case of nullity, ***the principles of pacta sunt servanda and of res judicata could be invoked to prevent the boundary [established by way of treaties and arbitral or judicial proceedings] being called again into question.***”¹¹⁹⁷

725. The tribunal reasoned that this standard applied generally, to boundaries determined by both negotiated treaties and adjudicative decisions where the parties had received an opportunity to be heard.¹¹⁹⁸ Even outside these contexts, in settings involving purely administrative rulings by a foreign power, the tribunal held that even these rulings could not be disregarded and possessed binding force except where disregarded by both parties.¹¹⁹⁹

2. Generally applicable Principles of Finality and Res Judicata Apply with Peculiar Force to the ABC Report

726. There can be no serious doubt that the foregoing, generally applicable principles of finality and *res judicata* apply to the ABC’s adjudicative determination regarding the Abyei Area. Indeed, there are peculiarly important reasons of policy for according finality to the ABC Report.

Territorial Disputes and International Conflict: Empirical Findings and Theoretical Explanations, in M. Pratt & J. Brown (eds.), *Borderlands Under Stress* 99, 100 & 104 (2000) (“territorial disputes are systematically related to the emergence and escalation of militarised confrontations between states. ... Territorial disputes increase the risk of militarised conflict and war between states in a strong and consistent way”), **Exhibit-LE 11/2**; M. Kohen, *Règlement Territorial et Maintien de la Paix*, in P. Weckel (ed.), *Le Juge international et l’aménagement de l’espace: la spécificité du contentieux territorial* 202 (1998) (“Out of all interstate conflicts, the territorial dispute is the most likely to endanger the peace. ... It is hardly necessary to recall that most armed conflicts are caused by territorial claims.”), **Exhibit-LE 11/3**.

¹¹⁹⁷ *Award of 19 October 1981, Dubai v. Sharjah*, 91 I.L.R. 543, 579 (1981), **Exhibit-LE 11/1** (emphasis added).

¹¹⁹⁸ The tribunal reasoned: “[O]ne cannot attribute the same value to a ***boundary which has been settled under a treaty, or as the result of an arbitral or judicial proceeding, in which independent interested Parties have had a full opportunity to present their arguments***, as to a boundary which has been established by way of an administrative decision emanating from an authority which could have failed to take account of the Parties’ views and arising in a situation of inherent inequality. ***In the first hypothesis, except in a case of nullity, the principles of pacta sunt servanda or of res judicata could be invoked to prevent the boundary so settled being called again into question.*** In the second hypothesis, the boundary would have been established in the majority of cases, in the interests of the administering authority, on the basis of other than legal criteria, and according to the needs of a particular political or economic context.” *Award of 19 October 1981, Dubai v. Sharjah*, 91 I.L.R. 543, 579 (1981), **Exhibit-LE 11/1** (emphasis added).

¹¹⁹⁹ While holding that the decisions in question were merely administrative acts of a foreign power, the tribunal went on to hold that “[t]his does not mean that the Tripp decisions were devoid of legal effect. ***The two Rulers, when consenting to the delimitation of their boundaries by the British authorities, did specifically undertake to respect the decisions that would be forthcoming.***” *Award of 19 October 1981, Dubai v. Sharjah*, 91 I.L.R. 543, 577 (1981), **Exhibit-LE 11/1** (emphasis added). See also *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, [2001] I.C.J. Rep. 40, 83 (I.C.J.) (referring to the decision in *Dubai v. Sharjah* the ICJ held in respect of a similar, ‘administrative’ decision of a foreign power, that: “The Court will begin by recalling that the 1939 decision is not an arbitral award (see paragraphs 113-114 above). This does not, however, mean that it was devoid of all legal effect. Quite to the contrary, ***the pleadings, and in particular the Exchange of Letters referred to above (see paragraphs 118 and 119 above), show that Bahrain and Qatar consented to the British Government settling their dispute over the Hawar Islands. The 1939 decision must therefore be regarded as a decision that was binding from the outset on both States and continued to be binding on those same States after 1971, when they ceased to be British protected States (see paragraph 65 above).***”), **Exhibit-LE 6/1** (emphasis added); *Eritrea case of 1952*, quoted after V. Coussirat-Coustère & P. Eisemann, *Repertory of International Arbitral Jurisprudence*, 199 (1991) (“***no doubt that the General Assembly’s resolution is binding on the four Powers, since they agreed to accept it by the Peace Treaty. This is not the first time that Powers have undertaken by treaty to comply with the resolutions of an organ of an international body.***”), **Exhibit-LE 11/4**.

727. In particular, the finality of the ABC Report must be considered in the light of the specific terms of the Comprehensive Peace Agreement (including the Abyei Protocol and Abyei Annex) and the role of the ABC Report in resolving disputes regarding the Abyei Area and in ending the wider North-South Sudanese civil war. As discussed in Part VII(D) below, these considerations preclude *any* challenge by the GoS to the finality of the ABC Report (whether for excess of mandate or otherwise).¹²⁰⁰

728. Alternatively, as discussed in this section, these considerations require that generally applicable principles of finality and *res judicata* apply with particular force to the ABC Report. As a consequence, there are especially weighty reasons of policy to uphold, rather than overturn, the ABC Report.

729. Preliminarily, it is beyond serious debate that the ABC conducted itself in the manner of an adjudicative body and rendered an adjudicative decision, leaving no doubt that the principles of finality and *res judicata* outlined above are fully applicable to the ABC Report. That is evident from the terms of the parties' agreements regarding the ABC and from the manner in which the Commission conducted its work.

730. There can be no doubt that the Commission afforded the parties opportunities to present their cases regarding the definition and delimitation of the Abyei Area and to be heard in an adjudicative manner. As detailed above, the parties and the ABC jointly designed a set of essentially adversarial procedures that were tailored precisely to enable both the GoS and the SPLM/A to present their respective arguments and evidence to the Commission and to provide it with maximum opportunities to hear (and see) the evidence.¹²⁰¹ In particular:

a. The parties' agreed procedures afforded each party opportunities to make a total of four separate presentations to the ABC.¹²⁰² In addition, immediately after the parties' final presentations to the ABC on 16 and 17 June 2005, the GoS requested the opportunity to give a third presentation.¹²⁰³ The SPLM/A did not object to this request and a further presentation was made.¹²⁰⁴

b. There were no limitations placed on the length of time that the parties utilized or on other aspects of their presentations to the ABC. Neither party complained about the procedures that were adopted or requested different or alternative procedures for presenting their cases.¹²⁰⁵

c. The parties' agreed procedures afforded both the GoS and the SPLM/A opportunities to present live witness testimony to the Commission, under procedural conditions jointly agreed and implemented by the parties.¹²⁰⁶ A total of 125 witnesses were heard by the ABC, of which 104 were heard in the presence of the parties, with full opportunities for questioning and comment by the parties' representatives.¹²⁰⁷ To ensure that as many witnesses as deemed relevant were heard, the ABC Experts traveled to the middle of a recent war zone under onerous and risky conditions;

¹²⁰⁰ See below at paras. 796-826.

¹²⁰¹ See above at paras. 506-507, 5140, 513-517.

¹²⁰² See above at paras. 576, 607, 609, 625.

¹²⁰³ See Witness Statement of Minister Deng Alor Kuol, at pp. 24-25, ¶152; Witness Statement of James Lual Deng, at pp. 16-17, ¶93. See also GoS Additional Presentation, dated 17 June 2005, **Exhibit-FE 14/1**.

¹²⁰⁴ See Witness Statement of Minister Deng Alor Kuol, at pp. 24-25, ¶152; Witness Statement of James Lual Deng, at pp. 16-17, ¶93.

¹²⁰⁵ See above at paras. 556, 613, 616, 625.

¹²⁰⁶ See above at paras. 576, 607, 613.

¹²⁰⁷ See above at paras. 610-611, 618.

indeed, they conducted extra hearings, not originally specified, in order to accommodate the parties' wishes and to obtain the maximum amount of information possible.¹²⁰⁸

d. The parties' agreed procedures afforded each party the opportunity to designate physical and geographical locations, including shrines, burial sites and the like, that the Commission should visit and inspect.¹²⁰⁹ Again, the ABC traveled throughout the Abyei Area and neighboring regions to view the locations identified by the parties.¹²¹⁰

e. The parties' agreed procedures for the ABC afforded the representatives of each party the opportunity to present whatever historical documents that it deemed relevant. As with opportunities to present argument and witnesses, the parties fully availed themselves of this possibility, submitting a substantial number of historical documents and maps to the Commission.¹²¹¹

f. The parties' agreed procedures provided for the joint selection of the five impartial ABC Experts (with the IGAD available to resolve disputes regarding composition of the Commission).¹²¹² Neither party objected to any of the five experts nor requested the IGAD to take any action with regard to the ABC's membership.

731. It is not an exaggeration to conclude that the Commission's fact finding and evidentiary procedures were remarkable by both international and national standards. The ABC's members had opportunities to hear the parties – in both formal and informal settings – over an extended period of time. They also had opportunities to see and hear a large number of live witnesses, and to inspect multiple physical locations, that virtually no international tribunals or courts enjoy. In these circumstances, there can be little serious doubt but that the Commission employed quintessentially adjudicative procedures in its conduct of the proceedings before it.

732. Equally, it is clear that the ABC conducted itself in an adjudicative manner by applying the terms of the Abyei Protocol (and particularly Article 1.1.2's definition of the Abyei Area) to the evidence before it. As discussed above, the testimony of witnesses before the Commission was recorded and transcribed, while the parties' presentations were available in hard copy to the ABC.¹²¹³ Among other things, each party was fully aware of the other party's submissions and evidence, and enjoyed multiple opportunities to meet and rebut those submissions and evidence.

733. It is also beyond doubt that the Commission reached its decision by bringing the documentary, oral and physical evidence that it heard to bear on the definition of the Abyei Area in the Abyei Protocol. That is crystal clear from the ABC Report, which carefully details how the ABC Experts evaluated the parties' arguments and evidence (in the Report's nine Propositions).¹²¹⁴

¹²⁰⁸ See above at paras. 607, 613.

¹²⁰⁹ See above at paras. 583, 619.

¹²¹⁰ See above at paras. 608-620.

¹²¹¹ See above at paras. 513-514.

¹²¹² See above at paras. 592-606.

¹²¹³ ABC Report, Part II, App. 4, **Exhibit-FE 15/1**.

¹²¹⁴ Thus, in their Report, the ABC Experts addressed nine separate propositions which had "emerged from the GoS and SPLM/A presentations and from the oral testimony." ABC Report, Part I, at p. 12, **Appendix B**.

734. It is also evident from the manner in which the ABC Report described its decision, remarking in its Preface, that the “*two sides [had] presented their own positions* concerning the mandate of the ABC and *their contrasting definitions* of the area under consideration”¹²¹⁵ (referring to the presentations described above¹²¹⁶). The Report also noted that the parties and their witnesses presented “*two sharply differing versions* of what constitutes the Abyei Area,”¹²¹⁷ and summarized these versions (as noted above).¹²¹⁸

735. In evaluating these position, the ABC Report “emphasized that in reaching their decision the experts did not accept or reject either the GoS or the SPLM/A final positions,”¹²¹⁹ and instead “used both positions as points of departure.”¹²²⁰ In so doing, the ABC performed a classically adjudicative function.

736. Finally, the ABC Experts rendered a reasoned decision that was intended, as agreed by the parties, to be a “final and binding”¹²²¹ determination of their dispute regarding the Abyei Area (and not an advisory recommendation). The ABC Report also set forth a detailed, careful explanation of the Commission’s reasoning, which compares very favorably to the reasoned decisions and awards of national courts and international tribunals around the world. That, of course, was precisely what the parties had contemplated when they jointly provided for five experts in Sudanese history, culture, law and politics with authentic understandings and sensitivity to the regional and African context of their dispute.¹²²²

737. The Commission’s procedures, decision-making and final decision were all adjudicative in every sense of the term. In these circumstances, there can be no doubt but that the principles of finality and *res judicata*, generally applicable under all developed international and national legal systems, apply fully to the ABC’s decision.

738. Indeed, the application of principles of finality and *res judicata* to the ABC Report is particularly vital because of the parties’ central role in designing the Commission and its procedures. Important public interests are served by giving full effect to consensual dispute resolution mechanisms, which serve as substitutes for self-help; those interests are peculiarly weighty where the self-help at issue entails past decades of civil war and where the dispute resolution mechanism was a collaborative approach to fact finding and adjudication.¹²²³

739. There are also further reasons, relating specifically to the role of the ABC’s decision in implementing the Comprehensive Peace Agreement, for applying general principles of finality and *res judicata* to the ABC Report. As discussed above, the delimitation of the

¹²¹⁵ ABC Report, Part I, at p. 10, **Appendix B** (emphasis added).

¹²¹⁶ See above at paras. 576, 607, 609, 625.

¹²¹⁷ ABC Report, Part I, at p. 10, **Appendix B** (emphasis added).

¹²¹⁸ ABC Report, Part I, at p. 11 (“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 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.”) **Appendix B** (emphasis added).

¹²¹⁹ ABC Report, Part I, at p. 9, **Appendix B**.

¹²²⁰ ABC Report, Part I, at p. 9, **Appendix B**.

¹²²¹ Abyei Annex, Art. 5, **Appendix D**.

¹²²² See above at para. 594.

¹²²³ See below at paras. 827-839, and above at paras. 445-450, 716-725 discussing the importance of principles of *pacta sunt servanda*, particularly in the context of boundary determinations.

Abyei Area by the ABC Experts was essential to the future treatment of that Area under the Abyei Annex and Abyei Protocol. That was true in a number of related respects:

- a. Local Administration – Under the Abyei Protocol, the Abyei Area (and not other areas of Sudan) would be accorded “special administrative status under the institution of the Presidency”¹²²⁴ and would be administered by a “local Executive Council, elected by the residents of Abyei,”¹²²⁵ established in accordance with specified criteria.¹²²⁶
- b. Financial Resources – Under the Abyei Protocol, “the net-oil revenue from the oil produced in Abyei Area” shall be shared according to a specified formula.¹²²⁷ In addition, “Abyei Area shall be entitled to” specified percentages of other financial amounts.¹²²⁸
- c. Public Participation – Under the Abyei Protocol, authority over “local government and on customary matters,” “budget” matters, “reconstruction, development and urbanization plans” and other matters is granted to the Abyei Area Council.¹²²⁹
- d. Abyei Area Residents – Under the Abyei Protocol, the residents of the Abyei Area (but not other areas of Sudan) would be “citizens of both Western Kordofan and Bahr el Ghazal with representation in the legislatures of both States.”¹²³⁰
- e. Security Arrangements – Under the Abyei Protocol, provisions are made for a joint battalion of GoS and SPLM/A troops and for international monitors in the Abyei Area.¹²³¹
- f. Abyei Referendum – Critically, the Abyei Protocol provides that an “Abyei Referendum” is to be conducted simultaneously with the Southern Sudan referendum.¹²³² In the Abyei Referendum, “residents of Abyei” are entitled to cast a separate ballot, presenting voters with the choice whether Abyei “retain its special administrative status in the north” or “be part of Bahr el Ghazal,” in the south.¹²³³

740. In order effectively to achieve the foregoing results, it is an essential precondition that the Abyei Area be defined and demarcated. A delimitation of the Abyei Area was necessary, among other things, to (a) defining the territorial competence of the Abyei Area’s local Executive Council, and identifying the voters entitled to vote for that Council; (b) defining the geographical area as to which oil revenues must be shared under the Abyei Protocol; (c) defining the territorial competence of the Abyei Area Council; (d) identifying those persons who will be Abyei Area residents (entitled to dual citizenship in Western Kordofan and Bahr el Ghazal); (e) defining the area in which international monitors are to be deployed; and (f) identifying those persons who will be entitled to vote in the Abyei Referendum and defining that territory to which the referendum will apply.

¹²²⁴ Abyei Protocol, Art. 2.1, **Appendix C**.

¹²²⁵ Abyei Protocol, Art. 2.2, **Appendix C**.

¹²²⁶ Abyei Protocol, Arts. 2.3-2.7, **Appendix C**.

¹²²⁷ Abyei Protocol, Art. 3.1, **Appendix C**.

¹²²⁸ Abyei Protocol, Art. 3.2, **Appendix C**.

¹²²⁹ Abyei Protocol, Art. 4.3, **Appendix C**.

¹²³⁰ Abyei Protocol, Art. 6.2, **Appendix C**.

¹²³¹ Abyei Protocol, Arts. 7.2-7.4, **Appendix C**.

¹²³² Abyei Protocol, Art. 8.1, **Appendix C**.

¹²³³ Abyei Protocol, Art. 8.2, **Appendix C**.

741. It was also essential to the implementation of the parties' agreements that the ABC's delimitation of the Abyei Area proceed in the very timely and definitive fashion required by the parties' agreement. Until the Abyei Area was delimited, the various governance, financial and security measures prescribed by the Abyei Protocol could not be effectively implemented. That is explained in clear terms by General Sumbeiywo and Minister Deng Alor in their witness statements.¹²³⁴

742. There are particularly compelling reasons for giving final and binding effect to the ABC Report which arise from Sudanese civil war and the nature of the Comprehensive Peace Agreement. As discussed above, the CPA is essential to ending a decades-old civil war, which has claimed millions of lives and which threatens even wider calamity.¹²³⁵ In turn, the resolution of disputes over the Abyei Area was central to the parties' acceptance of the CPA.¹²³⁶

743. The Abyei Area was of central importance to the peace agreement between GoS and SPLM/A for a variety of historical, cultural and economic reasons:

a. Historic – Historically, “Abyei is a bridge between the north and the south, linking the people of Sudan.”¹²³⁷ The pivotal geographic and historic position of the Abyei Area made resolution of the Area's boundaries and status essential to the lasting resolution of disputes between the North and South of Sudan.

b. Cultural – Culturally, the Abyei Area is the traditional homeland of the Ngok Dinka people, who are in turn one of the largest population groupings in Southern Sudan.¹²³⁸ The Abyei Protocol recited that the Abyei Area “is defined as the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905,”¹²³⁹ confirming the deep cultural significance of the Area to the Ngok. That significance is underscored in witness testimony¹²⁴⁰ and other historic and contemporary materials.¹²⁴¹ The profound cultural significance of the Abyei Area as the Ngok Dinka's traditional homeland made resolution of the Area's boundaries and status essential to the overall peace agreement between the North and the South of Sudan.

c. Economic – Economically, the Abyei Area is rich in natural resources, particularly oil,¹²⁴² with the GoS deriving a significant amount of oil revenue from the Abyei Area.¹²⁴³ These resources were the subject of specific transitional arrangements in the Abyei Protocol,¹²⁴⁴ and are of vital importance to the land-locked, otherwise comparatively poor South of Sudan.¹²⁴⁵ The substantial economic importance of the Abyei Area made resolution of the Abyei Area's boundaries and status essential to the broader peace agreement between the North and South of Sudan.

¹²³⁴ Witness Statement of Lt. Gen. Sumbeiywo, at p. 15, ¶¶74; Witness Statement of Minister Deng Alor Kuol, at p. 27, ¶¶168-169 and p. 29, ¶178.

¹²³⁵ See above at paras. 445-450.

¹²³⁶ See above at paras. 495, 559, 562, 566. See also Witness Statement of Lt. Gen. Sumbeiywo, at p. 15, ¶75; Witness Statement of Minister Deng Alor Kuol, at p. 3, ¶14.

¹²³⁷ Abyei Protocol, Art. 1.1.1, **Appendix C**.

¹²³⁸ See above at paras. 78, 85-88, 111-118.

¹²³⁹ Abyei Protocol, Art. 1.1.2, **Appendix C**.

¹²⁴⁰ See above at paras. 168-175.

¹²⁴¹ See above at paras. 168-175.

¹²⁴² See above at paras. 109-110.

¹²⁴³ Witness Statement of Minister Deng Alor Kuol, at pp.23, 28, ¶¶143, 173. See also Witness Statement of James Lual Deng, at p. 15, ¶¶83-84.

¹²⁴⁴ See Abyei Protocol, Art. 3, **Appendix C**; see above at paras. 490.

¹²⁴⁵ See Abyei Protocol, Art. 3, **Appendix C**; see above at paras. 490.

744. In these circumstances, principles of *pacta sunt servanda* and *res judicata* apply with particular force to the ABC Report. Agreements and decisions involving boundary determinations, especially in the context of resolving armed conflicts, demand particular respect and implicate delicate interests. Where failures to honor the parties' commitments threaten not merely commercial self-help, economic hardship, or diplomatic offense – but instead military conflict and civilian bloodshed – it is peculiarly incumbent on parties to honor their promises and for tribunals to enforce those commitments.

745. These considerations apply with particular force to the GoS's claims in this arbitration. At bottom, the GoS is pursuing a cynical, opportunistic effort to relitigate the substantive issues that the Commission has already decided. The GoS's actions thus directly contradict long-standing and fundamental principles of finality and *res judicata*, as well as the specific terms and purposes of the Comprehensive Peace Agreement. Simply put, the GoS's tactics fly in the face of the rule that

“an issue which has already been adjudicated in favour of that party [may not be] argued again. ... ***Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.***”¹²⁴⁶

In these circumstances, the GoS's effort to resile from its solemn commitments, and to relitigate the ABC's decision should be viewed by this Tribunal with the deepest disfavor and skepticism.

3. An “Excess of Mandate” is an Exceptional Conclusion which Requires the Party Challenging an Adjudicative Decision to Demonstrate a “Manifest,” “Glaring” and “Flagrant” Excess

746. An excess of mandate is an exceptional conclusion, contradicting the presumptive finality of adjudicative decisions, which is rarely invoked. As discussed below, only where the party challenging an adjudicative decision carries its burden of proof, by demonstrating a “*manifest*,” “*glaring*,” “*flagrant*” and unambiguous excess of authority may a decision be set aside. Conversely, it is well-settled that a decision-maker's error of law, interpretation or fact is not grounds for setting a decision aside.

747. These generally applicable rules need not be invoked to resolve the present case, because it is entirely clear that the ABC Experts did not exceed their mandate. These rules nonetheless underscore both the speciousness of the GoS's case and the importance to the international legal system of giving full and immediate effect to the ABC Report.

a) An Excess of Mandate is An Exceptional Conclusion as to Which the Party Challenging An Adjudicative Decision Bears the Burden of Proof

748. General principles of international law, as well as the laws of developed legal systems, recognize only a limited number of potential grounds for the invalidity or nullity of an arbitral award or other adjudicative decision. Even where they are available,¹²⁴⁷ these

¹²⁴⁶ *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] I.C.J. Rep. 1, 44 (I.C.J.), **Exhibit-LE 8/5** (emphasis added).

¹²⁴⁷ Here, as discussed below, the specific terms of the Abyei Protocol, Abyei Annex and other agreements

grounds provide only narrowly defined exceptions to the general rule (discussed above) that arbitral awards and other adjudicative decisions are presumptively final and entitled to *res judicata* effects. It is well-established that the party challenging an adjudicative decision bears the burden of proving an excess of mandate or other exception to the presumptive validity of that decision.

749. The exceptional character of the generally applicable grounds of nullity is uniformly confirmed by both international conventions and other authority, as well as by national law. As discussed above, although different authorities identify slightly different grounds for claiming the nullity of arbitral awards and other adjudicatory decisions, all authorities are uniform in treating such grounds as exceedingly narrow, specifically defined exceptions to the presumptive finality of a decision-maker's determination.¹²⁴⁸

750. It is equally clear that the burden of establishing the applicability of one of the specified bases for the nullity of an adjudicative decision – and in particular the burden of establishing an excess of mandate – is on the party seeking to set the decision aside.¹²⁴⁹ This allocation of the burden of proof is universally affirmed in both international and national authority. It results from the general principle that each party bears the burden of establishing its case and from the presumptive validity and finality of international arbitral awards and other adjudicative decisions (discussed above¹²⁵⁰).

751. It is, of course, well-settled that the party seeking to establish a claim or proposition bears the burden of proving that claim. As the ICJ put it in *Temple of Preah Vihear Case (Cambodia v. Thailand)*, “[t]he burden of proof in respect of [claims] will of course lie on the [p]arty asserting or putting them forward.”¹²⁵¹

752. Other ICJ authority is to the same effect.¹²⁵² The same basic rule regarding the allocation of the burden of proof also applies under all developed legal systems, requiring parties to bear the burden of establishing their respective claims.¹²⁵³

between the parties exclude any basis for challenging the ABC Report. See below at paras. 796-826.

¹²⁴⁸ See above at paras. 701-709.

¹²⁴⁹ See e.g. Permanent Court of Arbitration Optional Rules For Arbitrating Disputes Between Two Parties Of Which Only One Is A State (the “PCA Rules”), Art. 26 (“Each party shall have the burden of proving the facts relied on to support its claim or defence.”). The PCA Rules govern the procedure of this arbitration by virtue of ¶10.1, Terms of Appointment dated 24 November 2008 (except to the extent of any exclusion or modification by the Arbitration Agreement; see ¶10.2 Terms of Appointment).

¹²⁵⁰ See above at paras. 700-715.

¹²⁵¹ *Temple of Preah Vihear Case*, [1962] I.C.J. Rep. 6, 16 (I.C.J.), **Exhibit-LE 10/4**.

¹²⁵² See, e.g., *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906, Judgment of 18 November 1960 (Honduras v. Nicaragua)*, [1960] I.C.J. Rep. 192, 214-216 (I.C.J.), **Exhibit-LE 7/3**; *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, [2007] I.C.J. Rep. 1, 75 (I.C.J.) (“**On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it**”), **Exhibit-LE 8/5**. See also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 327 (1953, reprint 2006) (citing *The Queen Case* (1872) 2 Arb. Int’l, 706, 708) (“With regard to the incidence of the burden of proof in particular, international judicial decisions are not wanting which expressly hold that **there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings.**”), **Exhibit-LE 8/6** (emphasis added); M. Kazazi, *Burden of proof and related issues: a study on evidence before international tribunals* 85 (1995) (“The rule generally applied by the [International] Court [of Justice] **with respect to the burden of proof is the basic rule according to which the party who asserts a fact is responsible for providing proof thereof.** This rule has consistently been applied by the Court in cases before it no matter whether they are brought by application or by special agreement.”), **Exhibit-LE 11/5** (emphasis added); K. Highet, *Evidence, The Chamber and the ELSI case*, in Lillich, *Fact Finding by International Tribunals*, 34 and 46 (1991) (“The normal rule of evidence and burden of proof that has been adopted in the practice of the International Court is the simplest of all in its formulation: that **a party seeking to assert a claim should bear the burden of proof as**

753. It is equally well-established that the party seeking to challenge an adjudicative decision bears a particularly heavy burden of proving the applicability of one of the defined exceptions to the presumptive validity of such decisions. Judge Weeramantry stated the rule as follows:

“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.**”¹²⁵⁴

754. Specifically in the context of a claim to nullity, the ICJ and PCIJ have repeatedly held that the burden of proof lies on the party alleging the nullity of a legal act.¹²⁵⁵ Put simply, “**the burden of proof is on the party that alleges the nullity of a legal act under the national law, to prove it.**”¹²⁵⁶ In the words of the Rapporteur to the ILC Commission: “in 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.**”¹²⁵⁷

755. The same allocation of the burden of proving the invalidity of an award or other adjudicative decision applies in all developed national legal systems. That is true, for example, under Article V of the New York Convention (and Article 5 of the Inter-American Convention). As discussed above, both Conventions provide that an award may be denied

to the facts necessary to support that claim.”) and at 46 (“consonant with the Court’s practice . . . the burden of proof and persuasion lie on the party that advances a point for adjudication.”), **Exhibit-LE 11/6** (emphasis added).

¹²⁵³ See, e.g., R. Greger in R. Zöller, *Zivilprozeßordnung*, Vor §284, ¶17a (26th ed. 2007) (“The unwritten principle (which was first contained in the proposed draft for the Code of Civil Procedure but then taken out as it is self-explaining) as it is generally acknowledged today is: **The Claimant bears the burden of proof for the facts establishing its claim . . .**”), **Exhibit-LE 11/7** (emphasis added); W. Rechberger in W. Rechberger, *ZPO*, Introduction to Section 266, ¶11 (3rd ed. 2006) (“The result when applying this principle in case of *non liquet* is the so-called **general rule of proof which provides that each party has to carry the burden of proof for the factual requirements of the legal norm which is beneficial to this party.**”), **Exhibit-LE 11/8** (emphasis added); French Code of Civil Procedure, Art. 9 (“**Each party must in accordance with the law prove the facts necessary to the success of its claim.**”), **Exhibit-LE 11/9**; Halsbury’s Laws of England, Vol. 17(1) (Evidence), ¶¶420-421 (Reissue) (“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The incidence of this burden is usually clear from the statements of case, **it usually being incumbent upon the claimant to prove what he contends.**”), **Exhibit-LE 11/10** (emphasis added).

¹²⁵⁴ *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); see also A. Balasko, *Causes de nullité de la sentence arbitrale en droit international public* 201 (1938) (“[T]he validity of the arbitral award is to be presumed.”), **Exhibit-LE 11/12**.

¹²⁵⁵ *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906, Judgment of 18 November 1960 (Honduras v. Nicaragua)*, [1960] I.C.J. Rep. 192, 214-16 (I.C.J.) (party seeking to invalidate an award based on excess of jurisdiction bears burden of proof), **Exhibit-LE 7/3**; *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, [1991] I.C.J. Rep. 53, 152 (I.C.J.), (“[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.**”), **Exhibit-LE 11/11** (emphasis added); see also *Case concerning the Mavrommatis Jerusalem Concessions, Judgment of 26 March 1925*, PCIJ Series A, No. 5, pp. 29 *et seq.* (P.C.I.J. 1925) (“**[T]he Court considers that it is for the Respondent to prove that the concessions are not valid**, though it is indisputable that the reference to the Ottoman nationality of the beneficiary in the concessions is incorrect. . . . The Respondent has confined himself to putting forward arguments . . . , but no proof . . . has been produced.”), **Exhibit-LE 11/13** (emphasis added).

¹²⁵⁶ *Judge Read, Dissenting Opinion in Case Concerning Nottebohm (Liechtenstein v. Guatemala)*, [1955] I.C.J. Rep. 34, 35 *et seq.* (I.C.J.) (1955), **Exhibit-LE 12/1**, referring to *The Mavrommatis Jerusalem Concessions*, PCIJ Series A, No. 5, 29 *et seq.* (P.I.C.J. 1925), **Exhibit-LE 11/13**.

¹²⁵⁷ Report of Georges Scelle, Special Rapporteur on arbitral procedure to the ILC Commission, *Yearbook of the International Law Commission 1950* (Doc. A/CN.4/18), Vol. II., 114, 146, **Exhibit-LE 12/2** (emphasis added).

recognition only if one of a limited number of specifically-defined exceptions to the presumptive validity of an award applies.¹²⁵⁸

756. It is both well-settled and of paramount importance under the New York Convention (and Inter-American Convention) that the burden of establishing the applicability of an exception to the presumptive validity of an award lies entirely on the award debtor. This is reflected in a long, unbroken line of uniform judicial authority¹²⁵⁹ and in equally uniform academic commentary¹²⁶⁰ under the Conventions.

757. In the words of one well-reasoned decision, 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.**”¹²⁶¹ Or, as a distinguished commentator explained,

“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 result mentioned in Article V(1), has failed to supply evidence of their existence.”¹²⁶²

¹²⁵⁸ See above at paras. 709-710.

¹²⁵⁹ *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) (“**The party defending against enforcement of the arbitral award bears the burden of proof.**”), **Exhibit-LE 12/3**; *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.*, 969 F.2d 765, 770 (9th Cir. 1992) (“**The burden of proving the [arbitral tribunal] exceeded its jurisdiction rests on respondents . . .**”), **Exhibit-LE 12/4**; *Republic of Ecuador v. Occidental Exploration and Prod. Co.* [2006] 2 All E.R. 225, 254 (English Court of Appeal) (“The convention provides both for recognition and enforcement and, under art. V, for limited circumstances in which *recognition and enforcement ‘may be refused, at the request of the party against whom it is invoked’ if that party provides appropriate proof of such circumstances.*”), **Exhibit-LE 12/5**; *Rosseel NV v. Oriental Comm. Shipping (UK) Ltd* XVI Y.B. Comm. Arb. 615 (Q.B. 1990) (1991) (“The burden rests squarely on a respondent, who resists enforcement, *to prove the existence of one of the grounds of refusal*”), **Exhibit-LE 12/6** (emphasis added); *Resort Condominiums Int’l Inc. v. Bolwell and Resort Condominiums (Australasia) Pty. Ltd*, XX Y.B. Comm. Arb. 628, 642 (Queensland S.Ct. 1993) (1995) (“**the onus is upon the party opposing such an order**” enforcing a Convention award), **Exhibit-LE 12/7**; *Judgment of 26 February 1982, Joseph Mueller AG v. Bergesen*, IX Y.B. Comm. Arb. 437 (Swiss Federal Tribunal) (1984) (“The only question in this case is whether the arbitral award of December 14, 1978, has become binding. Appellant [Müller] must prove that this condition is not complied with.”), **Exhibit-LE 12/8** (emphasis added); *Judgment of 25 January 1996, Inter-Arab Inv. Guarantee Corp. v. Banque Arabe et Internationale d’Investissements*, XXII Y.B. Comm. Arb. 643 (Brussels Tribunal Première Instance) (1997) (“**the party against whom [the award] is invoked bears the burden of proof of the existence of one or more of such grounds for refusal.**”), **Exhibit-LE 12/9**; *Judgment of 28 January 1999, Sovereign Participations Int. SA v. Chadmore Developments Ltd.*, XXIVa Y.B. Comm. Arb. 714, 718 *et seq.* (Lux. Court of Appeal) (1999) (under Article V, “the party against whom enforcement is sought shall prove the existence of such ground[s]”), **Exhibit-LE 12/10**; *Judgment of 20 July 2004*, XXXI Y.B. Comm. Arb. 846 (Spanish Tribunal Supremo), **Exhibit-LE 12/11**; *Judgment of 23 November 2004*, XXXI Y.B. Comm. Arb. 786, 788 (Jerusalem District Court) (2006) (“It is a basic rule with respect to the New York Convention that **the burden of proof regarding the finality of the award is placed on the party seeking to resist confirmation.**”), **Exhibit-LE 12/12** (emphasis added).

¹²⁶⁰ See, e.g., A. van den Berg, *The New York Arbitration Convention of 1958* 275 (1981), **Exhibit-LE 5/11**; Da Silveira & Lévy, in E. Gaillard & D. Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards -- The New York Convention in Practise* 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 arbitrator’s 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); J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* 706 (2003) (“Recognition and enforcement may be refused **only if the party against whom enforcement is sought can show that one of the exclusive grounds for refusal enumerated in Article V (1) New York Convention has occurred.**”), **Exhibit-LE 5/12** (emphasis added); L. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1055 (1961), **Exhibit-LE 12/14**.

¹²⁶¹ *Judgment of 17 July 2003*, XXIX Y.B. Com. Arb. 819, 825 (Obergericht Zürich) (2004), **Exhibit-LE 12/15**.

¹²⁶² A. van den Berg, *The New York Arbitration Convention of 1958*, 264 (1981), **Exhibit-LE 5/11** (emphasis added). See also P. Sanders, *Enforcing Arbitral Awards under the New York Convention: Experience and*

758. The same approach applies with equal force under national arbitration legislation.¹²⁶³ In the words of one national court: “*The burden of proving any excess of jurisdiction lies on the person seeking to resist the enforcement of the award.*”¹²⁶⁴ Or, “*the burden of proving that the arbitrators exceeded their powers is very great.*”¹²⁶⁵

759. As already noted, this allocation of the burden of proof reflects both the general rule that it is for each party to prove its claims and the basic structure of the presumptive finality of adjudicative decisions, subject only to specific exceptions to that basic rule. Only where a party seeking to set a decision aside carries its burden of establishing the particular, defined grounds for an exception may the presumptive finality of the decision be disregarded.

760. It is beyond debate that, in the present case, the GoS bears the burden of establishing a purported “excess of mandate” by the ABC Experts. The well-established principles detailed above apply fully to the GoS’s claims that the ABC Experts exceeded their mandate and, as a consequence, that the ABC Report should not be treated – contrary to what the parties agreed – as “final and binding.”

761. In the present case, and assuming contrary to fact that any challenge to the ABC Report is permitted,¹²⁶⁶ there are particularly weighty reasons for requiring a party challenging the Report to bear the full burden of establishing an excess of mandate. As discussed above, principles of *res judicata* and finality apply with special force to boundary determinations.¹²⁶⁷ Likewise, the parties’ joint commitments to give “immediate effect” to the ABC Report and the central importance of the Report to implementation of the Comprehensive Peace Agreement¹²⁶⁸ underscore the finality of the Report. In these circumstances, it is of particular importance to impose fully on the GoS the burden of establishing a putative excess of mandate by the ABC.

b) An Excess of Mandate Requires A “Manifest,” “Glaring” and “Flagrant” Showing

Prospects, UN No. 92-1-133609-0, at p. 4 (1998) (“The main [aims] [of the New York Convention] ... were, first of all, the elimination of the double exequatur... **Another element of the proposal was to restrict the grounds for refusal of recognition and enforcement as much as possible and to switch the burden of proof of the existence of one or more of these grounds to the party against whom the enforcement was sought. This again stands to reason.**”), **Exhibit-LE 12/16** (emphasis added).

¹²⁶³ See, e.g., UNCITRAL Model Law, Art. 34(2) (“**the party making the application [to annul] furnishes...proof**”) **Exhibit-LE 12/17**; *Judgment of 14 January 1981*, VIII Y.B. Com. Arb. 387 (Court of Appeal of Trento) (1983) (arbitral award cannot be enforced only “**if the party against whom the award is invoked furnishes proof of the existence of a defect in the nature of ultra vel extra compromissum [beyond or outside the submission to arbitration].**”), **Exhibit-LE 12/18**; *Judgment of 23 January 1903*, GIUNF 76, 78 (Austrian Oberster Gerichtshof) (“There are no grounds for setting aside the award because ... **A could not even demonstrate, in how far the arbitrators should have exceeded their mandate.**”), **Exhibit-LE 13/1** (emphasis added); *Youngs v. American Nutrition, Inc.*, 537 F.3d 1135, 1141-42 (10th Cir. 2008) (heavy burden of proof on party challenging validity of arbitral award), **Exhibit-LE 13/2**; *D.-H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (burden of proof on party moving to vacate award), **Exhibit-LE 13/3**; *Canada (Attorney General) v. S.D. Myers Inc.*, [2004] 3 F.C.R. 368, 392 (Fed. Ct. of Canada), **Exhibit-LE 13/4**; *Corporacion Transnacional de Inversiones, SA de CV v. STET Int’l, SpA*, 45 O.R.3d 183, 191 (Ontario S.Ct. of Justice 1999), **Exhibit-LE 13/5**.

¹²⁶⁴ *Judgment of 24 March 1987*, XIII Y.B. Comm. Arb. 522, 529 (London Court of Appeal) (1988), **Exhibit-LE 13/6**.

¹²⁶⁵ *Federated Dep’t Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990), **Exhibit-LE 13/7**.

¹²⁶⁶ As discussed below, the Comprehensive Peace Agreement, Abyei Protocol and Abyei Annex exclude any challenge at all by the GoS to the ABC Report. See *below* at paras. 796-826.

¹²⁶⁷ See *above* at paras. 716-725.

¹²⁶⁸ See *above* at paras. 559-562, 566, 742-743 and *below* at paras. 798-807.

762. Second, it is also well-settled under general principles of international law that an excess of power is an exceptional conclusion, which will only be found where the decision-maker's excess of mandate is manifest, flagrant, glaring and unambiguous. Where the alleged excess of authority of an award or other decision is not manifest and flagrant, but is instead open to dispute or not readily-demonstrated, then no excess of mandate may be found.

763. As discussed above, arbitral awards and comparable adjudicatory decisions are presumptively valid and final under general principles of both international and national law.¹²⁶⁹ The presumptive finality of an adjudicatory decision can be overturned only exceptionally, when the non-complying party demonstrates that one of a limited number of bases for nullity exist.¹²⁷⁰

764. Additionally, an extensive range of materials hold that an excess of mandate may be found only where the decision-maker's excess is manifest or flagrant. In the words of one leading commentator on the subject, "most writers have agreed that an arbitral award is null in the measure that the tribunal has *manifestly and in a substantial matter passed beyond the terms of submission, express or implied.*"¹²⁷¹ Elsewhere, the same author observes:

"[w]riters who have given special study to the problem of nullity are agreed that the violation of the compromis should be *so manifest as to be readily established*. In order that a tribunal's decision or a jurisdictional issue shall be considered null, *it must, in general, be arbitrary, not merely doubtful or arguable.*"¹²⁷²

765. Similarly, another author explains that "very rigorous rules" must apply when establishing whether or not an excess of mandate exists.¹²⁷³ According to the same author, "[t]he violation of the arbitration agreement must be manifest to such an extent, that its [the excess of power's] existence could be easily established."¹²⁷⁴

766. Put differently, an excess of mandate only exists where "the violation of the terms of the arbitration agreement *appears so clearly* that it is sufficient to compare the award with the provisions of the arbitration agreement so that its existence can be *unmistakably established.*"¹²⁷⁵ The same commentator reasons that "when an excess of power is not obvious, *the presumption should be in favor of the validity of the award.*"¹²⁷⁶ Other writers have confirmed that an excess of mandate must be "*enormous, glaring ... in short, ... [a] manifest extravagance on the merits, and not a mere error of jurisdiction,*"¹²⁷⁷ "*flagrant*"¹²⁷⁸ and "*manifest*"¹²⁷⁹ or "*manifestly unjust.*"¹²⁸⁰

¹²⁶⁹ See above at para. 696-697, 700-715.

¹²⁷⁰ See above at para. 703-709.

¹²⁷¹ K. Carlston, *The Process of International Arbitration*, 81 (1946, reprinted 1972), **Exhibit-LE 1/3** (emphasis added).

¹²⁷² K. Carlston, *The Process of International Arbitration*, 86 (1946, reprinted 1972), **Exhibit-LE 1/3** (emphasis added).

¹²⁷³ S. Stoykovitch, *De l'autorité de la sentence arbitrale en droit international public*, 194 (1924), **Exhibit-LE 13/8**.

¹²⁷⁴ S. Stoykovitch, *De l'autorité de la sentence arbitrale en droit international public*, 193-194 (1924), **Exhibit-LE 13/8**.

¹²⁷⁵ D. Guermanoff, *L'excès de pouvoir de l'arbitre*, 63 (1929), **Exhibit-LE 13/9** (emphasis added).

¹²⁷⁶ D. Guermanoff, *L'excès de pouvoir de l'arbitre*, 73 (1929), **Exhibit-LE 13/9** (emphasis added).

¹²⁷⁷ de Lapradelle, *L'excès de pouvoir de l'arbitre*, 2 Rev. de Droit Int'l 14 (1928), **Exhibit-LE 13/10** (emphasis added).

¹²⁷⁸ Castberg, *L'excès de pouvoir dans la justice internationale*, 35 Recueil des Cours 443 (1931), **Exhibit-LE 13/11**, referring to *Delimitation of the Frontier between Greece and Turkey, Question of the Maritza*, 7 League of Nations O.J. 529 (1926), **Exhibit-LE 13/12**.

¹²⁷⁹ Verdross, *L'excès de pouvoir du juge arbitral dans le droit international public*, 55 Rev. de Droit Int'l LC

767. Similarly, as the Commentary to the Draft ILC Convention on Arbitral Procedure explains:

“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*. ***A departure from the terms of submission or excess of jurisdiction should be clear and substantial and not doubtful or frivolous.***”¹²⁸¹

768. The same approach was applied by the Permanent Court in determining an excess of mandate in the context of a boundary delimitation. In the *Delimitation of the Frontier between Greece and Turkey, the Question of Maritza*, Greece sought an advisory opinion interpreting the Treaty of Lausanne’s provisions for demarcation of the boundary between Turkey and Greece by a Mixed Boundary Commission. Turkey argued that the competent authority for the question of interpretation was the Mixed Boundary Commission itself. The Permanent Court agreed, saying:

“In the jurists’ opinion, it is for the Commission itself, under the terms of ... the Treaty of Lausanne, to delimit the frontier in accordance with the indications given in the treaty. ... It is further the duty of the Commission and each of its members to obtain, if they think it desirable for the performance of their work, the opinions of persons qualified to deal with any special questions which may be raised. It is only when the Commission has exhausted all these sources of information and announced that it has such serious doubts that it is unable to decide on these questions, or ***if it has flagrantly exceeded its powers, that the parties would be justified in attempting to reach a settlement of such difficulties in accordance with international law.***”¹²⁸²

769. The same approach is adopted by courts in many developed jurisdictions in the context of commercial arbitral awards. In evaluating whether an arbitral tribunal has exceeded its powers, courts resolve “any doubts concerning the scope of arbitrable issues as well as any doubts concerning the scope of the arbitrator’s remedial authority” in favor of the tribunal’s authority and the award.¹²⁸³ In another court’s words, “***review of the interpretation***

225, 228, 230-231 (1928) citing E. de Vattel. **Exhibit-LE 13/13**; S. Stoykovitch, *De l'autorité de la sentence arbitrale en droit international public*, 194 (1924), **Exhibit-LE 13/8**.

¹²⁸⁰ E. de Vattel, *Le droit des gens*, 1758 ed. Vol. 1, sect. 329 (1916), **Exhibit-LE 3/11**.

¹²⁸¹ *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, **Exhibit-LE 1/1** (emphasis added).

¹²⁸² *Delimitation of the Frontier between Greece and Turkey, Question of the Maritza*, 7 League of Nations O.J. 529 *et seq.* (1926), **Exhibit-LE 13/12** (emphasis added).

¹²⁸³ *Three S Delaware, Inc. v. Dataquick Information Systems, Inc.*, 492 F.3d 520, 531 (4th Cir. 2007), **Exhibit-LE 13/14**; J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration*, 714 (2003) (“***While the presumption is that the tribunal acted within its powers, this provision [Art. V (1) (c)] covers two different issues.***” and referring to the ultra petita defence: “This defence has also been rarely successfully invoked; ***There is a strong presumption that arbitrators have not exceeded their authority.***”), **Exhibit-LE 5/12** (emphasis added); M. da Silveira & Lévy in E. Gaillard & D. Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards -- The New York Convention in Practise*, 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 powers 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); J. Paulsson, *The New York Convention in International Practice – Problems of Assimilation, in The New York Convention of 1958*, ASA Special Series No. 9, 100, 108 (1996), **Exhibit-LE 13/15**; *Metromedia Energy, Inc. v. Enserch Energy Sers., Inc.*, 409 F.3d 574, 579-580 (3d Cir. 2005) (“(1) ***a reviewing court should presume that an arbitrator acted within the scope of his or her authority***; (2) this presumption may not be rebutted by an ambiguity in a written opinion; but (3) a court may conclude that an arbitrator exceeded his or her authority when it is obvious from the written opinion”), **Exhibit-LE 13/16** (emphasis added); *American Postal Workers Union v. Runyon*, 185 F.3d

of a submission to an arbitrator and to the arbitrator's award is highly deferential."¹²⁸⁴ And, "[w]e presume that an arbitrator acted within the scope of his authority. . . ." ¹²⁸⁵ Further, the existence of an excess of mandate will be found "*in serious cases only*."¹²⁸⁶

770. These standards apply fully in the present case. For all of the reasons identified above, the ABC Report should be overturned only in the most exceptional cases. The parties deliberately and carefully negotiated an indisputably valid agreement to abide by a "final and binding" decision by a body of experts, possessing complementary expertises in a range of African and Sudanese disciplines.¹²⁸⁷ Only in the most exceptional case should the decision of those experts be set aside on the grounds that they exceeded the scope of the disputes that they were mandated to resolve. Consistent with well-settled general principles of law, only where the ABC Experts' decision "manifestly," "flagrantly," or "glaringly" decided disputes outside of their mandate may it be set aside.

- c) An Error of Law, Treaty Interpretation or Fact Is Not An Excess of Mandate and, in Any Event, Is Only Rarely and Exceptionally Applicable

771. Third, it is well-settled under both international law and general principles of national law that neither an erroneous interpretation of applicable treaty provisions (or otherwise applicable law) nor a mistaken factual finding constitutes the basis for claiming an excess of mandate. Rather, these are substantive or evidentiary errors, which do not qualify as an excess of mandate. As a consequence, alleged errors by the ABC Experts in interpreting the Comprehensive Peace Agreement, Abyei Protocol, Abyei Annex or other agreements between the parties, in applying applicable legal principles or in assessing the factual record are irrelevant to the question whether the ABC Experts exceeded their mandate.

772. Preliminarily, it is doubtful that "essential" or "material" errors constitute grounds for claiming the nullity of an arbitral award even under general principles of contemporary international law. Although some historical authorities permitted claims of nullity to be based on essential or material error, the weight of contemporary international and national authority is to the contrary. This reflects the general principle, referred to above, against

832, 835-836 (7th Cir. 1999) ("[Courts] give great deference to the [tribunal]'s understanding of the parameters of the issues presented for arbitration. . . . *It is generally presumed that a [tribunal]'s authority is broad and courts expansively interpret the scope of a [tribunal]'s delegated authority.*"), **Exhibit-LE 13/17** (emphasis added); *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 976 (2d Cir. 1974) ("[Article V (1) (c)] basically allow[s] a party to attack an award predicated upon arbitration of the subject matter not within the agreement to submit to arbitration. . . . Once again a narrow construction would comport with the enforcement-facilitating thrust of the Convention. In addition, the case law under the similar provision of the Federal Arbitration Act strongly supports a strict reading. *In making this defence . . . Overseas must therefore overcome a powerful presumption that the arbitral body acted within its powers.*"), **Exhibit-LE 13/18** (emphasis added).

¹²⁸⁴ *Brennan v. Cigna Corp.*, 2008 WL 2441049 at *137 (3d Cir. 2008) (unpublished opinion), **Exhibit-LE 13/19**.

¹²⁸⁵ *Brennan v. Cigna Corp.*, 2008 WL 2441049 at *137 (3d Cir. 2008) (unpublished opinion), **Exhibit-LE 13/19**.

¹²⁸⁶ M. da Silveira & Lévy in E. Gaillard & D. Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards -- The New York Convention in Practice*, 641 *et seq.* (2008) (holding that the existence of an excess of mandate under Art. V(1)(c) "*should be accepted in serious cases only* [and that] obstructions . . . on trivial grounds should not be allowed."), **Exhibit-LE 12/13** (emphasis added); J. Paulsson, *The New York Convention in International Practice – Problems of Assimilation*, in *The New York Convention of 1958*, ASA Special Series No. 9, 100, 108 (1996) (according to whom "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* . . ."), **Exhibit-LE 13/15** (emphasis added).

¹²⁸⁷ See above at paras. 556, 560, 575, 592-606.

permitting any general right of appeal or substantive review of arbitral awards or similar adjudicative decisions.¹²⁸⁸

773. As discussed above, a few older international instruments recognized the possibility of claiming the nullity of international arbitral awards or other adjudicative decisions on the basis of “essential error” or “material error.”¹²⁸⁹ This includes, for example, Article 27 of the Institut de Droit International’s 1875 *Projet de Règlement pour la procédure arbitrale internationale*, which provided for the nullity of awards based on “essential error.”¹²⁹⁰ Similarly, the General Treaty of Arbitration of 1898 provided for appeal of an award “(1) if it has been based on a false or erroneous document; or (2) if the decision was in whole or in part the result of an error of positive or negative fact which results from the acts or documents in the case.”¹²⁹¹

774. In contrast, contemporary international instruments omit any reference to essential, material or other errors as a basis for claiming nullity of an award, absent contrary agreement by the parties. That is true, for example, under both the Draft ILC Convention on Arbitral Procedure¹²⁹² and the New York, Inter-American and ICSID Conventions,¹²⁹³ all of which exclude any right of general appeal or substantive review. 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.*”¹²⁹⁴

775. The prohibition against a claim of nullity based upon error, even if essential, is also recognized more generally in international law.¹²⁹⁵ Thus, as one author observes: “*An excess of power must not be confused with an essential error.*”¹²⁹⁶ The same author continues: “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.”¹²⁹⁷

776. The Permanent Court of Arbitration’s award in the *Orinoco Steamship Company Case* provides an example. In that arbitration, the United States sought to nullify the award of a mixed claims commission based, among other things, on the ground that the award contained

¹²⁸⁸ See above at paras. 700-715.

¹²⁸⁹ See above at para. 771-791.

¹²⁹⁰ *Projet de Règlement pour la procédure arbitrale, Session de la Haye de 28, 30 et 31 Août 1875*, 7 Rev. de Droit Int’l et de Législation Comparée (1875), **Exhibit-LE 5/2**. See also above at para. 773.

¹²⁹¹ M. Reisman, *Nullity and Revision*, 36 (1946), **Exhibit-LE 5/4**.

¹²⁹² See Draft ILC Convention on Arbitral Procedure, Art. 30, **Exhibit-LE 5/7**.

¹²⁹³ See below at para 780-781. See also *Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 A.C. 221, ¶30 (House of Lords) (“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”), **Exhibit-LE 14/1**; Park, *The Nature of Arbitral Authority: A Comment on Lesotho Highlands*, 21 Arb. Int’l 483 et seq (2005), **Exhibit-LE 14/2**; ICSID Convention, Art. 52, **Exhibit-LE 14/3**. Indeed, in the course of drafting the Convention, the delegates rejected a proposal to include “the manifestly incorrect application of law” as a basis for claiming nullity. See *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. 2, Part 2, Doc. No. 103, **Exhibit-LE 14/4**; Inter-American Convention on International Commercial Arbitration, Art. 5, **Exhibit-LE 5/10**.

¹²⁹⁴ *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, p. 289 (1886), **Exhibit-LE 14/5**.

¹²⁹⁵ 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**.

¹²⁹⁶ D. Guermanoff, *L’excès de pouvoir de l’arbitre* 63 (1929), **Exhibit-LE 13/9**.

¹²⁹⁷ D. Guermanoff, *L’excès de pouvoir de l’arbitre* 63 (1929), **Exhibit-LE 13/9** (emphasis added).

“numerous errors of law and fact equivalent to essential error.”¹²⁹⁸ The Permanent Court of Arbitration did not express an opinion on the essential error challenge directly but, in the course of upholding certain aspects of the commission’s judgment, stated:

“Whereas 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; that if an arbitral decision could be disputed on the ground of erroneous appreciation, appeal and revision, which the Conventions of the Hague of 1899 and 1907 made it their object to avert, would be the general rule; ... [B]ased on a consideration of facts and on an interpretation of legal principles *which are subject neither to re-examination nor to revision by this Tribunal*, the decisions awarded on these points [are] not void. ...”¹²⁹⁹

777. In like manner, the ICJ’s decision concerning the *Honduras v. Nicaragua* arbitration confirms the absence of essential error as a contemporary basis for nullity. In that case, Honduras argued that Nicaragua had wrongfully failed to give effect to a 1906 award of the King of Spain concerning the two countries’ boundary. Nicaragua defended its non-compliance on the ground, *inter alia*, that the “so-called ‘arbitral’ decision is ... incapable of execution by reason of its obscurities and contradictions.”¹³⁰⁰

778. The ICJ held that Nicaragua was precluded from arguing nullity on the basis of repeated acts of recognition of the boundary delimited therein (estoppel).¹³⁰¹ In addition, however, the ICJ also briefly explained why Nicaragua’s arguments based on alleged essential errors in the King of Spain’s decision would in any case fail:

“[T]he court will observe that the Award was not subject to appeal and that the Court cannot approach the consideration of the objections raised by Nicaragua to the

¹²⁹⁸ *Arbitral Award of 25 October 1910, Orinoco Steamship Co. Case (United States v. Venezuela)*, 11 U.N.R.I.A.A. 227, 238 (1910), **Exhibit-LE 8/3**; see also the *Trail Smelter Case*, 3 U.N.R.I.A.A. 1905, 1957 (1938) (stating that opinion generally prevailing in international law is that “to justify revision it is not enough that there has taken place an error on a point of law or in the appreciation of a fact, or in both” and that “[a] mere error in law is no sufficient ground for a petition tending to revision”), **Exhibit-LE 8/4** (emphasis added).

¹²⁹⁹ *Arbitral Award of 25 October 1910, Orinoco Steamship Company Case (United States v. Venezuela)*, 11 U.N.R.I.A.A. 227, 239-240 (1910), **Exhibit-LE 8/3** (emphasis added); see also K. Carlston, *The Process of International Arbitration*, 150 (1946, reprinted 1972) (noting that insofar as the *Orinoco Steamship* tribunal declared, as a statement of substantive law, that an error of fact was not a ground for nullity, “no criticism can be voiced against it.”), **Exhibit-LE 1/3**.

¹³⁰⁰ *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906, Judgment of 18 November 1960 (Honduras v. Nicaragua)*, [1960] I.C.J. Rep. 192, 197 (I.C.J.), **Exhibit-LE 7/3**. See also Doerner, *Orinoco Steamship-Fall*, in K. Strupp & H.-J. Schlochauer, *Wörterbuch des Völkerrechts*, Vol. 2, 694 (1961) (“This decision is in conformity with the prevailing tendency to view ‘excès de pouvoir’ as an absolute ground for nullity, whereas an ‘erreur essentielle’ can only be attacked with the so-called revision, requiring the submission of new facts that were unknown by the time the award was rendered, but not allowing to attack the first judge’s legal assessment, or his consideration of evidence.”), **Exhibit-LE 14/6**.

¹³⁰¹ *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906, see also Judgment of 18 November 1960 (Honduras v. Nicaragua)*, [1960] I.C.J. Rep. 192, 212 *et seq.* (I.C.J.) (“It follows from the facts referred to above that Nicaragua took cognizance of the Award and on several occasions between the date of the Award and 19 March 1912 expressed its satisfaction to Honduras that the dispute concerning the delimitation of frontiers between the two countries had been finally settled through the method of arbitration. ... In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua’s failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived.”), **Exhibit-LE 7/3**.

validity of the Award as a Court of Appeal. *The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong. These and cognate considerations have no relevance to the function the Court is called upon to discharge in these proceedings, which is to decide whether the Award is proved to be a nullity having no effect.*¹³⁰²

779. The non-existence of essential error as a ground for nullity is confirmed by Article 61 of the Statute of the ICJ, which provides only very limited grounds for revision of an ICJ judgment.¹³⁰³ In the words of one commentator, Article 61 “strengthen[s] the arguments considered *against acceptance of essential error as a ground of nullity.*”¹³⁰⁴

780. The same general approach applies under international commercial arbitration conventions and developed national arbitration legislation. The New York Convention (as well as the Inter-American Convention) make no provision for non-recognition of arbitral awards based on alleged substantive errors by the arbitrators. That is expressly affirmed by both national court decisions¹³⁰⁵ and academic commentators.¹³⁰⁶ Indeed, the principle that no review of the arbitrators’ substantive decisions is a fundamental aspect of the Convention:

¹³⁰² *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906, Judgment of 18 November 1960 (Honduras v. Nicaragua)*, [1960] I.C.J. Rep. 192, 214 (I.C.J.), **Exhibit-LE 7/3** (emphasis added).

¹³⁰³ Article 61 of the ICJ Statute provides: “An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.” **Exhibit-LE 14/7**. See also *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, [1985] I.C.J. Rep. 192, 197 (I.C.J.) (noting, where party submitted combined request for interpretation, revision, and correction of error, that no provision of ICJ Statute or Rules governs request or procedure for correction of an error), **Exhibit-LE 14/8**.

¹³⁰⁴ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals* 700, 703 *et seq.*, **Exhibit-LE 5/5** (emphasis added). See also K. Kaikobad, *Interpretation and Revision of International Boundary Decisions* 303 (2007) (“[P]rovisions on revision and interpretation have been ‘couched and placed in the Statute [of the ICJ] in such a way as to emphasise the exceptional nature of [such] proceedings, as possibly impairing the stability of the jural relations established by the res judicata.”), **Exhibit-LE 4/7** (emphasis added).

¹³⁰⁵ See, e.g., *Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 A.C. 221, ¶30 (House of Lords) (“It is well established that **Article V(I)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award**”), **Exhibit-LE 14/1** (emphasis added); *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**; *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) (“**The court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact**”), **Exhibit-LE 12/3**; *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.*, 969 F.2d 765, 772 (9th Cir. 1992) (noting that two sentences in dispositive portion of award “appear to be flatly contradictory” and “are mutually inconsistent,” but court “proceed[s] under the assumption, however, that the [arbitral tribunal] is not irrational”), **Exhibit-LE 12/4**; *Fiat SpA v. Ministry of Finance and Planning of Repub. of Suriname*, 1989 WL 122891, at *1, *4 (S.D.N.Y. 1989), **Exhibit-LE 14/10**; *Qinhuangdao Tongda Enter. Dev. Co. v. Million Basic Co.*, XIX Y.B. Comm. Arb. 675, 678 (H.K. High Court, S.Ct. 1993) (1994) (“**The New York Convention is clear that it is not for the enforcing court to rehear the case on the merits**”), **Exhibit-LE 14/11**; *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) (“what Mr. Chan is effectively attempting to do is to appeal on the merits ... In my judgment, unless Mr. Chan can establish one of the New York Convention grounds ... his ground of opposition must fail”), **Exhibit-LE 14/12**; *Judgment of 13 August 1979, Götaverken v. GNMTC*, VI Y.B. Comm. Arb. 237, 238 (Swedish S.Ct.) (1981) (rejecting argument that recognition should be denied under Article V(1)(c) because tribunal supposedly awarded price reduction although not requested to do so), **Exhibit-LE 14/13**; *Judgment of 18 September 1997*, XXV Y.B. Comm. Arb. 710, 711 *et seq.* (Landgericht Hamburg) (2000) (rejecting argument that recognition should be denied under Article V(1)(c) because tribunal supposedly relied upon *lex mercatoria* and applied incorrect rate of interest), **Exhibit-LE 14/14**; *Judgment of 9 January 1995, Inter Maritime Mgt SA v. Russin & Vecchi*, XXII Y.B. Comm. Arb. 789, 797 (Swiss Federal Tribunal) (1997) (“**The appellant forgets that the enforcement court does not decide on the arbitral award as an appellate instance; the merits of an award cannot be reviewed under the cover of public policy.**”), **Exhibit-LE 14/15** (emphasis added); *Judgment of 24 January 1997, Inter-Arab Inv.*

“The New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits, with as the only reservation, the respect of international public policy. *Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal’s award.*”¹³⁰⁷

781. To the same effect, in the annulment decision in *CMS v. Argentine Republic*, the Ad Hoc Annulment 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.*”¹³⁰⁸

782. Likewise, contemporary national arbitration legislation in most developed jurisdictions also excludes substantive errors as a basis for annulment of arbitral awards made locally. That is true, for example, under the UNCITRAL Model Law,¹³⁰⁹ the French Code of Civil Procedure,¹³¹⁰ the Austrian ZPO,¹³¹¹ the German ZPO,¹³¹² the Swiss Law on Private International Law¹³¹³ and (according to U.S. Supreme Court authority) the U.S. Federal Arbitration Act¹³¹⁴ -- none of which provide for annulment of arbitral awards based on the arbitrators’ substantive legal or factual mistakes.

783. Thus, the weight of contemporary authority is that, as a matter of generally applicable international law, an essential or material error is not grounds for challenging the finality and validity of an arbitral award or similar decision. The decision-maker’s mistakes in applying

Guarantee Corp. v. Banque Arabe et Internationale d’Investissements, XXII Y.B. Comm. Arb. 643, 666 (Brussels Cour d’appel) (1997) (“*The Court shall not examine the reasoning [of the arbitrators] as an appellate court.* The examination of incoherent and contradictory reasoning belongs to an appellate jurisdiction ...”), **Exhibit-LE 14/16** (emphasis added); *Judgment of 28 January 1999*, XXIVa Y.B. Comm. Arb. 714, *Sovereign Participations Int. SA v. Chadmore Development Ltd.*, (Lux. Cour d’appel) (1999) (“*Even if the arbitral tribunal makes a gross mistake of fact or law, this is not a ground for refusing enforcement of the award.* This is the case, in particular, of the accusation that the arbitrators wrongly evaluated certain documents...”), “the Convention does not allow the enforcement court in any case to review the manner in which the arbitrators decided on the merits, with the sole exception of the compliance with international public policy”), **Exhibit-LE 12/10** (emphasis added); *Judgment of 19 November 1987*, XIV Y.B. Comm. Arb. 675, 677 (Italian Corte di Cassazione) (1989) (“[T]he enforcement court cannot review the merits of the dispute but can only ascertain whether in the specific case the conditions for recognizing a foreign arbitral award are met.”), **Exhibit-LE 14/17**.

¹³⁰⁶ See A. Mourre & L. di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, 23 J. Int’l Arb. 171, 172 (2006), **Exhibit-LE 14/18**; K.-H. Böckstiegel, S. Kröll & P. Nacimiento, *Arbitration in Germany* 452 (2007), **Exhibit-LE 14/19**; J. Hamlin, *Contractual Alteration of the Scope of Judicial Review: The U.S. Experience*, 15 J. Int’l Arb. 4, 53, 54 (1998) (“Congress did not authorize *de novo* review of [arbitral awards] on [their] merits; it commanded that when the exceptions [to confirmation] do not apply, a federal court has no choice but to conform.”), **Exhibit-LE 14/20**.

¹³⁰⁷ *Judgment of 24 November 1993*, XXI Y.B. Comm. Arb. 617, 623 (Lux. Superior Court of Justice) (1996), **Exhibit-LE 15/1**.

¹³⁰⁸ *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**.

¹³⁰⁹ UNCITRAL Model Law, Art. 34, **Exhibit-LE 12/17**.

¹³¹⁰ French Code of Civil Procedure, Art. 1502, **Exhibit-LE 11/9**.

¹³¹¹ Austrian ZPO, §-611, **Exhibit-LE 15/3**.

¹³¹² German ZPO, §-1059, **Exhibit-LE 15/4**.

¹³¹³ Swiss Law on Private International Law, Art. 190, **Exhibit-LE 3/7**; *Judgment of 7 September 2006*, 4P.134/2006, ¶5 *et seq.* (Swiss Fed. Sup. Ct), **Exhibit-LE 15/5**.

¹³¹⁴ U.S. Federal Arbitration Act, §§9-11 U.S.C., **Exhibit-LE 15/6**; see also *Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S.Ct. 1396, 1404-05 (U.S. S.Ct. 2008) (reiterating that courts will not conduct a general review of arbitral awards for legal errors), **Exhibit-LE 5/6**; *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (U.S. S.Ct. 1987) (“Courts thus do not sit to hear claims of factual or legal error by an arbitrator. ...”), **Exhibit-LE 15/7**.

substantive legal rules, or evaluating the evidence, is ordinarily not a basis for challenging its ultimate decision. This is entirely consistent with the vital public policies favoring the finality of arbitral awards and similar determinations.

784. Of course, even in those instances where it is available, the concept of “essential” or “material” error is narrowly limited. In the words of one commentator, “[e]ssential error is unlikely to be a significant ground of the nullity of an international award or judgment.”¹³¹⁵ Similarly:

*“major errors – essential or inessential – tend to be viewed as matters of judicial discretion. As with comparable mistakes of municipal courts, their exclusion from consideration in the context of nullity may be thought to be part of the price to be paid for the independence of the international judiciary.”*¹³¹⁶

785. Other authorities are to the same effect in concluding that, even in those cases where it is theoretically available, an “essential error” is a basis for nullity only in the clearest and most unusual cases.¹³¹⁷ For example, in discussing “essential error,” one authority explains that “[n]ullity can hardly result from an error of fact” and that, while, “[a]lthough in theory, cases can be imagined where an essential error of law can be found, there is no practice where nullity was invoked on the ground of an essential error of law.”¹³¹⁸

786. In any event, even where essential or material error is a potential ground for nullity, it is a separate basis, distinguishable from other bases for nullity. In particular, essential or material error is separate and distinguishable from alleged excess of power. That is evident, as discussed above, from the separate inclusion of both “essential error” and “excess of power” under Article 27 of the Institut de Droit International’s 1875 *Projet de Règlement pour la procédure arbitrale internationale*¹³¹⁹ and from the separate treatment of the two grounds in leading commentary.¹³²⁰

¹³¹⁵ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals* 700, 701 (1986), **Exhibit-LE 5/5**.

¹³¹⁶ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals* 700, 701 *et seq.* (1986), **Exhibit-LE 5/5** (emphasis added).

¹³¹⁷ Verzijl, *La validité et la nullité des actes juridiques internationaux*, 15 Rev. de Droit Int’l, 284, 327 (1935) (With respect to error, as a cause of nullity of an international legal act, it is equally very rare, and one must apply the usual distinctions drawn up by legal scholars, namely private law scholars. It is possible that the error may be of such an essential character that, as a consequence the legal act is null, due to lack of consent as to the subject matter of the act, but the error could also lead to a mere relative nullity, or not affect the validity of the act at all.”), **Exhibit-LE 15/8**; H. Thevenaz, *Peut-on parler de causes de nullité des sentences arbitrales?*, 46 RGDIP 53, 56 (1939) (“If by virtue of the very definition of arbitration, an award must be considered mandatory, this means that neither errors of fact or errors of law, nor corruption, incapacity of judges, excess of power or incompetence, prevent an award from being fully and immediately applicable to the parties.”), **Exhibit-LE 15/9**.

¹³¹⁸ Oellers-Frahm, *Validity and Nullity of Judicial and Arbitral Decisions*, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Elsevier ¶10 (January 2006), available at www.mpelil.com, **Exhibit-LE 15/10**.

¹³¹⁹ *Projet de Règlement pour la procédure arbitrale internationale*, Session de La Haye 1875, **Exhibit-LE 5/2**; *see above* at para. 773.

¹³²⁰ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, 700, 703 *et seq.* (1986), **Exhibit-LE 5/5**; K. Carlston, *The Process of International Arbitration* 86 *et seq.* (excess of power), 150 *et seq.* (error) (1946, reprinted 1972), **Exhibit-LE 1/3**; M. Reisman, *Nullity and Revision*, 31-43 (1971), **Exhibit-LE 5/4**; K. Kaikobad, *Interpretation and Revision International Boundary Decisions* 70-77 (2007), **Exhibit-LE 4/7**; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 357-372 (1953, reprinted 2006), **Exhibit-LE 8/6**; Reisman & Pulkowski, *Nullity in International Law* in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* ¶13 (2008), available at www.mpepil.com, **Exhibit-LE 5/8**; Oellers-Frahm, *Judicial and Arbitral Decisions: Validity and Nullity* in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* ¶¶8-14 (2008), available at www.mpepil.com, **Exhibit-LE 15/10**; D. Guermanoff, *L’excès de pouvoir de l’arbitre, Chapitre IV, L’excès de pouvoir dans la doctrine et*

787. The foregoing authorities demonstrate the utter implausibility of the GoS's excess of mandate claim in the present case. Here, as discussed above, the parties expressly agreed in Article 2 of the Abyei Arbitration Agreement to exclude any grounds for challenging the ABC Report other than "excess of mandate."¹³²¹ There is, therefore, no basis at all for considering efforts by the GoS to reargue the merits of the parties' disputes (under Articles 2(a) or 2(b)), whether in the guise of essential error or otherwise; the only issue relevant under Articles 2(a) and 2(b) is an excess of mandate.

788. That conclusion is evident from the plain language of Articles 2(a) and 2(b), which do not make any provision for challenging the ABC's decisions on the basis of errors of law or fact. That result is confirmed – although this is scarcely necessary – by both the absence of any general basis for claiming "essential" or "material" error under contemporary international law and the distinctly limited character of "essential error" and other grounds of alleging the nullity of a decision. Both of these characteristics of the generally applicable grounds for challenging the validity or finality of a decision underscore the narrow and exceptional character of an "excess of mandate" under the Abyei Arbitration Agreement.

789. Here, there is no basis at all for any suggestion that the ABC Experts made any sort of error – essential or otherwise – in their Report. Rather, as detailed above, the Report was thoroughly reasoned and arrived at a carefully-considered application of the definition of the Abyei Area in its "Final and Binding Decision" and depicted as the "Abyei Area" on Map 1. That decision was, at the very least, a reasonable and sensible application of Article 1.1.2 of the Abyei Protocol (requiring definition and demarcation of the "Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905"); it certainly suffered from no essential or material errors.

790. More fundamentally, however, even if the ABC *had* committed some obvious error of law or fact – for example, misconstruing the substantive definition of the Abyei Area set forth in Article 1.1.2 of the Abyei Protocol or misunderstanding the factual record – that would be entirely irrelevant in these proceedings. That is because these proceedings do not concern claims of essential error and instead only concern an alleged "excess of mandate." And, as discussed above, an excess of mandate simply does not include alleged errors of law, interpretation of agreements or facts; those are matters of purported substantive mistakes in decision-making and not an excess of mandate which would be cognizable in these proceedings.

791. Simply put, even if the ABC misinterpreted or grossly misinterpreted the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol, that would not constitute an excess of mandate and would not be grounds for disregarding the ABC Report. Rather, the Commission would have committed an error of law (or mistake of fact) which is not grounds for alleging an excess of mandate.

à la lumière du droit de la Haye, 63 (1929) ("An excess of power must not be confused with an essential error."), **Exhibit-LE 13/9**; Verdross *L'excès de pouvoir du juge arbitral dans le droit international public*, 9 Rev. de droit Int'l et de législation comparée 228 (1928) ("In the same way as an award on the merits, a decision [rendered on the question of jurisdiction], can contain an essential error. However, as the arbitral tribunal has jurisdiction on the basis of the *compromis* to adjudicate precisely the question of the scope of its own competence, and that therefore the decision rendered on this issue falls within the scope of the *compromis*, it cannot contain an excess of power"), **Exhibit-LE 13/13**.

¹³²¹ See above at paras. 665-673.

D. *The GoS has Excluded or Waived any Rights to Claim that the ABC Experts Exceeded Their Mandate*

792. There is a final but equally important reason why the GoS is not entitled to have the ABC Report set aside by this Tribunal. Even if the GoS might have had some non-frivolous basis for an “excess of mandate” claim, it has waived or excluded the possibility of asserting any such claim. It has done so both by agreeing to the terms of the Comprehensive Peace Agreement, including the Abyei Protocol and Abyei Appendix, and by its subsequent conduct during the ABC proceedings.

793. First, the GoS and SPLM/A agreed 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.

794. Second, it is well-settled that jurisdictional objections must be raised at the outset of adjudicative proceedings. A party is not permitted to play “Heads, I win, but Tails, you lose” games with its counterparty, and instead must assert claims of an excess of mandate at the earliest opportunity.

795. 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 above, the GoS repeatedly and explicitly affirmed that the Commission’s decision would be final and binding. 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.

1. The Parties Excluded any Rights to Claim an Excess of Authority by the ABC Experts

796. The GoS and SPLM/A agreed 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 a heavily negotiated, specially tailored dispute resolution mechanism, in the implementation of which the parties’ representatives and local inhabitants actively and voluntarily participated, this regime left neither party with any rights to challenge the ABC Experts’ decision.

797. In these circumstances, there is no substantive basis for any claim that the ABC Experts exceeded the scope of their mandate; the scope of that mandate was, pursuant to the parties’ agreement, for the ABC Experts alone to determine during the course of the parties’ collaborative proceedings before the Commission. Nothing in the Abyei Arbitration Agreement grants the GoS any greater substantive rights to assert an excess of mandate claim than it had previously – to wit, none.

a) The Parties Agreed that the ABC Report Would Be “Final and Binding” and Would Be Given “Immediate Effect”

798. The parties expressly agreed that the ABC Report defining the Abyei Area would be **final and binding**, without any possibility for appeal or delay. That agreement was recorded

specifically in the Abyei Annex, the Abyei Protocol, the Terms of Reference and the Rules of Procedure. In none of these instruments was there any provision, or even a suggestion, that the ABC Report would be subject to any sort of review or that there could be any delay by either party in implementing the Report.

799. Article 5 of the Abyei Protocol made clear that the ABC Report was to be final and binding on the parties and that it was to be immediately implemented. Nothing in the Protocol permitted any review of the Report or any delay in its implementation.

800. As discussed elsewhere, Article 5.1 provided for the formation of the ABC, whose mandate was to define and demarcate the Abyei Area. Article 5.2 required that the ABC “finish its work within the first two years of the Interim Period,”¹³²² a period subsequently shortened yet further by the parties’ agreement.¹³²³ In turn, Article 5.3 of the Abyei Protocol provided that the ABC “shall present its *final report* to the Presidency as soon as it is ready” and that, “upon presentation of the *final report*, the Presidency *shall* take necessary action to put the special administrative status of Abyei Area into *immediate effect*.”¹³²⁴

801. In addition to requiring implementation of the ABC Report, nothing in the Abyei Protocol qualifies this obligation, or provides for review of the Report, in any manner. Although the parties carefully and comprehensively negotiated an entire, complex dispute resolution mechanism, they did not include any provision for any sort of appeal or challenge (for example, to a subsequent appellate arbitral body, commission or other review mechanism). On the contrary, the parties agreed instead to a mandatory obligation to put the Report into “*immediate effect*,” which is inconsistent with any notion of subsequent rights of appeal or challenge.

802. Likewise, Article 5 of the Abyei Annex provides that in simple and direct terms that: “The report of the Experts, arrived at as prescribed in the ABC rules of procedure, shall be *final and binding* on the Parties.”¹³²⁵ Even more explicitly than the Abyei Protocol, Article 5 of the Abyei Annex underscores, without qualification, the parties’ obligations to treat the ABC Report as final and binding.

803. Nothing in the Abyei Annex qualifies this commitment, or provides for review of the ABC Report, in any manner. Again, while dealing comprehensively with all aspects of the dispute resolution process (i.e., selection of ABC Experts, in Article 2; procedures for ABC Experts, in Article 3, 4 and 5, report of ABC Experts, in Article 5), nothing in the Annex provided any right of appeal or other challenge to the ABC Report.

804. The same commitments by the parties, to respect the ABC Report as “final and binding” and to give it “immediate effect,” were reiterated in the Terms of Reference and Rules of Procedure. Article 3.5 of the Terms of Reference provided that the ABC was to “prepare their *final report* that shall be presented to the Presidency in Khartoum.”¹³²⁶

¹³²² Abyei Protocol, Art. 5.2, **Appendix C**; *see also above* at para. 570.

¹³²³ *See* Witness Statement of Minister Deng Alor Kuol, at p. 15, ¶92 (“Originally in the terms of the Abyei Protocol, we anticipated that the ABC would conclude its work within two years. ... This timeline was shortened in order for the ABC Report to be available before the end of the Pre-Interim Period.”); *see also above* at para. 503.

¹³²⁴ Abyei Protocol, Art. 5.3, **Appendix C** (emphasis added); *see also above* at para. 570.

¹³²⁵ Abyei Annex, Art. 5 **Appendix D** (emphasis added).

¹³²⁶ ABC ToR, Art. 3.5, **Appendix E** (emphasis added).

Likewise, the Program of Work for the ABC provided for the ABC Experts to “present in the presence of the whole membership of the ABC their *final report* to the Presidency.”¹³²⁷

805. Again, while comprehensively addressing a wide range of procedural and other issues regarding the ABC dispute resolution mechanism, no provision was made in the Terms of Reference for any appeal from or review of the ABC Report. Indeed, while the parties provided (in Article 2.1) for the resolution of disputes over constitution of the ABC by IGAD, no comparable provision was included for review of the ABC Experts’ ultimate decision.

806. Finally, the Rules of Procedure provided (in Article 13) that the ABC Experts “will prepare the final report” and that (in Article 14), if “an agreed position by the two sides is not achieved, the experts will have the final say.”¹³²⁸ Recognizing the obligation of the parties immediately to implement the Report, the Rules of Procedure also provided for the ABC Experts, as soon as they had delivered their Report, to “choose the relevant technical personnel who shall make a survey and conduct demarcation on land.”¹³²⁹

807. The SPLM/A participants on the ABC confirm both that the ABC Report was understood by all members of the ABC as being “final and binding” and that the ABC members also fully recognized the parties’ immediate obligation to implement the Report. That is clear from the witness statements of Minister Deng Alor and James Lual Deng.¹³³⁰

- b) The Parties’ Agreement that the ABC Report Is “Final and Binding” and Entitled to “Immediate Effect” Waives Any Right to Challenge the Report

808. The GoS and SPLM/A agreed that the ABC Report would be “final and binding,” and that it would be given “immediate effect,” without any rights of appeal, for vitally important reasons. Indeed, it was essential to the Abyei Annex and the Abyei Protocol, as well as to the entire Comprehensive Peace Agreement, that the ABC Report be immediately implemented. The plain language and structure of the parties’ agreements, together with these vitally important objectives, waives either party’s rights to challenge the ABC Report, including on excess of mandate grounds.

809. The parties’ use of the phrase “final and binding,” with regard to the ABC Report, in the Abyei Annex, Terms of Reference and Rules of Procedure, must be interpreted as an exclusion of any rights to challenge the ABC Report. That meaning is dictated by the plain and ordinary meaning of the term “final.”

810. The term “final” in Article 60 of the ICJ Statute has a clear meaning, providing: “The judgment is final and without appeal.”¹³³¹ There can be little doubt but that the term “final” in

¹³²⁷ ABC ToR, at p. 2 (“Program of work”), **Appendix E** (emphasis added).

¹³²⁸ ABC RoP, Arts. 13-14, **Appendix F**.

¹³²⁹ ABC RoP, Art. 16, **Appendix F**.

¹³³⁰ Witness Statement of Minister Deng Alor Kuol, at p. 21, ¶133; at p. 23, ¶¶142 and 144; Witness Statement of James Lual Deng, at p. 7, ¶36; Witness Statement of Lt. Gen. Sumbeiywo, at p. 14, ¶75.

¹³³¹ Statute of the International Court of Justice, Art. 60, **Exhibit-LE 14/7**. See J. Collier & V. Lowe, *The Settlement of Disputes in International Law*, 261 (1999) (“Once a valid award has been rendered it has the status of *res judicata* between the parties. *In the case of the International Court judgments this principle is generally regarded as implicit in articles 59 and 60 of its Statute; and a similar position obtains in respect of other standing tribunals.*”), **Exhibit-LE 15/11**; *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, [1999] I.C.J. Rep. 31, 36 (I.C.J.) (“*The language and structure of Article 60 reflect the primacy of the principle of res judicata.*”), **Exhibit-LE 5/14**; *South West Africa Cases (Ethiopia v. South Africa; Liberia v.*

Article 60 means that there shall be no right of recourse from the Court's judgments. As Judge Waldock explained in a concurring opinion in the *Fisheries Jurisdiction* case:

“Under Article 60 ... the Judgment is ‘final and without appeal.’ It thus constitutes a final disposal of the case brought before the Court. ...”¹³³²

811. More generally, this conclusion is confirmed by the plain meaning of the term “final.” The Merriam-Webster Dictionary defines the term “final” as: “(1)(a) **not to be altered or undone**[.] (b) of or relating to a concluding court action or proceeding; (2) **coming to an end [--] being the last in a series**, process, or progress; (3) of or relating to the ultimate purpose or result of a process.”¹³³³ Similarly, the Oxford English Dictionary defines “final” as “2.a. Marking the last stage of a process; leaving nothing to be looked for or expected; ultimate. 3.a. Putting an end to something ...; ... **not to be undone, altered, or revoked; conclusive**.”¹³³⁴ To the same effect, Black’s Law Dictionary defines “final judgment” as “[a] court’s **last action that settles the rights of the parties and disposes of all issues in controversy**, except for the award of costs ... and enforcement of the judgment.”¹³³⁵

812. These various definitions provide the basis for interpretation of the parties’ agreement. They constitute the plain meaning of the language that the parties used, both in the ordinary sense of the word “final” and in more specialized legal settings.

813. It also bears emphasis that the parties did not merely provide that the ABC Report would be “**final**,” but instead that it would be “**final and binding**.” The use of the phrase “final and binding” makes even clearer the parties’ exclusion of any rights to challenge the ABC Experts’ Report.

814. A number of international instruments use the term “**binding**,” including the New York Convention,¹³³⁶ the ICSID Convention,¹³³⁷ the Model Rules on Arbitral Procedure¹³³⁸ and the Draft ILC Convention on Arbitral Procedure.¹³³⁹ In each case, the term “binding” entails

South Africa), [1966] I.C.J. Rep. 6, 332 *et seq.* (I.C.J.) (Jessup, J., dissenting) (“**The statement in Article 60 of the Statute that ‘the judgment is final and without appeal,’ taken in conjunction with the reference in Article 59 to ‘that particular case,’ constitutes a practical adoption in the Statute of the rule of res judicata**, a rule, or principle, cited in the proceedings of the Commission of Jurists which drafted the Statute of the Permanent Court of International Justice in 1920, as a clear example of ‘a general principle of law recognized by civilized nations.’”), **Exhibit-LE 15/12**; M. Schröder in G. von Vitzthum, *Völkerrecht*, Chapter 7.IV, ¶100 (4th ed. 2007) (“**The judgments [of the ICJ] are final because national laws do not contain setting aside procedures. The parties’ right to invoke the Court in the event of a dispute as to the meaning of the judgment (Art. 60 ICJ Statute) ... does not touch upon the finality of the judgment** since the interpreting judgment may not change the content of the judgment to be interpreted but may only determine its scope. At the same time, this means that the ICJ’s judgments also enjoys substantive res judicata effect in the sense that once decided, the parties may no longer bring the dispute in front of the ICJ (Art. 59 I.C.J. Statute).”), **Exhibit-LE 16/1**.

¹³³² *Separate opinion of Judge Waldock in Case Concerning Fisheries Jurisdiction (Great Britain v. Iceland)*, [1974] I.C.J. Rep. 3, 105, 125 (I.C.J.), **Exhibit-LE 16/2**.

¹³³³ Available at www.merriam-webster.com/dictionary/final, as at 9 December 2008, **Exhibit-LE 16/3** (emphasis added).

¹³³⁴ Oxford English Dictionary (2nd ed. 1989, printed online 2008), **Exhibit-LE 16/4**.

¹³³⁵ Black’s Law Dictionary (final judgment) (8th ed. 2004), **Exhibit-LE 16/5** (emphasis added).

¹³³⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) Art. III (“**Each Contracting State shall recognize arbitral awards as binding** and enforce them”), **Exhibit-LE 5/1** (emphasis added).

¹³³⁷ ICSID Convention, Art. 53 (1) (“**The award shall be binding on the parties** and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”), **Exhibit-LE 14/3** (emphasis added).

¹³³⁸ Model Rules on Arbitral Procedures, Art. 30 (“Once rendered, the Award shall be binding upon the parties.”)

¹³³⁹ Draft ILC Convention on Arbitral Procedure, Art. 26 (“The award is **binding** upon the parties when it is rendered. It must be carried out in good faith.”), **Exhibit-LE 5/7** (emphasis added).

the validity of the arbitral award, while leaving open limited possibilities for resisting enforcement or recognition of the award (discussed above¹³⁴⁰).

815. In contrast, by agreeing that the ABC Report would be both “*final and binding*,” the parties went beyond merely treating the ABC Report as an obligatory instrument and, consistent with both the ordinary and legal meaning of that term “*final*,” additionally waived any right to challenge or appeal that Report. Other readings of the parties’ agreement deny the term “final,” contained in the phrase “final and binding,” any meaning, in contravention of basic rules of interpretation and common sense.¹³⁴¹

816. The same conclusion is dictated by the parties’ separate agreement that the special administrative status of the Abyei Area “*shall*” be given “*immediate effect*,” in Article 5.3 of the Abyei Protocol. This obligation again leaves no room for any appeal or challenge to the ABC Report: any such appeal or challenge would have prevented “immediate” compliance with the ABC Report, again in contradiction to the plain language of the parties’ agreement.

817. It also bears emphasis that the parties’ agreements comprehensively regulated almost every conceivable procedural aspect of the ABC dispute resolution mechanism, including its timing, site inspections, witness hearings and other matters, in extensive detail. The terms of the Abyei Protocol, Abyei Annex, Terms of Reference and Rules of Procedure were in this respect uniquely comprehensive and detailed in setting out the entire procedural course of the parties’ dispute resolution mechanism.

818. Despite the detail and comprehensive character of the parties’ agreements, nothing provided for any form of challenge or appeal from the ABC Report. Rather, as already noted, the parties provided the opposite, requiring that the ABC Report be treated as “final and binding” and given “immediate effect.” This absence of an appellate or other review was no oversight. On the contrary, the parties knew perfectly well how to agree upon some sort of review, providing in Article 2.1 of the Abyei Terms of Reference for the IGAD to consider disputes over the composition of the ABC, while adopting no comparable avenue with regard to the ABC Experts’ Report.

819. In the circumstances of a specially negotiated, comprehensive and highly detailed dispute resolution mechanism, the parties’ agreement that the ABC Report would be “final and binding” and entitled to “immediate effect” can have only one meaning. That meaning was that no appeals or challenges of any sort to the ABC Report would be permitted. That agreement made particular sense given the parties’ ongoing, intimate involvement in the work of the ABC, which enabled them to see that their agreed dispute resolution mechanism was being implemented in accordance with their expectations and to protest or take other steps if it was not. In these circumstances, the GoS simply had no right to challenge the ABC Report on excess of mandate or any other grounds.

¹³⁴⁰ See above at paras. 703-709.

¹³⁴¹ See, e.g., Third Report of the Special Rapporteur, Sir Humphrey Waldock, *Yearbook of the International Law Commission 1964*, II, U.N. Doc. A/CN.4/167, 55 (1964) (“... particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the *normal sense of the words and with other parts of the text, and in such a way that reason and a meaning can be attributed to every part of the text.*”), **Exhibit-LE 2/2** (emphasis added); UNIDROIT Principles of International Commercial Contracts, Art. 4.5 (“*Contract terms shall be interpreted so as to give effect to all the terms* rather than to deprive some of them of effect.”), **Exhibit-LE 2/7** (emphasis added); Halsbury’s Laws of England, Vol. 13, ¶175 (Reissue 2007) (“It is a rule of construction applicable to all written instruments that ... *the words of each clause must be so interpreted* as to bring them into harmony with the other provisions of the instrument.”), **Exhibit-LE 16/7** (emphasis added); *Restatement (Second) Contracts* §202 (1981) (“A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.”), **Exhibit-LE 3/3**.

820. There were also vitally important reasons of policy for the parties to agree to treat the ABC Report as final and binding, excluding any rights to challenge or appeal from the Report's determinations. As discussed above, the delimitation and demarcation of the Abyei Area was necessary, among other things, to (a) defining the territorial competence of the Abyei Area's local Executive Council, and identifying the voters entitled to vote for that Council; (b) defining the geographical area as to which oil revenues must be shared under the Abyei Protocol; (c) defining the territorial competence of the Abyei Area Council; (d) identifying those persons who will be Abyei Area residents (entitled to dual citizenship in Western Kordofan and Bahr el Ghazal); (e) defining the area in which international monitors are to be deployed; and (f) identifying those persons who will be entitled to vote in the Abyei Referendum and defining that territory to which the referendum will apply.¹³⁴²

821. It was also essential to the implementation of the Abyei Protocol that the ABC's delimitation of the Abyei Area proceed in the very timely (i.e., with "*immediate* effect") and definitive fashion required by the parties' agreement. Until the Abyei Area was delimited, the various governance, financial and security measures prescribed by the Abyei Protocol could not be effectively implemented as intended by the parties.

822. The importance of immediate implementation of the ABC Report to the administration and status of the Abyei Area is explained by Minister Deng Alor and James Lual Deng. As Minister Deng Alor says in his witness statement, "[t]he immediate implementation of the ABC Report was of considerable significance to the people of the Abyei Area as it was intertwined with the implementation of the CPA. . . . The non-implementation . . . meant a delay in very basic services to the people in the Abyei Area: security, housing, health care etc."¹³⁴³

823. Equally, the possibility of continuing disputes and disagreements about the ABC Experts' determinations would have jeopardized the legitimacy of the parties' chosen dispute resolution mechanism and commitments to work together collaboratively in resolving the Abyei Area disputes. Neither party could, in good faith, have desired such results. Again, that is explained in clear terms by General Sumbeiywo and Minister Deng Alor.¹³⁴⁴

824. The finality and immediate implementation of the ABC Experts' delimitation of the Abyei Area was important for reasons that extended beyond the Abyei Area itself. In addition, as discussed above, delimitation and demarcation of the Abyei Area was essential to implementation of the entire Comprehensive Peace Agreement.¹³⁴⁵

825. A failure to implement the Addis Ababa Accord with respect to Abyei contributed to a return to civil war in the past.¹³⁴⁶ The implications that implementation of the ABC Report had for the larger peace throughout Sudan could not be overstated.

826. In sum, for a host of vitally-important reasons, the GoS and SPLM/A specifically agreed in the Comprehensive Peace Agreement, and subsequent instruments, that the ABC Report would be "final and binding" and entitled to "immediate effect." In the context of the Comprehensive Peace Agreement, these commitments exclude any possibility for either party

¹³⁴² See above at paras. 739-745.

¹³⁴³ Witness Statement of Minister Deng Alor Kuol, at pp. 26-27, ¶164; see also Witness Statement of James Lual Deng, at p. 7, ¶36.

¹³⁴⁴ Witness Statement of Lt. Gen. Sumbeiywo, at p. 15, ¶¶74-75. See also Witness Statement of Minister Deng Alor Kuol, at pp. 16-17, ¶¶96-101; Witness Statement of James Lual Deng, at p. 9, ¶47.

¹³⁴⁵ See above at paras. 445-450, 495, 559, 562, 566, 743-743.

¹³⁴⁶ See above at paras. 424-444, 450.

to challenge the ABC Experts' decisions; they subject both parties to a binding, substantive obligation to accept the ABC Report and to give the special administrative status of the Abyei Area "immediate effect," without any sort of challenge.

- c) The Parties Are Bound, *Pacta Sunt Servanda*, by Their Agreement that the ABC Report Is "Final and Binding" and Entitled to "Immediate Effect"

827. There are particular reasons of policy demanding that the GoS be held to its agreement to accept the ABC Report as "final and binding" and entitled to "immediate effect." The principle of *pacta sunt servanda* is universally-recognized as an essential foundation of both international and national legal regimes. The doctrine requires the good faith performance of freely undertaken agreements – a requirement that is essential as both a matter of international security and fundamental morality. Of critical importance here, the *pacta sunt servanda* doctrine applies with particular force in the context of boundary agreements, such as the parties' commitments in the Abyei Protocol.

828. The principle of *pacta sunt servanda* is an "indisputable rule of international law,"¹³⁴⁷ which is "but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations as well as that of individuals."¹³⁴⁸ It has been observed, without exaggeration, that without this rule, "[i]nternational law as well as civil law would be a mere mockery."¹³⁴⁹

829. The good faith observance of treaty obligations is just "one aspect of the fundamental rule that requires all subjects of international law to exercise in good faith their rights and duties."¹³⁵⁰ Thus:

¹³⁴⁷ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 113 (1953), **Exhibit-LE 8/6**, referring to *Harvard Research*, (1935 Part III), Supplement to 29 Am. J. Int'l L. 671-685 (1935), **Exhibit-LE 16/8**.

¹³⁴⁸ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 113 (1953), **Exhibit-LE 8/6**. See also H. Lauterpacht, *Oppenheim's International Law*, Vol. 1, 38 (9th ed. 1992), **Exhibit-LE 9/13**; R. Hyland, *Pacta Sunt Servanda: A Meditation*, 34 Va. J. Int'l L. 421-427 (1994) (describing origin of *pacta sunt servanda*), **Exhibit-LE 16/9**; *Harvard Research*, (1935, Part III), *Draft Convention on the Law of Treaties*, Supplement to 29 Am. J. Int'l L. 977 *et seq.* (1935), **Exhibit-LE 16/8**; Draft Articles on the Law of Treaties with Commentaries, Report of the International Law Commission on the work of its seventeenth session (Doc. A/6309/Rev.1), Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission*, Vol. II, 187, 211, ¶1 (1966), **Exhibit-LE 16/10**; I. Lukashuk, *The Principle "Pacta Sunt Servanda" and the Nature of Obligation Under International Law*, 83 Am. J. Int'l L. 513 (1989), **Exhibit-LE 16/11**; J. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 Am. J. Int'l L. 180-197 (1945), **Exhibit-LE 16/12**; S. Schwebel, *Address to the Plenary Session of the General Assembly of the United Nations*, dated 26 October 1999, p. 3 ("the principles of free consent and good faith and *pacta sunt servanda* ... are at the heart of international law and relations."), **Exhibit-LE 16/13**; M. Shaw, *International Law*, 97 (5th ed. 2003) ("Perhaps the most important general principle, underpinning many international legal rules, is that of good faith."), **Exhibit-LE 4/6**.

¹³⁴⁹ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 113 (1953), reprint 2006), **Exhibit-LE 8/6**, quoting the *Interlocutory Award in the Rudloff Case*, American-Venezuelan Commission, Reports of International Arbitral Awards (1903-1905) Vol. IX, 244, 255 **Exhibit-LE 16/14**.

¹³⁵⁰ I. Lukashuk, *The Principle "Pacta Sunt Servanda" and the Nature of Obligation Under International Law*, 83 Am. J. Int'l L. 513 (1989), **Exhibit-LE 16/11**. See also M. Shaw, *International Law* 97 (5th ed. 2003) ("One crucial general principle of international law is that of *pacta sunt servanda*, or the idea that international agreements are binding."), **Exhibit-LE 4/6**; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment*, [1998] I.C.J. Rep. 275, 296 (I.C.J.), **Exhibit-LE 16/15**; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1984] I.C.J. Rep. 392, 418 (I.C.J.), **Exhibit-LE 17/1**; *Judgment of 20 December 1974, Case concerning nuclear tests (Australia v. France)*, [1974] I.C.J. Rep. 253, 268 (I.C.J.), **Exhibit-LE 17/2**; *Judgment of 20 December 1974, Case concerning nuclear tests (New Zealand v. France)*, [1974] I.C.J. Rep. 457, 473 (I.C.J.), **Exhibit-LE 18/1**.

*“It need hardly be stated that the obligations of a treaty are as binding upon nations as private contracts upon individuals. This principle has been too often cited by publicists and enforced by international decisions to need amplification here.”*¹³⁵¹

830. The principle of good faith is also codified in a wide range of international treaties.¹³⁵² Thus, the preamble to the Vienna Convention on the Law of Treaties declares that “the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,” and prescribes in Article 26 the rule that “[e]very treaty in force is binding upon the parties and must be performed by them in good faith.”¹³⁵³

831. The ILC’s Commentary to the Convention explains that: “the rule that treaties are binding on the parties and must be performed in good faith – is *the fundamental principle of the law of treaties*. Its importance is underlined by the fact that it is enshrined in the Preamble to the Charter of the United Nations.”¹³⁵⁴ Indeed, the ILC gave consideration whether Article 26 ought to be given “special prominence” by placing it “towards the beginning of the articles”¹³⁵⁵ or making reference to it in the Preamble.¹³⁵⁶

832. The principles of good faith and *pacta sunt servanda* have been described by the International Court of Justice as having “overriding importance,”¹³⁵⁷ the “significance of this principle which touches every aspect of international law.”¹³⁵⁸ The Court has repeatedly held:

a. *“Observance of treaty obligations is not only moral, but serves an important role in maintaining peace and security between neighboring States and in preventing military conflicts between them.”*¹³⁵⁹

b. *“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very*

¹³⁵¹ *Arbitral Award of 27 September 1900, Metzger & Co. Case v. Haiti*, (1900) USFR 262, 276, **Exhibit-LE 18/2** (emphasis added). See also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 112 (1953), **Exhibit-LE 8/6**; *Arbitral Award of 4 December 1888, Van Bokkelen Case*, 2 Int’l Arb. 1807, 1849-1850 (1888) (“*Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals ... and to be kept with the most scrupulous good faith.*”), **Exhibit-LE 18/3** (emphasis added).

¹³⁵² See generally B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 106-160 (1953, reprint 2006), **Exhibit-LE 8/6**.

¹³⁵³ Vienna Convention on the Law of Treaties 1969, Preamble, Art. 26, **Exhibit-LE 1/10**; see also Vienna Convention on the Law of Treaties 1969, Art. 27 which similarly requires that all treaties be interpreted in good faith, a further statement of the principle of *pacta sunt servanda*, **Exhibit-LE 1/10**; Draft Articles on the Law of Treaties with Commentaries, Report of the International Law Commission on the work of its seventeenth session (Doc. A/6309/Rev.1), *Yearbook of the International Law Commission*, Vol. II, 187, 219, ¶5 (1966), **Exhibit-LE 16/10**.

¹³⁵⁴ Draft Articles on the Law of Treaties with Commentaries, Report of the International Law Commission on the work of its seventeenth session (Doc. A/6309/Rev.1), *Yearbook of the International Law Commission*, Vol. II, 187, 211, ¶1 (1966), **Exhibit-LE 16/10**.

¹³⁵⁵ Draft Articles on the Law of Treaties with Commentaries, Report of the International Law Commission on the work of its seventeenth session (Doc. A/6309/Rev.1), *Yearbook of the International Law Commission*, Vol. II, 187, 211, ¶5 (1966), **Exhibit-LE 16/10**.

¹³⁵⁶ Draft Articles on the Law of Treaties with Commentaries, Report of the International Law Commission on the work of its seventeenth session (Doc. A/6309/Rev.1), *Yearbook of the International Law Commission*, Vol. II, 187, 211, ¶5 (1966), **Exhibit-LE 16/10**.

¹³⁵⁷ H. Lauterpacht, *Oppenheim’s International Law* 38 (9th ed. 1992), **Exhibit-LE 9/13**.

¹³⁵⁸ H. Lauterpacht, *Oppenheim’s International Law* 38 (9th ed. 1992), **Exhibit-LE 9/13**.

¹³⁵⁹ *Declaration of Judge Koroma in favor of the Judgment of 19 December 2005, Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] I.C.J. Rep. 168, 284, 291 (I.C.J.), **Exhibit-LE 18/4** (emphasis added).

rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.¹³⁶⁰

c. “The principle of good faith is, as the Court has observed, ‘*one of the basic principles governing the creation and performance of legal obligations*.’¹³⁶¹

d. “[T]he principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969.”¹³⁶²

833. Likewise, arbitral awards have referred repeatedly to the principle of “good faith” and the rule of “*pacta sunt servanda*” when addressing international boundary and other disputes:

a. In the *North Atlantic Coast Fisheries Case* (1910) the Permanent Court of Arbitration affirmed that “[E]very State has to execute the obligations incurred by Treaty bona fide, and is urged thereto by the ordinary sanctions of International Law in regard to observance of Treaty obligations.”¹³⁶³

b. In the *Iron Rhine Railway Line* arbitration,¹³⁶⁴ the tribunal noted that “good faith is both a specific element in Article 31, paragraph 1 of the Vienna Convention and a general principle of international law that relates to the conduct of parties vis-à-vis each other.”¹³⁶⁵

¹³⁶⁰ *Case Concerning Nuclear Tests (New Zealand v. France)*, [1974] I.C.J. Rep. 457, 473 (I.C.J.), **Exhibit-LE 18/1** (emphasis added).

¹³⁶¹ *Case concerning Border and Transborder Armed Actions Case (Nicaragua v. Honduras)*, [1988] I.C.J. Rep. 69, 105 (I.C.J.), **Exhibit-LE 2/5** (emphasis added); see also *Case Concerning Nuclear Tests (New Zealand v. France)*, [1974] I.C.J. Rep. 457, 473 (I.C.J.), **Exhibit-LE 18/1**.

¹³⁶² *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, [1998] I.C.J. Rep. 275, 296 (I.C.J.), **Exhibit-LE 16/15** (emphasis added); *Case concerning the Factory at Chorzów, Merits, Judgment No. 13*, PCIJ Series A, No. 17, 1 (P.C.I.J. 1928), **Exhibit-LE 18/5**; *Case concerning the Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930*, PCIJ Series A, No. 24, 3, 12 (P.C.I.J. 1930), **Exhibit-LE 19/1**; *Case of the Free Zones of Upper Savoy and the District of Gex, Judgment of 7 June 1932*, PCIJ Series A/B, No. 46, 167 (P.C.I.J. 1932), **Exhibit-LE 19/2**; *Case concerning Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, [1974] I.C.J. Rep. 3, 33 *et seq.* (I.C.J.) (Merits), **Exhibit-LE 16/2**; *Case concerning Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, [1974] I.C.J. Rep. 175, 202, 205 (I.C.J.) (Merits), **Exhibit-LE 19/3**; *Judgment of 20 December 1974, Case concerning Nuclear Tests (Australia v. France)*, [1974] I.C.J. Rep. 253, 268 (I.C.J.), **Exhibit-LE 17/2**; *Case concerning Nuclear Tests (New Zealand v. France)*, [1974] I.C.J. Rep. 457, 473 (I.C.J.), **Exhibit-LE 18/1**; *The Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, [1988] I.C.J. Rep. 69, 105 (I.C.J.) (Jurisdiction and Admissibility), **Exhibit-LE 2/5**.

¹³⁶³ *North Atlantic Coast Fisheries Case, Award in Permanent Court of Arbitration (7 September 1910)*, 14, available at www.pca-cpa.org, **Exhibit-LE 19/4**; see also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 114 (1953), **Exhibit-LE 8/6**.

¹³⁶⁴ *Iron Rhine Railway Line, Award in Permanent Court of Arbitration (24 May 2005)*, 25, available at www.pca-cpa.org, **Exhibit-LE 19/5**.

¹³⁶⁵ *Iron Rhine Railway Line, Award in Permanent Court of Arbitration (24 May 2005)*, 25, available at www.pca-cpa.org, **Exhibit-LE 19/5**. See also *Barbados v. Republic of Trinidad and Tobago, Award in Permanent Court of Arbitration (11 April 2006)*, 89, 115, available at www.pca-cpa.org, **Exhibit-20/1**; *Guyana v. Suriname, Award in Permanent Court of Arbitration (17 September 2007)*, 153, 159, available at www.pca-cpa.org, **Exhibit-LE 20/2**; *Case concerning Fisheries Jurisdiction (Federal Republic Germany v. Iceland)(Merits)*, [1974] I.C.J. Rep. 175, 202, 205 (I.C.J.), **Exhibit-LE 19/3**; *Case concerning Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, [1974] I.C.J. 1974, 3, 33 *et seq.* (I.C.J.) (Merits), **Exhibit-LE 16/2**.

834. Although of paramount importance in all settings, the doctrine of *pacta sunt servanda* has even greater significance in the context of boundary determinations. Not only does the preamble to the Vienna Convention on the Law of Treaties note “that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,” but Article 62 provides special rules for application of the doctrine of *res sic stantibus* to boundary settlements.¹³⁶⁶ Similarly, Article 11 of the Convention on Succession of States in Respect of Treaties provides that a succession of states does not, as such, affect a boundary established by treaty.¹³⁶⁷

835. In its report on the Draft Vienna Convention, the ILC concluded:

“treaties establishing a boundary should be recognized to be an exception to the rule, ***because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions.*** ... By excepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed.”¹³⁶⁸

836. In sum, there is uniform and deeply-rooted authority underscoring the paramount importance of good faith compliance (*pacta sunt servanda*) with international and other agreements, particularly in matters concerning territorial demarcations and boundaries. These principles are at the foundation of the international legal system: dishonoring them strikes at the legitimacy and efficacy of law, and invites chaos and a return to measures of self-help, including, in international matters, armed force.

837. Thus, it is of paramount importance that the GoS and SPLM/A honor – and be unambiguously directed to honor – their agreement that the ABC Report would be “final and binding” and that the special administrative status of the Abyei Area would be entitled to “immediate effect.” In the context of the Comprehensive Peace Agreement, the parties’ agreement excluded any possibility of challenging the ABC Report and required both parties to immediately comply with the Commission’s decision. That agreement served important interests, reflected in the Comprehensive Peace Agreement and described above. Even more

¹³⁶⁶ Vienna Convention on the Law of Treaties 1969, Art. 62 (“1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. 2. ***A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary;*** or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.”), **Exhibit-LE 1/10** (emphasis added).

¹³⁶⁷ Convention on Succession of States in respect of Treaties 1978, Art. 11. **Exhibit-LE 20/3**; see also H. Lauterpacht, *Oppenheim’s International Law* 663 (9th ed. 1992), **Exhibit-LE 9/13**. Article 62(2) of the Convention on the Law of Treaties between States and International Organisations or between International Organisations provides that a fundamental change of circumstances “may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations if the treaty establishes a boundary.” Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986, Art. 62(2), **Exhibit-LE 20/4**.

¹³⁶⁸ Report of the International Law Commission on the work of its seventeenth session (Doc. A/6309/Rev.1), Draft Articles on the Law of Treaties with Commentaries *Yearbook of the International Law Commission*, Vol. II, 187, 259 (1966), **Exhibit-LE 16/10** (emphasis added). See also *case concerning Aegean Sea Continental Shelf Case (Greece v. Turkey)*, [1978] I.C.J. Rep. 3, 36 (I.C.J.) (“Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the ***same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances.***”), **Exhibit-LE 10/5** (emphasis added).

fundamentally, enforcing compliance with that agreement serves broader interests, going to the heart of the international legal system.

838. The reasoning of the ICJ, quoted above, has particular import in the present context: “Observance of treaty obligations is not only moral, but serves an important role in maintaining peace and security between neighboring States and in preventing military conflicts between them.”¹³⁶⁹ Equally, “[o]ne of the basic principles governing the creation and performance of legal obligations ... is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.”¹³⁷⁰

839. Here, the terms of the Abyei Protocol, as implemented by the parties in the context of the Comprehensive Peace Agreement, were tangible demonstrations of the “*trust and confidence ... inherent in international cooperation*” and necessary to “*maintaining peace and security*.” As the parties put it in their Terms of Reference, their agreements reflected “the spirit of the Comprehensive Peace Agreement and the [parties’] *forthcoming partnership*.”¹³⁷¹ Having agreed to lay down their arms, and work collaboratively as partners, together with the ABC, it is the gravest breach of fundamental principles of good faith for the GoS to have resiled on its commitments immediately to implement the ABC Report. Likewise, it is of the utmost importance in these proceedings for the GoS’s breach of its commitments not to be permitted.

- d) The Abyei Arbitration Agreement Gives Neither Party Greater Substantive Rights to Challenge the ABC Report Than It Previously Enjoyed

840. Finally, and for the sake of completeness, the Abyei Arbitration Agreement obviously gave the parties no greater substantive rights to challenge the ABC Report than existed prior to the Agreement’s conclusion. The Arbitration Agreement established a procedure, pursuant to which a particular claim could be heard in a specified forum (this Tribunal). The Agreement did not, however, expand the substantive rights that the GoS previously claimed with regard to an alleged “excess of mandate.”

841. This conclusion is recorded in Article 4 of the Abyei Road Map, which provided that the parties’ agreement to arbitrate disputes regarding the GoS’s refusal to comply with the ABC Report was “*without prejudice to the position of either party on the findings of the Abyei Boundaries Commission*.”¹³⁷² That recorded the parties’ understanding that the proposed arbitration agreement would not preclude either party from relying on its existing rights under the ABC Report and the Comprehensive Peace Agreement.

842. Nor would it be consistent with the underlying purpose of the Abyei Arbitration Agreement to interpret it as allowing the GoS to raise substantive claims of nullity which it otherwise did not possess. Rather, the Arbitration Agreement provided a means of resolving a dispute regarding the only basis that the GoS had even suggested with regard to the ABC Report and, most fundamentally, seeking to ensure prompt and final recognition of the

¹³⁶⁹ Declaration of Judge Koroma in favor of the Judgment of 19 December 2005, *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] I.C.J. Rep. 168, 284 (291) (I.C.J.), **Exhibit-LE 18/4**.

¹³⁷⁰ *Case Concerning Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, [1974] I.C.J. Rep. 457, 473 (I.C.J.), **Exhibit-LE 18/1**.

¹³⁷¹ ABC ToR, Preamble, **Appendix E** (emphasis added).

¹³⁷² Abyei Road Map, Art. 4, Preamble, **Appendix G**.

Report. In these circumstances, it would make no sense to interpret the Agreement as expanding the GoS's substantive rights to claim an excess of mandate.

2. The GoS Waived any Rights it might have had to Challenge the ABC Experts' Fulfilment of their Mandate

843. Independently, it is a general principle of law, uniformly recognized in international and national legal systems, that a party must raise objections to a decision-maker's jurisdiction at the earliest opportunity during proceedings before that decision-maker. Here, the GoS never raised objections that the ABC was exceeding its mandate during the proceedings before the Commission. On the contrary, the GoS explicitly recognized the possibility that the ABC might delimit boundaries comparable to those set out in the Report and nonetheless repeatedly and explicitly confirmed that the Report would be final and binding. In these circumstances, the GoS has either waived, or is estopped from asserting, any excess of mandate claim.

a) Jurisdictional Objections Are Waived Unless Raised at the Earliest Feasible Opportunity

844. It is a basic principle of any developed legal system that parties must raise challenges to the competence of a tribunal at the earliest feasible opportunity. No developed or sensible legal system permits a party to hold back jurisdictional objections, hoping to prevail on the merits of the dispute, but then challenge the tribunal's authority if it loses, in a kind of "Heads I win, Tails you lose" attitude.

845. This rule has been confirmed by a considerable number of international decisions considering the assertion of jurisdictional objections that could have been – but were not – raised in a timely manner. In *The Mechanic*, the Arbitral Commission held that:

*"Ecuador --- having fully recognized and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honor and good faith deny the principle when it imposed an obligation."*¹³⁷³

846. The decision in the *Rights of Minorities in Upper Silesia* case stated the same rule. There, the Respondent participated in the proceedings, submitted its arguments on the merits, and filed a counterclaim, before contesting the Tribunal's jurisdiction in its rejoinder. The Permanent Court rejected the jurisdictional objection, reasoning that, if a party has "indicated his desire to obtain a decision on the merits and his intention to abstain from raising the question of jurisdiction, *it seems clear that he cannot, later on in the proceedings, go back upon that declaration.*"¹³⁷⁴ The Court therefore,

"arrive[d] at the conclusion that *the Polish Government has implicitly accepted the jurisdiction of the Court to give judgment* on the merits in respect of all the claims of the German Government and that the objection to the jurisdiction made in the

¹³⁷³ *Ecuador – U.S. Claims Comm. (25 November 1862), Case of the Atlantic and Hope Insurance Companies v. Ecuador (The Mechanic)*, in J. Bassett Moore (ed.), *History and Digest of the International Arbitrations to which the United States has been a party*, Vol. III, 2073, 3221, 3226 (1898), **Exhibit-LE 20/6** (emphasis added).

¹³⁷⁴ *Rights of Minorities in Upper Silesia Case*, PCIJ Series A, No. 15, 3, 25 (P.C.I.J. 1928), **Exhibit-LE 21/1** (emphasis added).

Rejoinder cannot invalidate the acceptance which existed at the time of the Submission of the Counter-Case.”¹³⁷⁵

847. Similarly, in the *Haya de la Torre Case*, involving a dispute between Colombia and Peru, the ICJ stated:

“The parties have in the present case consented to the jurisdiction of the Court. All the questions submitted to it have been argued by them on the merits, and no objection has been made to a decision on the merits. ***This conduct of the parties is sufficient to confer jurisdiction on the Court.***”¹³⁷⁶

848. Other international authorities similarly hold that jurisdiction may not be disputed if

“[a] state has accepted to appear before the Court, ... or if it has actually participated in the debates by submitting its own conclusions, or by failing to object against a future decision on the merits.”... ***The Court considers such conduct as ‘a tacit acceptance of its jurisdiction, which on the basis of the principles of good faith and estoppel, the defending party can no longer question.’***”¹³⁷⁷

849. The same rule, requiring parties to raise jurisdictional objections at the earliest feasible opportunity, is also adopted in developed national legal systems. Under the UNCITRAL Model Law, for example, a jurisdictional challenge must be asserted by a party “not later than when submitting his first statement on the substance of the dispute.”¹³⁷⁸ Other national arbitration statutes are generally similar,¹³⁷⁹ as is U.S., French and other judicial authority.¹³⁸⁰

¹³⁷⁵ *Rights of Minorities in Upper Silesia Case*, PCIJ Series A, No. 15, 3, 26 (P.C.I.J. 1928), **Exhibit-LE 21/1** (emphasis added).

¹³⁷⁶ *Case concerning the Affaire Haya de la Torre (Columbia v. Peru)*, [1951] I.C.J. Rep. 71, 78 (I.C.J.), **Exhibit-LE 21/2** (emphasis added).

¹³⁷⁷ P. Daillier & A. Pellet, *Droit International Public*, ¶543 (7th ed. 2002), **Exhibit-LE 2/3** (emphasis added); see also M. Schröder in G. von Vitzthum, *Völkerrecht*, Chapter 7 IV, ¶98 (4th ed. 2007) (“The initiation of the proceedings [in front of the ICJ] is followed by the exchange of exhaustive submissions regarding the dispute. At the same time, the parties have to raise all procedural objections, especially regarding the Court’s jurisdiction. Those are usually handled in advance (Art. 67 of the I.C.J. Rules of Procedure). ***In case of a participation without having raised objections, the Court’s jurisdiction – even if it did not exist – is prorogated.***”), **Exhibit-LE 16/1** (emphasis added); P-M. Dupuy, *Droit International Public* ¶541 (9th ed. 2008) (“Finally, it should be noted that regarding the prerequisites for establishing the Court’s jurisdiction, ***those are fulfilled in certain instances where the parties have expressed their informal consent to submit the dispute to the Court...***”), **Exhibit-LE 10/1** (emphasis added); A. Balasko, *Causes de Nullité de la sentence arbitrale en droit international public*, 1, 201 (1938) (“***To prevent the claim from being precluded, the excess of power exception must be raised at the moment the interested party has acquired knowledge of the irregular act.*** An excess of power can be “covered up” by an act by the wronged State, which implies acceptance of the irregular act. It is thanks to this principle that one can prevent all manoeuvres seeking to raise [the exception] the nullity exception at a later stage, and not at the useful moment, but at the appropriate moment, according to the needs of the cause [pursued].”), **Exhibit-LE 11/12** (emphasis added).

¹³⁷⁸ UNCITRAL Model Law, Art. 8(1), **Exhibit-LE 12/17**.

¹³⁷⁹ See, e.g., English Arbitration Act, 1996, §31(2) (“***Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.***”), 31(3) (“The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.”), **Exhibit-LE 3/6**; Swiss Law on Private International Law, Art. 186(2) (“***A plea of lack of jurisdiction must be raised prior to any defense on the merits.***”), **Exhibit-LE 3/7**; German ZPO, §1040(2) (“A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers that the party has justified the delay.”), **Exhibit-LE 15/4**; Austrian ZPO (Code of Civil Procedure), §592 (2) (“***A plea of lack of***

850. Institutional arbitration rules, from essentially all leading international arbitral institutions, adopt the same approach. The UNCITRAL Rules are representative, requiring that a jurisdictional objection “shall be raised not later than in the statement of defense or, with respect to a counterclaim, in the reply to the counter-claim.”¹³⁸¹ Other institutional rules contain either similar provisions,¹³⁸² or provide for a waiver of jurisdictional objections where a party proceeds with the arbitration without raising its objection.¹³⁸³

851. National courts and other authorities adopt a straightforward approach to failures to raise jurisdictional objections. Simply stated, “[p]rinciples of estoppel prevent a party to arbitration from taking a position before the arbitrator that invites consideration of [an issue], losing in arbitration, and then seeking relief from the unfavorable arbitral award in ... court by arguing that the arbitrator lacked authority to consider the [issue] in the first instance.”¹³⁸⁴

jurisdiction of the arbitral tribunal is to be raised no later than at the time of the first submissions on the subject-matter of the dispute. A party shall not be precluded from raising this plea by the fact of having appointed an arbitrator or having participated in the appointment of an arbitrator: A plea that a matter exceeds the authority of the arbitral tribunal must be raised as soon as such matter is made the subject-matter of a substantive motion or petition. In either case, a later plea is not permitted; if however in the opinion of the arbitral tribunal the default is sufficiently excused, the plea may be entered subsequently.”), **Exhibit-LE 15/3** (emphasis added); Japanese Arbitration Law, Art. 23(2), **Exhibit-LE 21/3**; French Code of Civil Procedure, Article 74 al. 1 (“*Pleas must, under the penalty of inadmissibility, be raised simultaneously and prior to any defence on the merits* or plea of non-admissibility. It is so even when the rules relied upon to sustain the plea are of public policy nature.”), **Exhibit-LE 11/9** (emphasis added); French Cour de Cassation, Civ. 2e, 22 November 2001; Bull. Civ. II, No. 168; (“The [incompetence] exception raised on the basis of the existence of an arbitration clause is governed by the general procedural provisions...”), **Exhibit-LE 21/4**.

¹³⁸⁰ S. Riegler in S. Riegler et al., *Arbitration Law in Austria: Practice and Procedure*, Section 611, ¶26 (2007) (“... *the setting aside of an arbitral award under this item [Section 611 (2) no. 1 ZPO] may only be requested if the particular reason was already raised during the arbitral proceedings. In other words, new grounds of challenge of jurisdiction cannot be raised for the first time before the domestic court in a challenge procedure.*”), **Exhibit-LE 21/5**; *Judgment of 27 March 2003*, 2003 SchiedsVZ 133 (German Bundesgerichtshof) (“...[i]f a party fails to file an application pursuant to Section 1040 sub 3, 2nd sentence German ZPO against an interim award in which the arbitral tribunal confirms its jurisdiction, the party is precluded from raising the defence of an invalid arbitration agreement subsequently in enforcement or setting aside proceedings.”), **Exhibit-LE 21/6** (emphasis added); *Jones Dairy Farm v. Local No. 8-1236, United Food and Commercial Workers Int’l, AFL-CIO*, 760 F.2d 173, 175 et seq (7th Cir. 1985), **Exhibit-LE 21/7**; *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983) (“*a party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result*”), **Exhibit-LE 21/8**; *Judgment of 15 May 2003, Czech Republic v. CME Czech Republic BV*, Case No. T 8735-01, 33, 35 (Svea Court of Appeal) (2003) (“From section 34, second paragraph [of the Swedish Arbitration Act] it is evident that *a party is not entitled to invoke a circumstance which he may be deemed through participating in the arbitration proceedings without objection* or otherwise, he may be deemed to have waived. Thus, in such a case, the right to invoke a circumstance is barred. ... The Court of Appeal finds that the Republic’s failure to raise the objection against CME’s claim in conjunction with the submission of the written document at the final hearing has the result that the Republic is now barred from arguing that the arbitral tribunal exceeded its mandate in this respect.”), **Exhibit-LE 21/9** (emphasis added); Decision of Swiss Federal Supreme Court of 9 December 2003 (5P.315/2003), at para. 2.1.2. (“... *If a party chooses not to bring a challenge based upon lack of jurisdiction, it will no longer be possible to raise its jurisdictional objection at a later stage.* ...”), **Exhibit-LE 21/10**; *Herlin v. Banque Populaire Rives de Paris*, Court of Appeal of Amiens, Ch. 1, Sec. 2, *JurisData*: 2008-367088, 30 April 2008 (“*When a jurisdictional objection is presented for the first time before the Court of Appeal, it is inadmissible.*”), **Exhibit-LE 21/11**.

¹³⁸¹ UNCITRAL Rules, Art. 21(3), **Exhibit-LE 21/12**.

¹³⁸² See, e.g., LCIA Rules, Art. 23(2), **Exhibit-LE 21/13**; ICDR Rules, Art. 15(3), **Exhibit-LE 21/14**; Art. 19 VIAC Rules **Exhibit-LE 21/15**; Swiss Rules, Art. 21(3) **Exhibit-LE 21/16**; AAA Arbitration Rules, Art. 15(3), **Exhibit-LE 21/17**.

¹³⁸³ See, e.g., ICC Rules Art. 33 **Exhibit-LE 21/18**; DIS Rules, §41 **Exhibit-LE 21/19**.

¹³⁸⁴ *Builer Mfg. Co. v. United Steelworkers of Am.*, 336 F.3d 629, 635 (7th Cir. 2003) (finding party had waived ability to challenge award on ground that arbitrator exceeded scope of his authority by considering external law, because party failed to present and reserve that challenge in arbitration), **Exhibit-LE 21/20**. See also Decision of the Swiss Federal Supreme Court dated 4 April 2008 (4A_528/2007) (“*The principle of good faith does not allow the parties to submit ex post procedural objections, which could have been raised at an earlier stage of the proceedings.*”), **Exhibit-LE 22/1**; P. Huber in K.-H. Böckstiegel, S. Kröll & P. Nacimiento, *Arbitration in Germany*, 253 (2007) (“The party who has anticipated in the arbitration without raising the objection in accordance with §1040 (2) ZPO should in principle *be regarded as having lost its right to rely on the invalidity of the arbitration clause or on the excess of the competences of the tribunal in future proceedings* ...”), **Exhibit-LE 22/2**; French Cour de Cassation, Cass. Civ. 1e, 6 July 2005, *JurisClasseur No. 01-15-912*

As another court explains, “[this] doctrine is based upon the well-founded view that if a party could circumvent arbitration by awaiting an adverse award before asserting objections on grounds which he had knowledge of prior to the award, then the arbitration clause would be meaningless.”¹³⁸⁵

852. Similarly, under the New York Convention, authors agree that:

“if this party has, for instance, taken part in the arbitral proceedings without raising any objection with respect to the jurisdiction (and there has nevertheless been no tacit extension of the agreement) or mandate of the tribunal, it can be deemed to be estopped from invoking the ground for refusal.”¹³⁸⁶

853. This rule also serves vitally important interests in fairness and procedural regularity. It is fundamentally inequitable to permit a party to try its luck in litigating a substantive dispute and then, only when it does not prevail, to turn around and challenge the decision-maker’s competence with the aim of relitigating the dispute in a different forum. As one authority explained:

“[A party cannot] wait in an ambush and then render wasteful years of effort at an expenditure of millions of dollars. *A party cannot remain silent, raising no objection during the arbitration proceedings, and when an award adverse to him has been handed down, complain of the situation of which he had knowledge from the first.*”¹³⁸⁷

854. Permitting a party to hold back its jurisdictional objections is not only abusive, by imposing unnecessary costs and risks on the counter-party and the decision-maker, but profoundly unjust, by allowing a party to take multiple bites at the same apple, in the hope of finding someone somewhere who will accept its substantive position. Neither international nor national law permits this type of opportunistic litigation strategy to succeed.

- b) The GoS Never Objected to the Commission’s Conduct of the ABC Proceedings, Statement of Its Mandate or Interpretation of the Definition of the Abyei Area

855. The GoS never raised any objections during the course of the ABC’s work to any aspect of the Commission’s actions. On the contrary, the GoS expressly affirmed the legitimacy, fairness and care of ABC and its actions and explicitly undertook to respect the ABC Report, including specifically if the ABC rejected the GoS’s position regarding the boundaries of Kordofan. In these circumstances, the GoS has waived, or is estopped from raising, claims that the Commission exceeded its mandate.

(explicitly referring to the principle of estoppel considering that since the appellant “had himself had recourse to arbitration before the Iran-U.S. Claims Tribunal, and that he participated in that arbitral procedure without any reserve for more than nine years”, he was “*by virtue of the rule of estoppel, precluded from claiming that the arbitration agreement was inexistent or null...*”). **Exhibit-LE 22/3.**

¹³⁸⁵ *International Bhd. of Elec. Workers v. Coral Elec. Corp.*, 576 F.Supp. 1128, 1134 (S.D. Fla. 1984), **Exhibit-LE 22/4.**

¹³⁸⁶ da Silveira & Lévy, in E. Gaillard & D. Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards -- The New York Convention in Practice*, 643 (2008), **Exhibit-LE 12/13**; A. van den Berg, *The New York Arbitration Convention of 1958* 266 (1981) (“The exceeding by an arbitrator of his powers (Art. V(1)(c)) as well as the composition of the arbitral tribunal or the conduct of the arbitral procedure not in conformity with the agreement of the parties may also be considered as provisions of the Convention which may involve estoppel.”), **Exhibit-LE 5/11.**

¹³⁸⁷ *Hunt v. Mobil Oil Corp.*, 654 F.Supp. 1487, 1518 (S.D.N.Y. 1984), **Exhibit-LE 22/5** (emphasis added).

856. As discussed above, the GoS never complained about any aspect of the ABC's proceedings.¹³⁸⁸ On the contrary, the GoS actively participated in a constructive process of collaboration which produced the Terms of Reference and Rules of Procedure of the Commission.¹³⁸⁹ Indeed, during the course of the Commission's work, the head of the GoS delegation declared:

“The experts will be having about a whole month to inspect whatever documents are presented and to look at any other documents they want to look through. Later on we will present the experts with more documents. After one month we are going to also make our final presentation on the issue. Then we should very much assure those *experts who are really very much knowledgeable and experienced*, as well as being delegated by very important states in this world, to be completely impartial when it comes to the Ngok Dinka and the Misseriya case. *We are quite sure that finally they will really be fair*. And in respect to what I am saying, this is an international Commission, which is very much concerned with the welfare of human beings and security. *In view of their knowledge, respect for mankind, countries and Sudanese community will never be prejudiced or favor anybody*.”¹³⁹⁰

857. The GoS also expressly acknowledged the ABC's authority – and obligation – to interpret the definition of the Abyei Area set forth in Article 1.1.2 of the Abyei Protocol. Thus, as noted above, during its presentation to the ABC on 11 April 2005, the GoS announced its view of “*What the ABC Shall Do*,” being to “*Define the nine Ngok Dinka Chiefdom[']s territory transferred to Kordofan in 1905*” and “Demarcate that definition on land.”¹³⁹¹ The GoS thus explicitly acknowledged the ABC's power to define and demarcate the “Abyei Area” referred to in the Abyei Protocol (specifically, in Article 1.1.2 thereof).

858. As discussed above, the GoS's final presentation also identified a variety of things that “*the ABC Shall Not Do*,” including “*renegotiation*,” “*equitable compromise*,” “*invent a new parameter other than yardstick of the year 1905*,” and deal with “*other aspects of the settlement*.”¹³⁹² Throughout the work of the ABC, the GoS never suggested that the ABC Experts did any of these things. Moreover, wholly absent from that list was any suggestion that the ABC lacked the power to interpret Article 1.1.2 of the Abyei Protocol.

859. Indeed, the GoS never suggested that it considered that the ABC Experts would either err or exceed their mandate by interpreting Article 1.1.2 or by adopting the definition which the ABC's members had repeatedly referred to during the Commission's various meetings. Thus, as discussed above, the ABC Experts repeatedly said during their meetings with the parties that they understood the Abyei Area to comprise “*the boundaries of the nine Dinka Chiefdoms as they existed 100 years ago*,”¹³⁹³ or “*the boundaries that existed in 1905 between the Misseriya and Ngok Dinka*,”¹³⁹⁴ or “*the area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan from Bahr el-Ghazal province in 1905*,”¹³⁹⁵ or “*the area of the nine Ngok Dinka Chiefdoms, which were transferred to Kordofan*

¹³⁸⁸ See above at paras. 511-517, 556, 613, 616, 625.

¹³⁸⁹ See above at paras. 445-450, 496-504.

¹³⁹⁰ ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1** (emphasis added).

¹³⁹¹ GoS Opening Presentation, dated 12 April 2005, at p. 52, **Exhibit-FE 15/1**.

¹³⁹² GoS Opening Presentation, dated 12 April 2005, at p. 52, **Exhibit-FE 15/1**. Of course, there is no possible basis for suggesting that the ABC did any of these things.

¹³⁹³ ABC Report, Part II, App. 4, at p. 41, **Exhibit-FE 15/1**.

¹³⁹⁴ ABC Report, Part II, App. 4, at p. 53, **Exhibit-FE 15/1**.

¹³⁹⁵ ABC Report, Part II, App. 4, at p. 79, **Exhibit-FE 15/1**.

*Province from Bahr El-Ghazal Province in 1905,¹³⁹⁶ or the “*territory [which] was being used and claimed by those 9 chiefdoms when the administrative decision was made to place them in Kordofan.*”¹³⁹⁷*

860. In response to these various statements, the GoS never raised any objection and never offered any comprehensible alternative formulation for a definition. On the contrary, the GoS explicitly conceded that the ABC would be fully entitled to adopt an interpretation of the definition of the Abyei Area which differed from that which the GoS representatives advanced. Thus, again as discussed above, the GoS delegation acknowledged in unambiguous terms that the Abyei Area could – depending upon the facts – include territories both north and south of the Bahr el Arab, which the GoS claimed as the 1905 border of Kordofan.¹³⁹⁸

861. In particular, Ambassador Dirdeiry expressly acknowledged that the boundary defining the Abyei Area was the one “before th[e] transfer [in 1905] took place,”¹³⁹⁹ and, depending on the evidence, might *either* include “the current Abyei [lying north of the Bahr el Arab]” *or* “the one south of Bahr el Arab.”¹⁴⁰⁰ Ambassador Dirdeiry thus stated that:

*“After defining the [Abyei Area], if it includes the current Abyei, then the referendum will be conducted there. And if it is not this one, it is the one south of the Bahr el-Arab as we have presented in our document as a Government. Then the referendum and whatever other provisions in the agreement will be conducted south of the river Kiir.”*¹⁴⁰¹

862. Ambassador Dirdeiry explicitly acknowledged, on behalf of the GoS, that the Commission had the authority to interpret the parties’ definition of the “Abyei Area” in the Abyei Protocol. He could not have acknowledged any more clearly that the ABC might not ultimately accept the GoS’s position and might conclude that the Abyei Area was not limited to territory “south of the Bahr el Arab” (which the GoS identified as the Kordofan boundary in 1905).

863. Critically, if the Commission reached that conclusion, rejecting the GoS’s position, Ambassador Dirdeiry did not hint that the GoS considered that the ABC would have exceeded its mandate. On the contrary, he said in terms that the Abyei Referendum would then be held north of the Bahr el Arab in accordance with the Comprehensive Peace Agreement. In contrast to the GoS’s position following the ABC’s Report, Ambassador Dirdeiry’s statement was a forthright recognition of the ABC’s authority to interpret the parties’ definition of “Abyei Area” and of the possibility that the Commission might ultimately reject the GoS’s arguments.

¹³⁹⁶ ABC Report, Part II, App. 4, at p. 58, **Exhibit-FE 15/1**.

¹³⁹⁷ ABC Report, Part II, App. 4, at pp. 155-156, **Exhibit-FE 15/1**.

¹³⁹⁸ ABC Report, Part I, at p. 37, **Appendix B**; ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1**.

¹³⁹⁹ ABC Report, Part II, App. 4, at p. 77, **Exhibit-15/1**.

¹⁴⁰⁰ ABC Report, Part II, App. 4, at p. 97, **Exhibit-15/1**.

¹⁴⁰¹ ABC Report, Part II, App. 4, at p. 97, **Exhibit-15/1** (emphasis added). At the same meeting, Ambassador Dirdeiry stated as follows: “What we are here for is to draw boundaries that were drawn in 1905; that is saying, 100 years ago. As the Ambassador, the Chairman of this Committee, told you, before that year, the Ngok were in Bahr el Ghazal. In 1905, they were transferred to Kordofan. *There were boundaries in 1905, before that transfer took place. We want now to know those boundaries.*” ABC Report, Part II, App. 4, at p. 77, **Exhibit-FE 15/1** (emphasis added). The GoS also argued “*that we have presented to this commission 47 documents that prove the presence of Ngok Dinka before 1905 beyond the river Bahr el-Ghazal.*” ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1**; see also Witness Statement of James Lual Deng, at p. 13, ¶¶72-73.

864. The GoS not only accepted that the boundary line might be one other than that argued for by GoS,¹⁴⁰² it also expressly affirmed its intention to “fully adhere”¹⁴⁰³ to the decision of the ABC. The final presentation of the GoS specifically acknowledges the ABC’s conclusions having listened to the oral testimony of 125 witnesses during the course of April and May 2005, namely that details of events in 1905 were “scanty”¹⁴⁰⁴ and that the accounts from witnesses were, perhaps not surprisingly, “contradicting.”¹⁴⁰⁵

865. Finally, as discussed above, at the conclusion of the GoS’s last presentation to the ABC, the head of its delegation (Ambassador Dirdeiry) made the following, very specific acknowledgement of the ABC’s authority:

“And finally, *the fact that the ABC decision is final and binding was in fact, emphasized very, very much by us* there, by Deng, *by myself, ... and by everybody who helped.* ... [W]e want them to be very clear about that fact. And that once the decision is reached, *we have to accept it and welcome it.* What you are doing is to collect the information from them to bring the archives to the knowledge of our learned experts and then [your decision] will be *final and binding and everybody shall accept it.* ... *When a decision is agreed and accepted beforehand it has to be final and binding,* [and 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.* Because you should have the confidence in those people and you should respect it knowing that it will be taken on completely impartial grounds. Those in fact, are very, very important reminders. ... With those few words, Mr. Chairman, I’m coming to the conclusion of the Government of Sudan presentation, of the final presentation on the Abyei Commission and we are very much hopeful that the material which you 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. Thank you very much, Mr. Chairman.”¹⁴⁰⁶

866. Ambassador Dirdeiry’s statements are unambiguous. There was no hint of complaint about the ABC’s conduct of the proceedings and no hint of objection to the ABC Experts’ previous statements regarding the definition of the Abyei Area. Rather, precisely as the parties had agreed, in the Abyei Protocol and Abyei Annex, the GoS again committed itself at the conclusion of the presentations to the Commission to respect and implement the ABC Report.

867. In these circumstances, the GoS has either waived or is estopped from raising any excess of mandate claim. Rather than raising its objections during the course of the ABC’s proceedings, when they could have been addressed, the GoS chose to proceed with the ABC process and attempt to obtain a favorable ruling. Having failed in that effort, the GoS and its counsel only then began opportunistically to allege – without explanation or articulation –

¹⁴⁰² ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1**.

¹⁴⁰³ ABC Report, Part II, App. 4, at p. 96, **Exhibit-FE 15/1**.

¹⁴⁰⁴ GoS Final Presentation, dated 16 June 2005, at p. 3, **Exhibit-FE 14/16**. *See also* ABC Report, Part I, at p. 10, **Appendix B**.

¹⁴⁰⁵ GoS Final Presentation, dated 16 June 2005, at p. 3, **Exhibit-FE 14/16**.

¹⁴⁰⁶ Taped Recording of GoS Final Presentation, dated 16 June 2005, **Exhibit-FE 14/20 and FE 14/21** (emphasis added).

that the Commission's decision was not binding and that the ABC had somehow exceeded its mandate.

868. The GoS's attempted litigation tactics are abusive and violate universally accepted principles of good faith and procedural regularity, requiring parties to raise jurisdictional objections during the course of a decision-maker's proceedings, at the earliest feasible opportunity. Having failed to do so, the GoS cannot now seek to relitigate the matters on which it was unsuccessful before the Commission.

VIII. IF THE TRIBUNAL WERE TO CONCLUDE THAT THE ABC EXPERTS EXCEEDED THEIR MANDATE, IT SHOULD DEFINE THE ABYEI AREA AS ENCOMPASSING ALL OF THE TERRITORY OCCUPIED AND USED BY THE NGOK DINKA IN 1905

869. For the reasons set out in Part VII above, the ABC Experts did not exceed their mandate, and the definition of the Abyei Area in the ABC Report is therefore entitled to final and binding effect. If, however, this Tribunal were to conclude otherwise, then it should go on to define the Abyei Area to encompass all of the territory occupied and used by the Ngok Dinka in 1905, notwithstanding the exclusion of the northernmost part of that territory from the ABC Experts' definition of the Abyei Area.

870. This Tribunal is presented, under Article 2(c) of the Abyei Arbitration Agreement, with the following question: "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."¹⁴⁰⁷ Of course, if the Tribunal concludes that the ABC Experts did not exceed their mandate – as the SPLM/A submits is beyond serious dispute – then no consideration of the foregoing issue is necessary or permitted.

871. If this Tribunal were to consider the issue presented by Article 2(c) of the Arbitration Agreement, the evidence would convincingly demonstrate that the Abyei Area includes all of the territory marked on **Map 13** (Ngok Dinka Chiefdoms, 1905), extending north from the current Kordofan/Bahr el Ghazal boundary to a line marking the northern border of the *goz* to the northwest and extending at an approximate latitude 10°35'N. This area extends to the west to the current Kordofan/Darfur border, and extends to the east near the Ngok settlements of Miding [Arabic: Heglig] and Mardhok, as depicted on **Map 13** (Ngok Dinka Chiefdoms, 1905).

872. Alternatively, if this Tribunal were to consider the issue presented by Article 2(c) of the Abyei Arbitration Agreement, but not to accept the foregoing position, then any excess of mandate by the ABC Experts would not prevent the Tribunal from giving effect to the ABC Experts' determinations. Rather, depending on the nature of the excess of mandate claimed (as to which the GoS has never articulated its position), there would be many instances in which it would be both appropriate and necessary for this Tribunal to defer to the expertise and superior access to information of the Commission. The SPLM/A reserves its position in this regard until after the GoS attempts to articulate a comprehensible rationale for its putative excess of mandate claim.

A. *The "Area of the Nine Ngok Dinka Chiefdoms Transferred to Kordofan in 1905" Encompasses All of the Territory Occupied and Used by the Ngok Dinka in 1905 Extending North of the Current Bahr el Ghazal/Kordofan Boundary to Latitude 10°35'N*

873. As noted above, Article 2(c) of the Abyei Arbitration Agreement states that: "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)

¹⁴⁰⁷ Abyei Arbitration Agreement, Art. 2(c), **Appendix A**.

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.”¹⁴⁰⁸

874. Article 2(c) mandates this Tribunal to address the same substantive issues that were presented to the ABC. As discussed above, Article 1.1.2 of the Abyei Protocol provides: “The territory [i.e., the Abyei Area] is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”¹⁴⁰⁹ The same formulation is repeated in Article 2(c) of the Arbitration Agreement, which mandates this Tribunal with defining and delimiting the territory of the Abyei Area as defined by Article 1.1.2.

875. As discussed below, the “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” encompasses the traditional homelands of the Ngok Dinka people, centered on what is now known as Abyei town and the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems and extending north from the current Kordofan/Bahr el Ghazal boundary to an approximate latitude of 10°35’N. In most respects, this was the essential finding of the ABC Experts, and it is supported by a host of documentary, oral and other evidence.

876. Among other things, the ABC Experts’ delimitation is confirmed by: (a) historical documentation from 1905 and the years immediately surrounding 1905; (b) subsequent 20th century documentation, reflecting a continuity of occupation and use by the Ngok Dinka; (c) cartographic evidence from the early decades of the 20th century; (d) oral traditions of both the Ngok Dinka and the Misseriya, recorded by diverse commentators before the present dispute arose; (e) contemporary witness testimony regarding the extent of Ngok Dinka territory in 1905 and thereafter; and (f) environmental, climatic, cultural and similar evidence. It is also confirmed by the long-standing recognition of the immediate area of Abyei town as the political, cultural and commercial center of Ngok Dinka life, including in the Abyei Annex itself (at Article 7),¹⁴¹⁰ and supported by the equally long-standing recognition of Muglad as the Headquarters” of the Misseriya.

877. All of the foregoing materials demonstrate that by 1905 the Ngok Dinka occupied and used the area extending north from the Kordofan/Bahr el Ghazal boundary to the latitude of the northern edge of the *goz* (10°35’N). The factual conclusion is supported by the expert conclusions of the ABC, explained in detail in the ABC Report and corroborated by the extensive evidentiary record and factual finding of the Commission.

878. The principal aspect of the ABC Report where the evidence before this Tribunal would call for a different conclusion than that of the ABC Experts concerns the northern boundary of the Abyei Area. The ABC Experts concluded that the Abyei Area’s northern boundary fell midway between latitudes 10°10’ N and 10°35’ N, reasoning that the Ngok Dinka shared secondary rights of usage of the area with the Misseriya. In fact, the evidence demonstrates Ngok Dinka usage and permanent occupation of this area; under Article 1.1.2 of the Abyei Protocol, this area therefore constitutes Ngok Dinka territory (albeit subject to the Misseriya’ seasonal rights of usage).

879. As also discussed below, the “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” encompasses *all* of the territory occupied and used by the Ngok Dinka in 1905, when those Chiefdoms were transferred to the administration of Kordofan. Importantly, this definition does not encompass *some* of the territory of the Ngok Dinka, but

¹⁴⁰⁸ Abyei Arbitration Agreement, Art. 2(c), **Appendix A**.

¹⁴⁰⁹ Abyei Protocol, Art. 1.1.2, **Appendix C**.

¹⁴¹⁰ Abyei Annex, Art. 7, **Appendix D**.

all of that territory. Thus, Article 1.1.2 of the Abyei Protocol and Article 2(c) of the Abyei Arbitration Agreement refer to “*the area of the nine Ngok Dinka chiefdoms*,” fulfilling the obvious and essential purpose of defining the historic homeland of the Ngok people.

880. 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 CPA and Abyei Protocol. It would be no less irrational than defining the Abyei Area to exclude Abyei town itself.

1. In the Early 20th Century, the People of the Nine Ngok Dinka Chiefdoms Occupied and Used All of the Territory Extending North of the Current Bahr el Ghazal/Kordofan Boundary to Latitude 10°35’N

881. The ABC Report concluded that “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.”¹⁴¹¹ The Report also concluded that the Ngok occupied and used territory extending further north to latitude 10°35’N, albeit on a less sustained basis,¹⁴¹² but that there was “inconclusive evidence” of Ngok Dinka dominant rights in this region. As a consequence, the ABC Report concluded 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.”¹⁴¹³

882. The ABC Experts’ factual finding that the Ngok Dinka occupied and used lands extending up to at least latitude 10°35’N was clearly correct. Historical records, oral traditions, witness testimony and other evidence all uniformly show that the Ngok Dinka lived in and used territories extending from the current Bahr el Ghazal/Kordofan boundary to the latitude of the northernmost reaches of the *goz* (10°35’N). Under Article 1.1.2 of the Abyei Protocol, all such territories are included within the definition of the Abyei Area.

a) Oral Traditions of Ngok Dinka Migration to the Abyei Region in the 18th Century

883. As detailed above, the evidence indicates that the Ngok Dinka have lived in the Bahr river basin of the Abyei region for almost 300 years. Although there are very limited documentary records from pre-Condominium periods, oral tradition and accounts of early explorers establish that the Ngok Dinka migrated to the Bahr basin of the Abyei region in the early 18th century.¹⁴¹⁴

884. As discussed above, oral traditions of both the Ngok Dinka and the Misseriya describe the Ngok migrating west from the White Nile, heading through Bruna, Inywak, Malouth, Shargar, Abilang, Areng and Jau until they arrived in the area of the Ngol/Ragaba ez Zarga

¹⁴¹¹ ABC Report, Part I, at p. 21, **Appendix B**.

¹⁴¹² ABC Report, Part I, at pp. 21-22, (“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.”) **Appendix B**.

¹⁴¹³ ABC Report, Part I, at p. 21, **Appendix B**.

¹⁴¹⁴ See above at paras. 119-127 and also below at paras. 884-896.

river system by the early 18th century.¹⁴¹⁵ This migration is depicted on **Map 23** (Ngok Dinka Migration to Abyei Area) and is described in a number of early accounts.

885. Writing in the 1930s, Henderson collected Ngok Dinka oral accounts, which described 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.”¹⁴¹⁶ 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.

886. Santandrea also reports Ngok oral traditions of the Ngok migration to the current Abyei region in the 18th century. Santandrea recounts that “the first [of the Ngok Dinka] to cross the Nile was Kuol [being Kuol Dongbek, or ‘Kwoldit’], seemingly under the pressure of the Nuer advance, but also in search of wider grazing areas for their increasing number of cattle. Kuol settled along the Ngol, called in Arabic ‘Ragaba ez Zarka.’”¹⁴¹⁷ He also recounts that “when the Ngok arrived at Abyei, the Bahr el Ghazal Shatt (or Shatt-Thuri) had already left the country” but such departure “cannot have taken place a very long time before.”¹⁴¹⁸

887. A more recent Sudanese writer, Mohammed Azim Abu Sabah, provides a similar account, writing in 1978 that the Ngok “moved up to the present Ngowl” (referring to the Ngol/Ragaba ez Zarga) under “Paramount Chief Won Kwoldit” (Kuol Dongbek) and observing that the land “became the Ngok’s permanent home.”¹⁴¹⁹ As with Santandrea’s accounts, this is consistent with the locations of the Ngok Dinka in the earlier accounts of Henderson.

888. Ngok Dinka oral traditions recount that the Alei Chiefdom (the northernmost Ngok Chiefdom) followed a different migration.¹⁴²⁰ In their witness testimony, members of the Alei Chiefdom describe oral traditions which recount the Alei Chiefdom’s migration route from El Oddaya to Muglad, then southwards and settling around Turda and Nyama, before finally spreading further south to the area at and above the Ngol/Ragaba ez Zarga.¹⁴²¹ The migration

¹⁴¹⁵ See above at paras. 135-139; A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4 (1978), **Exhibit-FE 6/7**. See also D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 58 (1997) (“Ngok migrated to Abyei long ago from the east, from the Upper Nile area.”), **Exhibit-FE 8/14**.

¹⁴¹⁶ Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 49, 58 (1939), **Exhibit-FE 3/15**.

¹⁴¹⁷ S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**.

¹⁴¹⁸ S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**.

¹⁴¹⁹ A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4 (1978), **Exhibit-FE 6/7**.

¹⁴²⁰ The Alei have traditionally been the northernmost chiefdom of the Ngok Dinka with “the closest contacts with the Arabs” and in the early 20th century they were settled around Turda and Nyama (Turda and Nyama are identified on **Map 13** (Ngok Dinka Chiefdoms, 1905) and **Map 17** (Alei Chiefdom, 1905)). F. Deng, *War of Visions: Conflict of Identities in the Sudan* 254 (1995), **Exhibit-FE 8/13**.

¹⁴²¹ Witness Statement of Peter Nyuat Agok Bol (Alei elder), at p. 2, ¶8 (“...Alei feared further conflict with the Hamar, so they moved southwards from Maker [Arabic: El Odayya] to Mumu, where there was insufficient water. So Alei continued south to Deinga [Arabic: Muglad], where there were no Arabs. At Deinga [Arabic: Muglad] the Alei dug wells... The Misseriya followed because of the wells. But despite having two water pools [Arabic: hafirs], Kregi and Deinga, there was not enough water... so 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 my grandfather’s father, which was the time of Paramount Chief Arop Biong.”); Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶10 (“During the Chieftaincy of Chol Lual, in the late 1800s, the Chief’s family settled further south at Thuba, although Alei settlements remained in the north [at Thur [Arabic: Turda]].”).

of the Alei south from Muglad to the northern areas of the Bahr river basin is also recounted in the witness evidence and traditions of other Ngok Dinka Chiefdoms.¹⁴²²

889. Francis Deng provides similar accounts of Ngok oral traditions, which describe the Alei Chiefdom arriving from the northwest separately from the other Ngok lineages, and settling in the northern part of the Bahr river basin, above the Ngol/Ragaba ez Zarga and close to Turda and Nyama.¹⁴²³ The towns of Turda and Nyama are identified on **Map 7** (Abyei Area).

890. Misseriya oral traditions confirm the Ngok Dinka descriptions of the Alei migration. Henderson's 1931 notes recount Misseriya oral traditions that place the Alei Chiefdom north of the Ngol/Ragaba ez Zarga at Debbat el Mushbak, in the area of Turda.¹⁴²⁴ According to these traditions:

“[A certain Hamaydan Abu Hazla] owned a bull, which strayed from Wadai eastwards and the searchers were led to the court of the Shatt King Deinga in El Muglad, the porous ground enclosed by the khor El Hagiz. Deinga gave them rude welcome and they went off vowing vengeance. This little Shatt kingdom cannot have been of much consequence, as *the Ngork Dinka already held the Gnol river (Rageba Zerga) up to Hugnat 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 Kwai Dit, was chief of Malyor.”¹⁴²⁵

891. This Misseriya oral tradition includes three important elements: (a) as of the reign of Paramount Chief Monydhang, in the latter half of the 18th century, “the Ngok Dinka already held the Gnol river (Rageba Zerga) up to Hugnat Abu Urf” (clearly referring to the Ngok Dinka and the Ngol/Ragaba ez Zarga); (b) “Deing of Torjok,” described as the “leading man” of the “Ngork,” resided at “Debbat El Mushbak, near Hasoba” (Hasoba is located on the Ngol/Ragaba ez Zarga as depicted on **Map 46** (*Hasoba: Sheet 65 L*, Survey Office Khartoum, 1910¹⁴²⁶); and (c) it was at this time (the latter half of the 18th century), that the Misseriya first encountered the Ngok Dinka.

892. These references in the Misseriya oral tradition place the Ngok on the Ngol/Ragaba ez Zarga in the center of the Bahr river basin well before the end of the 18th century. That tradition, including references to specific Ngok place-names (“Debbat El Mushbak, near

¹⁴²² See, e.g., Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 2, ¶9, (recounting that the Achaak were once part of the Alei, before they broke away: “Historically and many years before the British, the Alei Chiefdom settled from Deinga [Arabic: Muglad] up to Maker [Arabic: El Odayya]. We moved from there during the time of the Turkish rule and before the British came to Sudan.”); Witness Statement of Nyol Paguot Deng Ayei (Chief at Bongo), at p. 4, ¶19 (“Muglad used to be called by its Dinka name “Deinga” or “Keregi.” Deinga and Keregi are names of Dinka families from in the Alei section.”). Witness Statement of Mijok Bol Atem (Diil elder), at p. 2, ¶10.

¹⁴²³ F. Deng, *War of Visions: Conflict of Identities in the Sudan 253-254* (1995), **Exhibit-FE 8/13**.

¹⁴²⁴ 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) (recounted by one Fiki Omar, a member of the Misseriya tribe).

¹⁴²⁵ 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).

¹⁴²⁶ See also **Map 46a** (*Hasoba: Sheet 65L*, Survey Office Khartoum, 1910 – Detail); **Map 47** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910 – Overlay); **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913); **Map 49** (*Kordofan Province*, Survey Office Khartoum, 1913 – Overlay).

Hasoba”) and Ngok Chiefs (Monydhang, accurately described as son of “Kwal Dit” (i.e., Kwoldit)), is precisely consistent with the Ngok Dinka oral traditions, described above.¹⁴²⁷

893. In sum, a considerable body of Ngok oral tradition describes the Ngok Dinka migration to the Bahr river basin the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab and, by the end of the 19th century, the Ngok occupation of that region. 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 the region; the same traditions are recorded by contemporary Ngok witnesses. While less extensive, Misseriya oral tradition corroborates the Ngok Dinka descriptions.

b) The Residences of Ngok Dinka Paramount Chiefs Prior to 1905

894. As discussed above, the Ngok Dinka have been distinguished by the institution of the centralized Paramount Chieftom since before the time of their migration to the Bahr river basin in the early 18th century.¹⁴²⁸ This institution provides a basis for organizing the tribal heritage, both in oral history and otherwise.

895. The Paramount Chiefs of the Ngok Dinka are listed below, together with the approximate dates of their deaths and the locations of their burial sites.

Paramount Chief	Approximate Dates	Place of Burial¹⁴²⁹
Jok Atur Kuk	Late 16 th century - early 17 th century	Pariang in Unity State, north of Bentiu
Bulabek Jok	Early-mid 17 th century	Pariang in Unity State
Dongbek Bulabek	Mid -late 17 th century	Pariang in Unity State
Kuol Dongbek (Kwoldit)	Late 17 th century-early 18 th century ¹⁴³⁰	Pakur (between Miding [Arabic: Heglig] and Dakjur [Arabic: Dembaloya])
Monydhang Kuol	Early-mid 18 th century ¹⁴³¹	Pachol (near Dakjur [Arabic: Dembaloya])

¹⁴²⁷ Witness Statement of Peter Nyuat Agok Bol (Alel elder), at p. 2, ¶8; Witness Statement of Belbel Chol Akuei Deng (Chief of Alel), at p. 2, ¶10.

¹⁴²⁸ See above at paras. 119-127.

¹⁴²⁹ Locations of burial sites are taken from Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 6, ¶ 27.

¹⁴³⁰ Since Monydhang’s Paramount Chieftancy was the middle of the 18th century, his father, Kwoldit, would have reigned as Paramount Chief in the late 17th/early 18th century (there being no suggestion that Kwoldit or Monydhang died young or became Paramount Chief very young). Where this has been the case, for example Kuol Arob, this has been indicated in the oral tradition. See F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 47 (1986) (“In 1905, Kwol Arob, who had just succeeded his father at a very early age...”), **Exhibit-FE 7/4**.

¹⁴³¹ Sabah notes that during the Paramount Chieftancy of “Maindang [Monydhang Kuol]” “peace was maintained except for individual and scattered disputes.” A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4 (1978), **Exhibit-FE 6/7**. This suggests that Monydhang Kuol’s rule predated the Nuer conflict of the late 18th century.

Alor Monydhang	Mid-late 18 th century ¹⁴³²	Majok Alor (near Abyei town)
Biong Alor	Late 18 th -early 19 th century ¹⁴³³	Wunchuei (southwest of Abyei town, just north of the Kiir/Bahr el Arab)
Arop Biong	b. early 18 th century ¹⁴³⁴ d. 1905 ¹⁴³⁵	Gol Gol (near Abyei town)
Kuol Arop	b. 1865 ¹⁴³⁶ d. 1942 ¹⁴³⁷	Abyei town (at Mirok)
Deng Kuol (known as Deng Majok)	b. 1900 ¹⁴³⁸ d. 1969 ¹⁴³⁹	Abyei town (at the house of Deng)
Monyyak (Abdallah) Deng	b. 1942 d. 1970 ¹⁴⁴⁰	Abyei town (at the house of Deng)
Kuol Deng Kuol Arop	b. 1952 ¹⁴⁴¹	

896. By 1905, at least four generations of Ngok Dinka Paramount Chiefs had lived and governed in the Abyei region. This is evidenced by the Ngok oral traditions regarding the residences and burial places of the Ngok Paramount Chiefs. These locations evidence the Ngok Dinka occupation of the Abyei region, and particularly the area of what is today Abyei town, during the 19th and early 20th centuries. The birth places of the Paramount Chiefs of the Ngok Dinka are depicted on **Map 23** (Ngok Dinka Migration to the Abyei Area).

c) The Effects of the Mahdiyya on the Ngok Dinka and Misseriya

897. It is also relevant to consider the conditions in Sudan immediately prior to the establishment of the Anglo-Egyptian Condominium in 1898, particularly as they affected the Ngok Dinka and the Misseriya. These conditions shed light on the relative numbers and vitality of the two tribes at the time of the Condominium.

¹⁴³² Sabah notes that during the Paramount Chieftancy of Alour [Alor] Maindang [Monydhang Kuol], “war broke out with the Nuer.” A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4 (1978), **Exhibit-FE 6/7**. This dates his rule to the late 18th century based on the historical record. See R. Collins, *Civil Wars and Revolution in the Sudan 111* (2005) (“this rivalry, [between the Dinka and Nuer] which began in the late eighteenth century...”), **Exhibit-FE 15/5a**.

¹⁴³³ Biong Alor was Paramount Chief at the beginning of the Turkiyya (ca. 1820) and “personally led the resistance.” See F. Deng, *War of Visions: Conflict of Identities in the Sudan* 255 (1995), **Exhibit-FE 8/13**.

¹⁴³⁴ Arop Biong was Paramount Chief by mid-Turkiyya (mid 1800s-1880) and Mahdiyya (1881-1898). See F. Deng, *War of Visions: Conflict of Identities in the Sudan* 255 (1995), **Exhibit-FE 8/13**.

¹⁴³⁵ F. Deng, *War of Visions: Conflict of Identities in the Sudan* 267 (1995), **Exhibit-FE 8/13**.

¹⁴³⁶ Santandrea describes a story told by a Ngok elder (born around 1900) who stated that “his village, on the Kir, called Pamun, derives its named from an old Bego man who died there. His father was not born at Pamun, but had gone there before his ‘initiation’ (by having the traditional scars cut on his head), after the Begi had been driven away by the Dinka.” Santandrea reasoned that by “placing the informant’s birth around the year 1900, his father might have been born around the year 1870, thus going to Pamun in 19885-87” and so confirmed that “Kuol Arop was born in c. 1865.” See S. Santandrea, *The Luo of the Bahr el Ghazal* 196 (1968), **Exhibit-FE 4-18**.

¹⁴³⁷ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* Preface xi (1986) (Deng Majok “assumed full control of the tribe in 1942”, which took place upon the death of the previous Paramount Chief), **Exhibit-FE 7/4**.

¹⁴³⁸ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* Preface xi (1986), **Exhibit-FE 7/4**.

¹⁴³⁹ F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* Preface xi (1986) (Deng Majok “reigned until his death in 1969”), **Exhibit-FE 7/4**.

¹⁴⁴⁰ Monnyak Deng was assassinated by the SAF on 19 October 1970. See Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 2, ¶7.

¹⁴⁴¹ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 2, ¶5.

898. As discussed in detail above, the Mahdiyya (1881-1898) did not disturb or curtail the Ngok Dinka historic occupation and use of the Bahr river basin around the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems.¹⁴⁴² Instead, the asymmetric effects of the Mahdiyya on the Ngok and the Misseriya enabled the Ngok to expand their historic territories at the end of the 19th century.

899. While the Ngok remained largely away from the frontlines during the Mahdiyya conflicts, many of the Humr were early members of the Mahdist forces (which drew the core of their early support from Kordofan's nomadic Arab tribes).¹⁴⁴³ The Misseriya in particular suffered severely during the Mahdiyya, incurring heavy casualties in the fighting against Anglo-Egyptian forces.¹⁴⁴⁴ Thus, based on his review of the historical record, Professor Daly concludes in his expert report that “[t]he evidence leaves us with the likely conclusion that *the Ngok suffered relatively little during the Mahdiyya, while the Humr's fortunes would appear to have declined precipitously.*”¹⁴⁴⁵

900. As also discussed above, the evidence suggests that some non-Mahdist Humr fled south during the Mahdiyya and that the Ngok accommodated them. As the ABC Report explained, during the Mahdist period many of the Humr sought “refuge among the Ngok Dinka of Arop Biong along the Ragaba ez-Zarga/Ngol until the overthrow of Khalifa in 1898-9 allowed them to return to their homes further north.”¹⁴⁴⁶

901. Ngok oral traditions also recount the events of the Mahdiyya. An elder of the Achaak Chiefdom recounts that members of the Alei Chiefdom supported the Misseriya, offering accommodation and protection to “the people of Azoza.”¹⁴⁴⁷ An account of this is also given by the current Paramount Chief of the Ngok.¹⁴⁴⁸

¹⁴⁴² See above at paras. 128-132.

¹⁴⁴³ Salih, *Pastoralists and the War in Southern Sudan* in J. Markakis, *Conflict and the Decline of Pastoralism in the Horn of Africa* 19 (1993), **Exhibit-FE 8/5**. Unlike some other southern tribes, the Ngok Dinka were spared the worst of the attacks during the Mahdist period, which is described as a “relatively peaceful period” for them. F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 47 n. 20 (1986), **Exhibit-FE 7/4**.

The Mahdist forces had no success in penetrating the southern Sudan. In 1896, a Mahdist expedition headed down the Bahr el Jebel to obtain supplies. Below Bor the men “hacked at the aquatic vegetation from May to June, only to die from hunger, exhaustion and fever,” and end the Khalifa's efforts to penetrate the region. R. Collins, *The Nile* 57 (2002), **Exhibit-FE 10/6**.

¹⁴⁴⁴ See above at paras. 231-232; see also Lloyd, *Some Notes on Dar Homr*, *The Geographical Journal*, 29 (January to June), 1907, at pp. 651-652, **Exhibit-FE 3/4**. Watkiss Lloyd observed in 1907 that the Misseriya were “formerly numerous and wealthy, but *suffered severely in dervish times.*” *Ibid.* He also explained that “greater portion [of the Misseriya] were fanatical followers of the Mahdi, and lost heavily in the various campaigns between 1884 and 1899. Those who remained behind were constantly raided and harassed by recruiting parties of Dervishes.”

¹⁴⁴⁵ Daly Expert Report, at p. 26 (emphasis added).

¹⁴⁴⁶ ABC Report, Part I, at p. 27, **Appendix B**. See also Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 49, 69 (1939) (“The survivors under Hamdan Abu Ein of the Kelabna, found asylum until the *futuh* with Chief Arop Biong in the swamps of Baralil.”), **Exhibit-FE 3/15**; F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 47 (1986), **Exhibit-FE 7/4**; Deng, in J. Spaulding and S. Beswick (eds.), *White Nile, Black Blood: War, Leadership, and Ethnicity from Khartoum to Kampala* 135 (2000), **Exhibit-FE 9/2**.

¹⁴⁴⁷ Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 2, ¶9; Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 4, ¶20; Witness Statement of Malual Alei Deng (Mareng elder), whose grandfather was the translator for Arop Biong in his dealings in Azoza, at p. 2, ¶6.

¹⁴⁴⁸ Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 7, ¶34 (“During the time of Arop Biong and the Mahdiyya, a Misseriya by the name of Azoza came into conflict with other Misseriya led by Ali Julla, a supporter of the Mahdi. Azoza escaped to the south and was found by the Ngok at a place which is now named Riang wat Aziz, which means the place of the sons of Azoza. When the Ngok discovered him there, Arop Biong offered refuge to Azoza and his tribe in the Ngok lands, and Azoza eventually returned to them his home in Muglad.”).

902. Professor Daly, having weighed the evidence, concludes that the Ngok oral history is convincing. He explains:

“Controversy has surrounded the relations of the Ngok and the Humr during the Mahdiyya ever since. The Humr recall shielding the Ngok from the worst excesses of the Khalifa’s regime and the banditry that accompanied it; the Ngok remember taking in survivors of the Khalifa’s punitive expeditions and welcoming the battered remnants who made their way back to the tribal *dar* after the battle of Omdurman had destroyed the Mahdist regime. The historical evidence favors the Ngok version. In any case, it is clear that the Misiriyya suffered substantial losses during the Mahdiyya, while the Ngok appear to have survived relatively unscathed.”¹⁴⁴⁹

903. In sum, although comparatively limited, the available evidence shows that, by the end of the 19th century, the Ngok had been settled for many generations in the Abyei region centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems. The events of the Mahdiyya did little to disrupt or curtail the Ngok occupation of the region, and on the contrary disproportionately benefited the Ngok vis-à-vis the Misseriya to the north.

d) The Ngok Dinka Occupation and Use of the Abyei Region in Early 20th Century

904. Beginning in the early 20th century, the historical record provides more detailed documentary evidence of Ngok Dinka occupation and use of the Abyei region. Both contemporaneous records of the Condominium (in the first decade of the 20th century) and subsequent records (in the first half of the 20th century) provide consistent documentary accounts of Ngok Dinka occupation and use of the area extending from south of the Kiir/Bahr el Arab to the Ngol/Ragaba ez Zarga and further north to Nyama, Turda and surrounding settlements. The same records confirm the Ngok Paramount Chiefs’ settlement both before and after 1905 in the immediate vicinity of what is now Abyei town and the role of Abyei town as the historic center of Ngok Dinka political, cultural and commercial life.

905. Preliminarily, the earliest first hand account of the Ngok Dinka in the Abyei region was by Browne, a British explorer in 1794. Browne’s report corroborates the oral traditions (discussed above) of Ngok occupation of the Abyei region in the late 18th and 19th centuries.¹⁴⁵⁰

906. Browne described “numerous” inhabitants, who were “tall and black,” being located at a place called “*Jungeion*” that was five days travel by foot south-east of the Misseriya.¹⁴⁵¹ Later observers (Henderson) identified “*Jungeion*” as the area of Debbat el Mushbak, near

¹⁴⁴⁹ Daly Expert Report, at p. 25.

¹⁴⁵⁰ W. Browne, *Travels in Africa, Egypt, and Syria from the year 1792 to 1798* 572 (2d ed. 1806), **Exhibit-FE**

1.

¹⁴⁵¹ W. Browne, *Travels in Africa, Egypt, and Syria from the year 1792 to 1798* 572 (2d ed. 1806), **Exhibit-FE 1/1.**

Hasoba on the Ngol/Ragaba ez Zarga.¹⁴⁵² Among other things, Browne described the people of this area as eating “*Mahriek* or white maize.”¹⁴⁵³

907. Browne’s description of “tall and black” tribesmen accords well with 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*.¹⁴⁵⁴ As Henderson notes, “*Mareig* is the Homr name for the Ngok.”¹⁴⁵⁵ Browne’s description, based on first-hand observations, thus places the Ngok in the area of the Ngol/Ragaba ez Zarga, consistent with Ngok oral traditions (discussed above) and with the later Sudan Government records (discussed below).

(1) Documentary Record Concerning the Ngok Dinka in 1905

908. The Sudan Government produced a number of documentary records bearing on the location of the Ngok Dinka in 1905. Although limited in number and detail, these records provide important evidence that confirms the Ngoks’ occupation of the Abyei region.

909. The officials of the Sudan Government had limited knowledge of the Ngok Dinka, and generally the Bahr river basin, in the first decade of the 20th century. As discussed above, the Abyei region was remote and difficult to access, particularly during the rainy season, while also being of limited interest to the Anglo-Egyptian administration.¹⁴⁵⁶ Commenting on this, Professor Daly states “British knowledge of the Ngok was based on a few hours’ path-crossing.”¹⁴⁵⁷ Indeed, as of 1905, the area of the nine Ngok Dinka Chiefdoms, and much of Kordofan and Bahr el Ghazal more generally, had not been mapped or even explored by the Sudan Government.¹⁴⁵⁸ As a consequence, the Government’s early records regarding the Abyei region are inevitably limited in number and detail.¹⁴⁵⁹

910. The limitations of the Sudan Government’s records were made more acute by the fact that Government administrators’ few visits to the Abyei region occurred only in the dry season. As the ABC noted, “officials came only in the dry season ... what few descriptions we do have are of Ngok dry season activities, which were concentrated around the rivers.”¹⁴⁶⁰ As a consequence, the Sudan Government’s early records present an incomplete account of Ngok land occupation and use of the region.

¹⁴⁵² Henderson, “*A Note on The Migration of the Messiria Tribe into South West Kordofan*,” 22(1) SNR 49, 60 (1939) (“This is a reasonable description of a journey from Kubja down the Wadhi Galla 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 1/1** (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*”).

¹⁴⁵³ W. Browne, *Travels in Africa, Egypt, and Syria from the year 1792 to 1798* 571 (2d ed. 1806), **Exhibit-FE 1/1**.

¹⁴⁵⁴ See above at paras. 176-189; ABC Report, Part I, at p. 30, **Appendix B**; Henderson, “*A Note on The Migration of the Messiria Tribe into South West Kordofan*,” 22(1) SNR 49, 60 (1939), **Exhibit-FE 3/15**.

¹⁴⁵⁵ Henderson, “*A Note on The Migration of the Messiria Tribe into South West Kordofan*,” 22 (1) SNR 49, 60 (1939) (“This is a reasonable description of a journey from Kubja down the Wadhi Galla 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 1** (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*”).

¹⁴⁵⁶ See above at paras. 270-279.

¹⁴⁵⁷ Daly Expert Report, at p. 43.

¹⁴⁵⁸ See above at paras. 331-336.

¹⁴⁵⁹ See below at paras. 913-944.

¹⁴⁶⁰ ABC Report, Part I, at p. 43, **Appendix B**. See also below at paras. 922, 928 and 930.

911. As discussed above, the Ngok Dinka grazed their cattle herds to the south of the Abyei region during the dry season.¹⁴⁶¹ As a consequence, the Sudan Government reports necessarily focused on time periods when there were fewer Ngok Dinka (and Ngok cattle) in northern parts of the Abyei region, while omitting descriptions of the Ngok and their activities during the rainy season, when the Ngok cattle had returned from the region of the Kiir/Bahr el Ghazal to the permanent Ngok settlements to the north.¹⁴⁶² Equally, the Government's focus on the dry season also necessarily accorded unrepresentatively prominent status to the Misseriya, whose cattle herds grazed seasonally in Ngok territory during that time of the year.¹⁴⁶³

912. Despite these qualifications, those Sudan Government records that do exist provide compelling confirmation of Ngok Dinka occupation of the Bahr river basin of the Abyei region during the first decade of the 20th century. In particular, as detailed below, the Government records from this period consistently describe the presence of the Ngok Dinka, under Paramount Chief Arop Biong (known at the time by Sudan Government administrators as "Sultan Rob"), extending north from the Kiir/Bahr el Arab to and beyond the Ngol/Ragaba ez-Zarga, including in the immediate area of the Ngok historic center of present-day Abyei town. Professor Daly concludes that the contemporaneous documentary evidence "establishes a permanent Ngok presence on the Ragaba al-Zarqa."¹⁴⁶⁴

(a) 1902 Sudan Intelligence Report (No. 92)

913. A 1902 Sudan Intelligence Report (No. 92) describing a trip by Brian Mahon, the Governor of Kordofan, provides early Sudan Government evidence of the location of Ngok Dinka settlements in the Abyei region. Mahon's report located "***Sultan Rob's country on the Bahr El Homr***, about 2 days from Lake Ambady."¹⁴⁶⁵ As discussed above, "Sultan Rob" was the Sudan Government's name for the Ngok Dinka Paramount Chief at the time, Arop Biong.

914. The report itself is scant on detail, and the reference to "Bahr El Homr" could be either a reference to the Ngol/Ragaba ez Zarga or the Kiir/Bahr el Arab. (Lake Ambady is approximately 60 miles from the Kiir/Bahr el Arab which is about two days walk). Either way, Mahon's report provides first-hand observations firmly establishing the Ngok Dinka either on the Kiir/Bahr el Arab or the Ngol/Ragaba ez Zarga during the dry season of 1902, which is consistent with the Ngok's dry season cattle grazing patterns.¹⁴⁶⁶

915. The same Report also noted that "***Rob's place is a great trade centre for Bahr El Ghazal*** and a lot of ivory comes there."¹⁴⁶⁷ The Report's description of "Rob's place" as a trading center is consistent with subsequent descriptions of the location of Abyei town as the center of Ngok commercial affairs.¹⁴⁶⁸ Map evidence indicates that the site of Sultan Rob's "trade centre" was on the east of the Nyamora/Ragaba Umm Baiero, where the modern-day

¹⁴⁶¹ See above at paras. 196-205 and below at paras 1064-1081.

¹⁴⁶² F. Deng, *Dinka and their Songs* 64 (1973), **Exhibit-FE 5/7**.

¹⁴⁶³ See above at para. 238-248 and below at paras. 1076-1081.

¹⁴⁶⁴ Daly Expert Report, at p. 49.

¹⁴⁶⁵ Sudan Intelligence Report No. 92, dated 31 March 1902, **Appendix F**, at p. 19, **Exhibit-FE 1/16** (emphasis added).

¹⁴⁶⁶ See below at paras.1073, 1074.

¹⁴⁶⁷ Sudan Intelligence Report No. 92, dated 31 March 1902, **Appendix F**, at p. 20, **Exhibit-FE 1/16** (emphasis added).

¹⁴⁶⁸ See below at paras. 961-967.

Abyei town market is located and where oral traditions record the Ngok Paramount Chiefs as having resided for four generations by 1902.¹⁴⁶⁹

916. The 1902 Report also observed with regard to Sultan Rob's settlements that "[t]hese people are well off and own immense heads of cattle."¹⁴⁷⁰ The Report noted elsewhere, fairly clearly with regard to the same locations, that "*the people are much more prosperous than I would expect*, and I came across no actual want. Some of them are very rich in cattle, especially the Dinkas."¹⁴⁷¹ Mahon also noted the cultivation of a "*great quantity of grain*," and particularly "*dhurra*" (or sorghum, the Ngoks' staple crop).¹⁴⁷² These descriptions are consistent with the agricultural practices of the Ngok (discussed above),¹⁴⁷³ and indicate the existence of relatively extensive settlements with prosperous agriculture and cattle-raising populations.

(b) 1902 Wilkinson Trek Record

917. An early 1902 trek record by Wilkinson detailed his reconnaissance from El Obeid to Lake Keilak and entering "*Dar El Jange*" from the north-east during the dry season of 1902.¹⁴⁷⁴ The route followed by Wilkinson is depicted on **Map 29** (Wilkinson's Route, 1902).

918. Wilkinson's record provides contemporaneous evidence that the Ngok lived in permanent, prosperous villages, with substantial agricultural fields, between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga. This is consistent with the 1902 Sudan Intelligence Report (No. 92) discussed above.

919. Wilkinson referred to the general area that he visited by the term "*Bara*,"¹⁴⁷⁵ derived from the Arabic *bahr* (river); as discussed above, this area encompassed the Bahr river basin of the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems. Wilkinson's record reports that, from Keilak he travelled through El Yoi and Debib to Fauwel where he records an "Arab settlement." From Fauwel, Wilkinson then had to cross what he called the "Bahr El Arab", but in fact this was the Ngol/Ragaba ez Zarga, as shown on **Map 29** (Wilkinson's Route, 1902).¹⁴⁷⁶ This was also the conclusion reached by the ABC.¹⁴⁷⁷

920. Wilkinson crossed the Ngol/Ragaba ez Zarga River, where he reached the country of "a Dinka chief called Rueng," and approximately 15 miles south from the Ngol/Ragaba ez

¹⁴⁶⁹ "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); **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); and is also located on the 1907 Cairo Survey Department map: **Map 42** (*The White Nile and Kordofan*, Survey Department Cairo, 1907); **Map 43** (*The White Nile and Kordofan*, Survey Department Cairo, 1907- Overlay).

¹⁴⁷⁰ Sudan Intelligence Report No. 92, dated 31 March 1902, **Appendix F**, at p. 19, **Exhibit-FE 1/16** (emphasis added).

¹⁴⁷¹ Sudan Intelligence Report No. 92, dated 31 March 1902, **Appendix F**, at p. 19, **Exhibit-FE 1/16** (emphasis added).

¹⁴⁷² See above at paras. 913-916.

¹⁴⁷³ See above at paras. 176-205. In contrast, these descriptions are inconsistent with the lifestyle of the Misseriya, whose nomadic lifestyle did not include more than minimal agriculture. See above at paras. 233-237.

¹⁴⁷⁴ 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**.

¹⁴⁷⁵ 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**.

¹⁴⁷⁶ 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).

¹⁴⁷⁷ ABC Report, Part I, at p. 38, **Appendix B**.

Zarga, “the first Dinka village of Bombo is reached.” Wilkinson noted “This district is now known as Bongo.”¹⁴⁷⁸ Wilkinson’s references to “Bombo” and “Bongo” are most likely references to the Bongo Chiefdom of the Ngok Dinka.

921. Wilkinson then goes on to report: “These villages [of the Bongo], *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.¹⁴⁷⁹

922. Parenthetically, this account of the “neatly built” villages that Wilkinson encountered is precisely consistent with other descriptions of Ngok Dinka villages, which characterize the homes as permanent, aesthetically-pleasing, clean and well-maintained (as described above).¹⁴⁸⁰ Wilkinson’s report is also consistent with the general pattern of Ngok village placement (also described above).¹⁴⁸¹ On the other hand, 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.¹⁴⁸²

923. Wilkinson’s trek record then goes on to recount that he:

“Reached 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.*”¹⁴⁸³

The description of “large settlements” of Dinka and the “headquarters” of a local chief is again consistent with the permanent character of Ngok villages and homes (discussed above).¹⁴⁸⁴

924. Wilkinson next records that, at a point 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*” which were located on both sides of the river. It is clear that the river referred to by Wilkinson was the Kiir/Bahr el Arab River. This is indicated on **Map 29** (Wilkinson’s Route, 1902) which plots Wilkinson’s trip.¹⁴⁸⁵

¹⁴⁷⁸ 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** 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).

¹⁴⁷⁹ 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) (the Ngok settlements are “used by the Dinkas in the rains and as long as the water lasts, with the villages being located a few miles distance from one another”), **Exhibit-FE 2/15**.

¹⁴⁸⁰ See above at paras. 206-216.

¹⁴⁸¹ See above at para. 209.

¹⁴⁸² See above at para. 207 and below at para. 1075. A more likely explanation for empty villages would have been concerns about the intentions of Wilkinson and his accompanying soldiers.

¹⁴⁸³ 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).

¹⁴⁸⁴ See above at paras. 206-216.

¹⁴⁸⁵ 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); and **Map 41** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907 – Overlay).

925. Wilkinson identified the location of Sultan Rob’s settlements as “Masian,” which is a reference to “Mithiang,” located to the southeast of the current location of Abyei town.¹⁴⁸⁶ The location of Masian/Mithiang is identified on **Map 13** (Ngok Dinka Chiefdoms, 1905) and **Map 29** (Wilkinson’s Route, 1902). The location is also identified on contemporaneous maps as “Sultan Rob’s Old Village.”¹⁴⁸⁷

926. Wilkinson then 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.*”¹⁴⁸⁸ As indicated on **Map 29** (Wilkinson’s Route, 1902), this portion of Wilkinson’s trek involved his return north and north-west in the direction of the Ngol/Ragaba ez Zarga, through Ngok territory. His descriptions of the Ngok settlements in this area are perfectly consistent with other evidence regarding both the Ngok agricultural practices (cultivation of sorghum (*dura*)) and the Ngoks’ permanent, well-maintained settlements.¹⁴⁸⁹

927. Wilkinson’s report provides reasonably detailed, first-hand evidence that describes the Ngok Dinka inhabiting permanent settlements with extensive agricultural lands and well-maintained houses in the area between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. Wilkinson’s account is consistent with and corroborates the earlier 1902 Mahon trip report, which also described prosperous Ngok agricultural populations in this area, as well as the pre-Condominium Ngok and Misseriya oral traditions discussed above.¹⁴⁹⁰

928. At the same time, Wilkinson’s trek was made in the dry season (when Ngok cattle had 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) and directly to the “settlements of Sultan Rob” on the Kiir/Bahr el Arab river, then returning by much the same route. Accordingly, while Wilkinson 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 settlements at the time.¹⁴⁹¹

(c) 1903 Trip Account of Kordofan Governor

¹⁴⁸⁶ 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) (“... and the Kir River, or Bahr El Jange, is struck, as one reaches the settlements of Sultan Rob. The river here is a most pleasant sight... Fish are plentiful, as are also crocodiles and hippos. 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.”), **Exhibit-FE 2/15**.

¹⁴⁸⁷ 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)). The reference to Sultan Rob’s “Old” village suggests that Sultan Rob (Arop Biong) subsequently returned to the area of Abyei town, where he was buried at Gol Gol in 1905: see above at para. 895.

¹⁴⁸⁸ 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).

¹⁴⁸⁹ See above at paras. 206-216.

¹⁴⁹⁰ See above at paras. 119-127 and below at paras. 1022-1034.

¹⁴⁹¹ Wilkinson did not travel to the area now known as Abyei town, or beyond, where at the time Ngok were settled in (among other places) Noong [Arabic: Na’am], Alal, Maker Abyior, Rumtil [Arabic: Antilla], and toward the border with Darfur at Mijok Alor, Maper Amaal, Thigei/Chigei [Arabic: Abudaba], Akot Tok, Kol Aruth [Arabic: Grinti] and near Meiram. 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 below at paras. 1015 to 1063.

929. In 1903, the Governor of Kordofan (Mahon) submitted “an account of his recent inspection of Kordofan Mudiria,”¹⁴⁹² reporting among other things on Dinka that he visited in southern and western Kordofan during the dry season of 1903. 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),¹⁴⁹³ and then “west” to reach “**Sultan Rob’s**.”

930. 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 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 friends last year after 30 years’ war, were on the best of terms**, and 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.”*¹⁴⁹⁴

931. Again, Mahon’s report confirms the presence of permanent Ngok settlements to the north of the Kiir/Bahr el Arab River. While the generality of the direction prevents entirely precise identification, Mahon’s description indicates that he travelled “west” from Fauwel (Pawol) to Arop Biong’s, indicating that Ngok Dinka (Arop Biong’s people) were located on the same latitude as Fauwel and Um Semina on the Ngol/Ragaba ez Zarga River. That is consistent with Wilkinson’s trek record (discussed above¹⁴⁹⁵). It is also notable that the reports regarding the Ngok in 1902 and 1903 emanate from the **Kordofan** Governor – indicating the location of the Ngok north of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, which was often referred to as the approximate provisional boundary between Kordofan and Bahr el Ghazal.¹⁴⁹⁶

932. That conclusion is corroborated by Mahon’s report that he went “south” from “Sultan Rob’s” to what he termed the “Riverain country.”¹⁴⁹⁷ The “Riverain” country likely included at least some portion of the Kiir/Bahr el Arab river system, one of the major rivers in that region of Kordofan. Given that Mahon went south from the Ngoks’ Paramount Chief’s court to these areas, the Ngok Dinka territories that he visited must have lay to the north of these systems.

¹⁴⁹² Sudan Intelligence Report No. 104, **Appendix E**, at p. 18, **Exhibit-FE 1/21**.

¹⁴⁹³ Sudan Intelligence Report No. 104, **Appendix E**, at p. 19, **Exhibit-FE 1/21**.

¹⁴⁹⁴ Sudan Intelligence Report No. 104, **Appendix E**, at p. 19, **Exhibit-FE 1/21** (emphasis added); Sudan Gazette No. 45, dated March 1903, **Exhibit-FE 1/22** (emphasis added). Mahon’s references to the “Arab country” was not precisely identified, and in any case the reference to “Arab country” was based upon dry season observations, which presented an unrepresentative view. See above at paras. 929-932.

¹⁴⁹⁵ See above at paras. 917-928.

¹⁴⁹⁶ See above at paras. 337-343.

¹⁴⁹⁷ Sudan Intelligence Report No. 104, **Appendix E**, at p. 19, **Exhibit-FE 1/21**.

(d) 1903 Sudan Intelligence Report (No. 110)

933. A September 1903 Sudan Intelligence Report (No. 110) provides further evidence of the location and nature of the Ngok Dinka settlements. The Report 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.”¹⁴⁹⁸

934. Again, 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). Once more, the Report is corroborative of the other descriptions (discussed above) by the Sudan Government of the Ngok and their location during the period.

(e) Gleichen’s 1905 *The Anglo-Egyptian Sudan*

935. The foregoing descriptions in Sudan Government records describe the Ngok Dinka as occupying permanent settlements, with substantial cattle herds even in the dry season, in the Bahr river basin centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems. These descriptions are consistent with the 1905 version of Gleichen’s *The Anglo-Egyptian Sudan*, which included brief references to the Ngok Dinka that described “**Sultan Rob and Dar Jange belonging to Kordofan,**”¹⁴⁹⁹ 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.**”¹⁵⁰⁰

936. Gleichen’s 1905 description paralleled the previous Sudan Government reports placing the Ngok Dinka (“Sultan Rob and Dar Jange”) in Kordofan, to the north of the Kiir/Bahr el Arab river system. It also indicates that the territory of the Ngok Dinka under Sultan Rob was a permanent homeland – hence, the reference again to “**Dar Jange,**” meaning “home” or “land” of the Dinka.¹⁵⁰¹

(f) 1905 Sudan Intelligence Report (No. 128)

937. Raids against the Ngok Dinka (as well as the neighboring Twic Dinka) resulted in a decision by Sudan Government to ensure that both the victims and the perpetrators of the

¹⁴⁹⁸ Sudan Intelligence Report No. 110, at p. 1, **Exhibit-FE 1/24** (emphasis added).

¹⁴⁹⁹ E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. I, 337 (1905), **Exhibit-FE 2/14**.

¹⁵⁰⁰ 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).

¹⁵⁰¹ A. 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**.

raids would be under the administration of the same authorities.¹⁵⁰² 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*”¹⁵⁰³

Once more, the Sudan Government report places the Ngok Dinka’ country (under “Sultan Rob”) in a location “*on the Kir river.*”

(g) 1905-1906 British Report

938. To the same effect, a British report in 1906 noted that the Kiir/Bahr el Arab River was “*occupied by the Dinkas under Sultan Rob.*”¹⁵⁰⁴ The author explained 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.*”¹⁵⁰⁵ The report is consistent with earlier Sudan Government descriptions of the Ngok Dinka inhabiting permanent settlements in territories that were regarded as “Sultan Rob’s country,” “Sultan Rob’s place,” the “country” of Sultan Rob, or the area that the Ngok “occupied.”

(h) 1905 Bahr el Ghazal and Kordofan Annual Reports

939. There are two Sudan Government documents from 1905 that could be interpreted as describing a different location of Ngok Dinka settlements at the time – the Annual Reports for Bahr el Ghazal and Kordofan for 1905. As discussed in detail above, these Reports described a transfer in 1905 of Sultan Rob and his territories and people from Bahr el Ghazal to Kordofan.¹⁵⁰⁶ Thus:

a. the 1905 Kordofan Annual Report provided: “The *Dinka Sheikhs, Sultan Rob* and Sultan Rihan Gorkwei are *now included in Kordofan instead of the Bahr El Ghazal*”¹⁵⁰⁷ and

b. the 1905 Bahr el Ghazal Annual Report provided: “In the north the territories of *Sultan Rob* and Sheikh Gokwei *have been taken from this Province and added to Kordofan.*”¹⁵⁰⁸

940. The two Reports explicitly proceeded on the basis that Sultan Rob and his people were included in Bahr el Ghazal prior to 1905, and that, in 1905, they were transferred to

¹⁵⁰² Sudan Intelligence Report, No. 128, March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

¹⁵⁰³ Sudan Intelligence Report, No. 128, March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

¹⁵⁰⁴ Lloyd, *Some Notes on Dar Homr*, The Geographical Journal, 29 (January to June), 1907, at p. 649, **Exhibit-FE 3/4**.

¹⁵⁰⁵ Lloyd, *Some Notes on Dar Homr*, The Geographical Journal, 29 (January to June), 1907, at p. 652, **Exhibit-FE 3/4** (emphasis added).

¹⁵⁰⁶ See above at paras. 346-358 and below at paras. 1096-1122.

¹⁵⁰⁷ Annual Report on the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13** (emphasis added).

¹⁵⁰⁸ Annual Report on the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13** (emphasis added).

Kordofan.¹⁵⁰⁹ 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.¹⁵¹⁰ Prior to 1905, the Sudan Government's administrators may have regarded the Ngok Dinka people ("Sultan Rob's" people) as being subject as a tribe to the same administration as other, ethnically similar tribes in Bahr el Ghazal, or they may have regarded the Bahr el Ghazal/Kordofan boundary as extending north of the Bahr el Ghazal for purposes of administering the Ngok Dinka, or they may have had some other reasoning.¹⁵¹¹

941. It is, however, unnecessary to hypothesize the rationale for the Sudan Government's Annual Reports for Kordofan and Bahr el Ghazal in 1905. The essential point for historical purposes is that these 1905 Government Reports were not reports describing 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. The Reports were instead bureaucratic decisions meant to announce a change to the administrative treatment of the Ngok Dinka by the Sudan Government.¹⁵¹² 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 physical matter.

* * * * *

942. In sum, the contemporaneous reports of the Sudan Government administrators at the beginning of the 20th century describe the Ngok Dinka, under the Paramount Chiefdom of Arop Biong (termed "Sultan Rob" or "Sheikh Rob"), as occupying prosperous villages with well-maintained homes, substantial cultivated fields and large cattle herds, located widely throughout the region centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems. This documentation is remarkably consistent in its treatment of the Ngok and their territories, with a number of different reports by different British officials over a period of years providing similar descriptions of the Ngok Dinka, often based on first-hand observations. These reports provide valuable evidence as to the location and extent of the Ngok Dinka lands in 1905.

943. At the same time, and as noted above,¹⁵¹³ the Sudan Government administrators had limited access to the Bahr river basin, particularly in the rainy season, and therefore had an inevitably incomplete understanding of the Ngok territories.¹⁵¹⁴ The consequence was that, while the Sudan Government records can provide affirmative evidence of where the Ngok Dinka were located, these records cannot comprehensively indicate the full extent or scope of the Ngok territories, particularly in the rainy season.¹⁵¹⁵

944. Despite these limitations, the Sudan Government's records establish the presence of sizeable (by local standards), permanent and prosperous Ngok villages in the Bahr river basin centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems. Although the furthest reaches or precise borders of the Ngok Dinka territory were not specified, it is clear

¹⁵⁰⁹ See below at paras. 1112-1118.

¹⁵¹⁰ See Daly Expert Report, at pp. 39-41.

¹⁵¹¹ See Daly Expert Report, at pp. 41-42.

¹⁵¹² Daly Expert Report, at pp. 41-42.

¹⁵¹³ See above at paras. 908-912.

¹⁵¹⁴ See above at paras. 910-911.

¹⁵¹⁵ Equally, as also discussed above, the Sudan Government administrators' geographic understanding of the Bahr region and the "Bahr el Arab" river system was understandably imperfect. See above at paras. 908-912.

that there was a substantial, settled Ngok presence in the heartland of what the ABC defined as the Abyei Area.

(2) The Subsequent Documentary Record Concerning the Ngok Dinka

945. The contemporaneous records of the Sudan Government concerning Ngok territory in 1905 are corroborated by subsequent documentary evidence from later decades in the 20th century. This post-1905 record provides inferential evidence as to the location and extent of the Ngok Dinka lands in 1905. That is because, absent some explanation for reaching a different conclusion, the location of the Ngok (and their neighbors) in the years following 1905 – particularly those years nearest in time – provides relatively strong evidence of their location(s) in 1905.

946. Absent some affirmative reason to conclude that the territories of the Ngok or the Misseriya altered between 1905 and later points in time, the correct inference is that the Ngok continued to inhabit and use the same lands that they historically had occupied and used. This was the conclusion (correctly) reached by the ABC, which reasoned “it is evident that over a period of years successive administrators accepted a continuity of settlement and use,”¹⁵¹⁶ citing Cunnison for the proposition that “the general area in which the Ngok maintained their permanent settlements remained the same over the years.”¹⁵¹⁷

947. As with the pre-1905 Sudan Government records, the documentary record following 1905 uniformly confirms the presence of the Ngok well to the north of the Kiir/Bahr el Arab River. Again, these reports emanate from a number of different sources, often based on first hand observations, extending over a number of years.

948. A British Inspector (and future governor of Kordofan) reported in 1907 on a visit the previous year, saying that when the Homr travel southwards towards the Kiir/Bahr el Arab River during the dry season, they enter into Dinka land: “when the roads are open they go south [from Muglad] and Dar Jange.”¹⁵¹⁸

949. The 1912 *Kordofan Province Handbook*, in describing the country of the Dinka in Kordofan, reported as follows:

“Country - to the south of Dar Nuba and living in the open plains (locally called fawa) which extends 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 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.”¹⁵¹⁹

950. This generic description to the “country” of the “considerable Dinka population” in Kordofan does not differentiate between the Ngok and Rueng Dinka, who were both in Kordofan at this time. However, this must have referred to the Ngok Dinka, given its

¹⁵¹⁶ ABC Report, Part I, at pp. 18-19, **Appendix B**.

¹⁵¹⁷ ABC Report, Part I, at p. 19, **Appendix B**.

¹⁵¹⁸ Lloyd, *Some Notes on Dar Homr*, *The Geographical Journal*, 29 (January to June), 1907, at p. 654, **Exhibit-FE 3/4**.

¹⁵¹⁹ *Kordofan Province Handbook* 73 (1912), **Exhibit-FE 3/8a** (emphasis added).

reference to “the Arab,” clearly a reference to the Bahr el Arab. Indeed, this is indicated by the map attached to the Kordofan Province Handbook **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913),¹⁵²⁰ 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. Note also that 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.¹⁵²¹

951. Court Treatt travelled into the Abyei region in the first half of the 20th century and encountered Ngok Dinka on the Kiir/Bahr el Arab.¹⁵²² Upon arriving in Abyei town, Court Treatt and his party were guests of Paramount Chief Kuol Arop. “[O]ur joy was complete when, rattling and rolling over this furrowed highway, we sighted through the mirage and shimmering heat haze the distant village of Abyei, the head settlement of the Dinka on this stretch of the river.” In Abyei, Court Treatt’s party was greeted by the Paramount Chief, saying. “There came to meet us, attended by his headman, a huge bony man; at least 6 feet 7 inches high, whose determined and intelligent face left no doubt in our minds that this was the Dinka chief, Kwol Arob.” Among other things, Kuol Arop “ordered three or four hundred Dinkas to clear the ground, collect wood and erect the tent.”¹⁵²³ This corroborates the substantial size of the Ngok Dinka settlements, as well as the importance of Abyei town.

952. Writing in the 1930s, Henderson placed the Misseriya in the Muglad-Baraka area and the Ngok Dinka at Debbat el Mushbak, near Hasoba on the Ngol/Ragaba ez Zarga.¹⁵²⁴ This is consistent with the pre-1905 Sudan Government references to Ngok settlements on the Ngol/Ragaba ez Zarga.¹⁵²⁵

953. Similarly, writing about his experiences in Sudan during the 1930s, Santandrea described “the very place where the Ngok live” as “*north of the Kir*,” “*Abyei*” or the “*Abyei area*.”¹⁵²⁶ He also observed that Abyei was “*the ‘capital’ of the Ngok*.”¹⁵²⁷ These accounts are again consistent with the historic role of Abyei town and the surrounding area as the center or capital of Ngok Dinka political, cultural and commercial life.¹⁵²⁸

954. Records of Robertson’s travels in the Bahr river basin during his tenure as Civil Secretary between 1945 and 1953 similarly confirm that the Ngok Dinka were well-established at the time to the north of the Ngol/Ragaba ez Zarga river system:

“One year in June, after the rains had begun, *I ventured down to Abyei* by car to meet the DC of Western Nuer District in Upper Nile Province, *whose people had crossed*

¹⁵²⁰ **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913); **Map 49** (*Kordofan Province*, Survey Office Khartoum, 1913 – Overlay).

¹⁵²¹ See above at para. 199.

¹⁵²² C. Treatt, *Out of the Beaten Track, A Narrative of Travel in Little Known Africa* 51-59 (1931), **Exhibit-FE 3/13**.

¹⁵²³ C. Treatt, *Out of the Beaten Track, A Narrative of Travel in Little Known Africa* 55 (1931), **Exhibit-FE 3/13**.

¹⁵²⁴ K. 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**.

¹⁵²⁵ See above at paras. 913-914, 919-922.

¹⁵²⁶ S. Santandrea, *The Luo of the Bahr El Ghazal* 192 (1968), **Exhibit-FE 4/18**.

¹⁵²⁷ S. Santandrea, *The Luo of the Bahr El Ghazal* 192 (1968), **Exhibit-FE 4/18**.

¹⁵²⁸ See below at paras. 961-967

*the Ragaba and built their big luaks - thatched huts - on the Kordofan side of the river, thereby trespassing on the Ngok Dinka lands.*¹⁵²⁹

955. Writing in 1951, Howell noted that the “*permanent villages, and cultivations*” of the Ngok “are set along the higher ground *north of the Bahr el Arab*.”¹⁵³⁰ Howell’s reference to “permanent” villages and agricultural “cultivation” is consistent with both the Sudan Government’s pre-1905 descriptions of Ngok Dinka settlements,¹⁵³¹ as well as more general ethnographic evidence regarding Ngok villages and culture.¹⁵³²

956. Similarly, writing about his experiences during the early 1950s, Cunnison reported that “*MUCH OF THE BAHR* has *permanent Dinka settlements*, although during most of the time the Humr occupy it the Dinka are with their cattle south of the Bahr el Arab.”¹⁵³³ The Bahr is described by Cunnison as “the area in which *the Humr spend the latter half of the dry season*... characterized by dark, deeply cracking clays and numerous winding watercourses all connected eventually with the Bahr el Arab.”¹⁵³⁴ Cunnison also contrasted the Ngok permanent settlements with the life-style of the Misseriya who “have no permanent homes and move about, though within circumscribed tribal territories” centered in the north at Muglad.¹⁵³⁵

957. Likewise, in a 1978 report on Abyei, a representative of the Sudanese Ministry of Agriculture 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.”¹⁵³⁶ 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.¹⁵³⁷

958. The GoS also recognized the geographic extent of the 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,¹⁵³⁸ including Abyei town, Langar [Arabic: Goleh], Dokura, Thigei, Alal, Tajalei, Mabek [Abu Azala], Nyadak Ayueng and Dakjur [Arabic: Dembaloya].

959. Finally, there is no evidence of any historical event that would explain a significant change in the Ngok Dinka and Misseriya’s historic territories and land use during the decades following 1905, until war displacement following independence in the mid-1950s. The ABC

¹⁵²⁹ J. Robertson, *Transition in Africa: From Direct Rule to Independence* 51 (1954), **Exhibit-FE 5/10** (emphasis added).

¹⁵³⁰ P. Howell, “Notes on the Ngok Dinka of West Kordofan,” 32(2) SNR 239, 243 (1951), **Exhibit-FE 4/3** (emphasis added).

¹⁵³¹ See above at paras. 916, 918.

¹⁵³² See above at paras. 206-216.

¹⁵³³ I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 19 (1966), **Exhibit-FE 4/16** (emphasis added).

¹⁵³⁴ I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 19 (1966), **Exhibit-FE 4/16** Elsewhere, he calls it the area of the “Regeba Repeating Pattern (Bahr) in the south, a land of meandering water courses, *talh*, forests, *Acacia seyal* – and meadows, where cattle spend their summer.” Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 10-11 (1960), **Exhibit-FE 4/8**.

¹⁵³⁵ 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 (11-12 January 1962), **Exhibit-FE 4/11**.

¹⁵³⁶ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province* 10 (1978), **Exhibit-FE 6/5**.

¹⁵³⁷ *Ibid.*

¹⁵³⁸ **Map 10**, (*Abyei Area Boundaries: Map 1*, Abyei Boundaries Commission, 2005).

made precisely this point in its Report, reasoning “There are strong arguments for the continuity of Ngok Dinka settlement along the main waterways of the Bahr el-Ara basin (the Bahr el-Arab/Kiir itself, the Umm Bierio, the Ragaba Lau, the Ragaba ez Zarga/Ngol and its tributaries.”¹⁵³⁹ Absent such evidence, the subsequent extent of the Ngok Dinka territory is indicative of the earlier, 1905 location of the Ngok people.

* * * * *

960. The documentary evidence from the later parts of the 20th century precisely corroborates the Sudan Government’s pre-1905 records, again describing the Ngok Dinka as inhabiting sizeable, permanent and prosperous villages, with accompanying agricultural lands and cattle herds, throughout the Bahr river basin. As discussed below, similar accounts describe what is today Abyei town as the center or capital of Ngok Dinka political, cultural and commercial life. Strikingly, there is no contrary report from this period, denying the presence of the Ngok in this region or disputing the nature of their settlements and lifestyle.

(3) The Documentary Record Concerning Abyei Town

961. As noted above, 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. Abyei town lies roughly three miles to the north of the Kiir/Bahr el Jange/Bahr el Arab River, as depicted on **Map 7** (Abyei Area) and **Map 59** (Abyei: Satellite Image)

962. Historical commentary and oral traditions indicates that the settlements of Abyei town had become the home of the Paramount Chief and the seat of “central government” for the nine Ngok Dinka Chiefdoms by the mid to late 1800s.¹⁵⁴⁰ Significantly, three of the Ngok Dinka’s most recent leaders, Paramount Chief Deng Majok, Paramount Chief Kuol Arop and Paramount Chief Arop Biong resided, held their chiefly courts and were buried in or very close to what is now called Abyei town.¹⁵⁴¹

963. The focus of Ngok Dinka political life in the region of what is today Abyei town is confirmed by a wide range of historical evidence. Thus:

a. Sabah writes that the Ngok settled on the “Ngowl” (Ngol) which “became the Ngok’s permanent home” in the time of Paramount Chief Kuol Dongbek (or Kwoldit) (i.e. in the early 18th century), following which there was some further migration some decades later to “*Majak near Abyei town*,” under Paramount Chief Biong Alor.¹⁵⁴²

b. Santandrea, a Catholic missionary who spent decades during the 1920s to 1950s compiling ethnographies of tribes in southern Sudan, described “the very place where the Ngok live” as “*north of the Kir*,” and more specifically as “*Abyei*” or “Abyei area.”¹⁵⁴³ He also observed that Abyei town is “*the ‘capital’ of the Ngok*.”¹⁵⁴⁴

¹⁵³⁹ ABC Report, Part I, at p. 43, **Appendix B**.

¹⁵⁴⁰ See above at paras. 883-893; Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 6, ¶30.

¹⁵⁴¹ 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**.

¹⁵⁴² A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4-5 (1978), **Exhibit-FE 6/7**.

¹⁵⁴³ S. Santandrea, *The Luo of the Bahr El Ghazal* 192 (1968), **Exhibit-FE 4/18**.

¹⁵⁴⁴ S. Santandrea, *The Luo of the Bahr El Ghazal* 192 (1968), **Exhibit-FE 4/18**.

- c. Court Treatt similarly described Abyei town in the 1920s as the village which was the “*head settlement of the Dinkas* on this stretch of the river.”¹⁵⁴⁵
- d. Writing in the 1950s, Cunnison described Abyei as “*the capital of the Ngok Dinka*.”¹⁵⁴⁶
- e. Howell noted at the same time that the “[p]ermanent villages, and cultivations” of the Ngok “are set along the higher ground *north of the Bahr el Arab*.”¹⁵⁴⁷

964. Abyei town has also long been the economic and cultural center of Ngok Dinka life and the Abyei region.¹⁵⁴⁸ A 1902 Sudan Intelligence Report (No. 92) described the village of the Ngoks’ Paramount Chief (“Rob’s place”) as “*a great trade centre for Bahr el Ghazal* and a lot of ivory comes there.”¹⁵⁴⁹

965. The same description of Abyei town is provided by Tibbs, the District Commissioner in the Misseriya district of Kordofan in the 1950s. Tibbs wrote:

“There is no doubt at all that *Abyei has always been the centre of the Ngok Dinka* although many of the merchants were Arab and at certain times of the year the market was used by the Misseriya.”¹⁵⁵⁰

Tibbs also wrote that “*Abyei was the centre of the Ngok Dinka* in the same way that Muglad was the headquarters of the Messeriya Humr and Lagawa of the Messeriya Zurug. *Apart from a few Arab merchants the inhabitants of Abyei were the Ngok Dinka*.”¹⁵⁵¹

966. Consistent with Abyei town’s historical status, Article 7 of the Abyei Annex provides that, if demarcation of the Abyei Area’s boundaries is delayed, then Abyei town shall be the “*seat*” of administrative functions for the Area:

“In case the ABC delays presentation of the final report beyond the time prescribed above, the Presidency shall take necessary action to put the Abyei Area special status into effect with Abyei town as its seat subject to any readjustment or confirmation by the ABC final report.”¹⁵⁵²

967. In recent decades, Abyei town has been badly damaged by armed conflict and famine.¹⁵⁵³ Due to attacks by the GoS’s military and militia forces, as recently as May 2008, somewhere between 50,000 and 100,000 persons have been displaced from Abyei town and its surrounds and forced to relocate temporarily, many of them in refugee camps in other

¹⁵⁴⁵ C. Treatt, *Out of the Beaten Track* 55 (1931), **Exhibit-FE 3/13** (emphasis added). See also a photo circa 1953 of the Abyei “ferryman” running a service across the river, **Appendix H**.

¹⁵⁴⁶ I. Cunnison, “*The Humr and their Land*,” 35(2) SNR 50, 61 (1954), **Exhibit-FE 4/5**.

¹⁵⁴⁷ Howell, “*Notes on the Ngok Dinka of West Kordofan*,” 32/2 SNR 239, 243 (1951), **Exhibit-FE 4/3** (emphasis added).

¹⁵⁴⁸ S. Santandrea, *The Luo of the Bahr El Ghazal* 192 (1968) (“the very place where the Ngok live” as “north of the Kir,” “Abyei” or “Abyei area,” specifying that Abyei is “the ‘capital’ of the Ngok.”), **Exhibit-FE 4/18**; Witness Statement of Alor Kuol Arop (Abyior elder), at p. 2, ¶8.

¹⁵⁴⁹ Sudan Intelligence Report No. 92, dated 31 March 1902, **Appendix F**, at p. 20, **Exhibit-FE 1/16** (emphasis added).

¹⁵⁵⁰ Letter from M. Tibbs to Zacharia Bol Deng dated 6 January 2004, **Exhibit-FE 11/9** (emphasis added).

¹⁵⁵¹ Letter from M. Tibbs to Zacharia Bol Deng dated 6 January 2004, **Exhibit-FE 11/9** (emphasis added).

¹⁵⁵² Abyei Annex, Art. 7, **Appendix D**.

¹⁵⁵³ See generally Human Rights Watch, *Abandoning Abyei. Destruction and Displacement May 2008*, **Exhibit-FE 16/7**.

regions.¹⁵⁵⁴ More than 50 percent of the homes in Abyei town were burned to the ground and the Ngok Dinka market was completely destroyed.¹⁵⁵⁵

(4) The Documentary Record Concerning the Misseriya

968. The location of the Ngok Dinka in 1905 may also be approached indirectly, by considering where the contemporaneous documentary record located the Misseriya. Given the Misseriya's status as the Ngoks' immediate neighbors to the north, located in sufficient proximity to share usage of the same lands in the dry season, the location of the Misseriya permits relatively secure inferences regarding the location of the Ngok.

969. The historical record is unclear as to when precisely the Misseriya migrated into Kordofan, although the better view appears to be the early 19th century.¹⁵⁵⁶ Whenever the Misseriya arrived in Kordofan, however, it is undisputed that their "headquarters" is in the area of Muglad, an administrative post established during the first decade of the Condominium.¹⁵⁵⁷

970. To the extent that the nomadic Misseriya had a territorial capital, it was Muglad, which Henderson in the 1930s called "*the key to Dar Humr*"¹⁵⁵⁸ and labelled as the Misseriya's "*centre of dispersal*" and "*headquarters*."¹⁵⁵⁹ Cunnison concluded similarly that

"[t]he *Muglad is regarded by the Humr as their home*. Their arrival there from the Bahr is the occasion for great rejoicing and anticipation. [Muglad] is almost the only place where [the Misseriya] have anything like permanent houses. It is where they cultivate and store their grain *as their forefathers did*. If people are away they want to return to it."¹⁵⁶⁰

971. As discussed above, during the dry season, the Misseriya move with their cattle south of Muglad to the Bahr river basin, described by Cunnison as the "*water course, forest and meadows inhabited by the Dinka*, where the Misseriya cattle spend their summers."¹⁵⁶¹ Similarly, Tibbs writes that the Misseriya's migration south would start in December and take

¹⁵⁵⁴ Food and Agricultural Organization of the United Nations, Special Alert No. 326, 28 May 2008, available at www.fao.org dated 28 May 2008, **Exhibit-FE 16/4**; See Press articles, **Exhibits-FE 16/5** and **16/12**. See also **Figures 37 to 39** and **Figures 40 to 42** (IDPs leaving Abyei town, May 2008) (Destruction of Abyei town, May 2008), **Appendix H**.

¹⁵⁵⁵ Human Rights Watch Report, *Abandoning Abyei, Destruction and Displacement May 2008*, at p. 2, **Exhibit-FE 16/7**. See Press articles, **Exhibits-FE 16/5** and **16/12**. See also **Figures 37 to 39** and **Figures 40 to 42** (IDPs leaving Abyei town, May 2008) (Destruction of Abyei town, May 2008), **Appendix H**.

¹⁵⁵⁶ See above at paras. 223-227; see also Daly Expert Report, at p. 10, which states that the generally accepted view is that Misseriya had stopped moving and settled by about 1860.

¹⁵⁵⁷ I. Cunnison, *Baggara Arabs—Power and the Lineage in a Sudanese Nomad Tribe* 16 (1966), **Exhibit-FE 4/16. Map 24** (Misseriya, 1905).

¹⁵⁵⁸ Henderson, "A Note on The Migration of the Messiria Tribe into South West Kordofan," 22(1) SNR 49 (1939), **Exhibit-FE 3/15**.

¹⁵⁵⁹ Henderson, "A Note on The Migration of the Messiria Tribe into South West Kordofan," 22(1) SNR 49 (1939), **Exhibit-FE 3/15**. See **Figures 26 to 34**, inclusive.

¹⁵⁶⁰ Cunnison, "*Humr and their Land*," 35(2) SNR 50, 54 (1954), **Exhibit-FE 4/5** (emphasis added).

¹⁵⁶¹ 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* 105 (11th-12th January 1962), **Exhibit-FE 4/11** (emphasis added). M. Tibbs & A. Tibbs, *A Sudan Sunset* 56-58 (1999), **Exhibit-FE 8/17** also described the Misseriya seasonal migration "into and through" Ngok Dinka territory. See also above at paras. 238-248. A diagrammatic representation of Misseriya dry and wet season grazing patterns are at **Map 25** (Abyei Area: Grazing Patterns in the Wet Season), and **Map 26** (Abyei Area: Grazing Patterns in the Dry Season.)

them “into the territory of the southern Nilotic tribe, the Ngok Dinka ... *centred on Abyie* [sic].”¹⁵⁶²

972. The Misseriya reach Ngok territory by travelling through the *goz*, a largely-uninhabited woodland savannah in the northwest corner of the Abyei region. Cunnison notes that “in December *the cattle are taken from the Muglad to the Bahr at high speed*. If they remained longer in the Muglad *the long stretch of Goz would not support water enough to allow the migration*.”¹⁵⁶³ The ABC Report similarly identified the *goz* as a “transitional zone,” lying between the Ngok and the Misseriya territories, used by both tribes.¹⁵⁶⁴

973. These various accounts, while drawn from mid-20th century sources, are uniform in describing the Misseriya as centered on Muglad, and as journeying south across a largely uninhabited *goz* during parts of the dry season to graze their cattle in the Ngok Dinka lands around the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems. These accounts, both directly and by inference, placed Ngok settlements immediately to the south of the Misseriya’s capital of Muglad in the mid-20th century.

974. There is substantial reason to conclude that the Ngok and Misseriya lived in similar places, and followed similar patterns, several decades earlier, in 1905. This is indicated directly by a British report in 1905-06 (noted above¹⁵⁶⁵), which recorded that when the Misseriya travel southwards through the *goz* towards the Kiir/Bahr el Arab during the dry season, they pass through Ngok Dinka country: “*the latter being occupied by the Dinkas under Sultan Rob*,”¹⁵⁶⁶ corroborating the evidence locating the Ngok above the Kiir/Bahr el Arab.¹⁵⁶⁷

975. Recording his observations between 1904 and 1906, Watkiss Lloyd described the seasonal grazing of the Misseriya as starting about “six weeks after the last storms” when “*the pools in Muglad dry up*, followed by the pools and khors further south, until by about the middle of December the only surface water is found in the wells and ‘ragabas,’ and the Muglad district has to be deserted.”¹⁵⁶⁸ He went on to recount that “[a]s soon as the grass is dry enough to burn, *the people move south, burning it before them to the ragabas, where there is surface water, and finally, as the ragabas dry up, to the Bahr el Arab*, where they remain until the rains break. Then, as soon as the pools fill, and before the country has again become a swamp, they return northwards to their rain quarters” in the region of Muglad.¹⁵⁶⁹

976. There are also reliable circumstantial reasons to conclude that the Ngok’s territories would have extended at least as far north in 1905 as in later decades. That is because of the severe losses that the Misseriya suffered as a result of Mahdist rule (as discussed above¹⁵⁷⁰). At the same time, the Ngok were largely unaffected by the Mahdiyya, protected by the remote inaccessibility of the Bahr region and by their general non-involvement in either the

¹⁵⁶² M. Tibbs & A. Tibbs, *A Sudan Sunset* 57-58 (1999), **Exhibit-FE 8/17** (emphasis added).

¹⁵⁶³ Cunnison, “*Humr and their Land*,” 35(2) SNR 50, 53 (1954), **Exhibit-FE 4/5** (emphasis added). See **Figure 35**.

¹⁵⁶⁴ ABC Report, Part I, at p. 44, **Appendix B**.

¹⁵⁶⁵ See above at para. 938.

¹⁵⁶⁶ Lloyd, *Some Notes on Dar Homr*, *The Geographical Journal*, 29 (January to June), 1907, at p. 649, **Exhibit-FE 3/4**.

¹⁵⁶⁷ See above at paras. 883-896, 904-907, 908-941 and 945-967 and below at 978-1004, 1005-1014, 1015-1063, 1064-1081 and 1082-1084.

¹⁵⁶⁸ Lloyd, *Some Notes on Dar Homr*, *The Geographical Journal*, 29 (January to June), 1907, at p. 651, **Exhibit-FE 3/4** (emphasis added).

¹⁵⁶⁹ Lloyd, *Some Notes on Dar Homr*, *The Geographical Journal*, 29 (January to June), 1907, at p. 651, **Exhibit-FE 3/4** (emphasis added).

¹⁵⁷⁰ See above at paras. 897-903.

Mahdist uprising or the Anglo-Egyptian reconquest.¹⁵⁷¹ In these circumstances, there is no reason that the Ngok would not have been able to live to the north as far as the *goz* by the first years of the 20th century, without resistance from the Misseriya.¹⁵⁷²

977. Significantly, there does not appear to be a single documentary source from either before or after 1905 that locates the Misseriya as inhabiting the area South of the *goz*. All of the documentary sources record the Misseriya as “headquartered” in the Muglad, area north of the *goz*, and no known document refers to the Misseriya having settlements in or (other than dry season grazing patterns) living between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga.

(5) The Cartographic Record Concerning the Ngok Dinka in 1905

978. As discussed above, the Sudan Government’s information concerning the Abyei region in the late 19th and early 20th century was limited. The maps prepared by cartographers, typically in Britain, were based on this same limited information. Nonetheless, as discussed below, the available cartography provides additional evidence 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, extending to the northernmost border of the *goz*.

(a) “Egyptian Sudan” Map, 1883

979. One of the earliest maps of the Abyei region is the 1883 “Map of Egyptian Sudan”, compiled at the Intelligence Branch, War Office in 1883 (the “1883 Map”).¹⁵⁷³ The 1883 Map was prepared during the Mahydia and cartographic information was based on limited military intelligence. This is reflected in the 1883 Map’s treatment of the Abyei region, as indicated by the historical overlay against an accurate 2008 map of the area at **Map 31** (*The Egyptian Sudan*, Intelligence Branch, War Office, 1883 – Overlay).

980. It is clear that the 1883 Map was based on limited and inaccurate information. The Lol is named the Bahr el Homr and is south of the Kiir/Bahr el Arab (as depicted on **Map 31** (*The Egyptian Sudan*, Intelligence Branch, War Office, 1883 – Overlay)). The route of the Kiir/Bahr el Arab itself is off course to the west and the Ngol/Ragaba ez Zarga is entirely absent. Despite these flaws, the 1883 Map identifies the area around the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems with the caption “*Denka*,” an obvious reference to the Ngok Dinka.

(b) “The Anglo-Egyptian Sudan” Mardon Map

981. The first map available during the Condominium is the Mardon Map (discussed above).¹⁵⁷⁴ As already described, a 1901 version of the Mardon Map was produced, followed by a version of the Mardon Map used by Mardon for his 1906 geography text on *Geography*

¹⁵⁷¹ See above at paras. 897-903; Daly Expert Report pp. 25-26.

¹⁵⁷² See Daly Expert Report, at p. 48.

¹⁵⁷³ **Map 30** (*The Egyptian Sudan*, Intelligence Branch, War Office); 1883, **Map 30a** (*The Egyptian Sudan*, Intelligence Branch, War Office, 1883 – Detail); **Map 31** (*The Egyptian Sudan*, Intelligence Branch, War Office, 1883 – Overlay.)

¹⁵⁷⁴ **Map 32** (*The Anglo-Egyptian Sudan*, Mardon, 1906) **Map 33** (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903)); **Map 34** (*The Anglo-Egyptian Sudan*, Mardon 1901 (rev. 1903) – Detail); **Map 35** (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903) – Overlay.) See above at para. 308.

of Egypt and the Anglo-Egyptian Sudan.¹⁵⁷⁵ Neither map contains information regarding the territories of the Ngok Dinka or the Misseriya in the Abyei region.

982. 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 (although it is correctly named). The Ngol/Ragaba ez Zarga is entirely absent.¹⁵⁷⁶ The Lol river is called the Bahr el Homr, located correctly below the Kiir/Bahr el Arab.

(c) The Gleichen Map from 1905 Handbook

983. The 1905 Gleichen *Handbook of Anglo-Egyptian Sudan* is discussed in detail above.¹⁵⁷⁷ The 1905 Handbook contains a detailed Map of “The Anglo-Egyptian Sudan, compiled in the Intelligence Office, Khartoum, May 1904” (the “1905 Gleichen Map”).¹⁵⁷⁸ The map contains some descriptions regarding the location and territories of the “Dar Jange” but not the Misseriya in the Abyei region.

984. 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.¹⁵⁷⁹ 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.

(d) The 1907 Watkiss Lloyd Map

985. 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 Watkiss Lloyd Map”).¹⁵⁸⁰ Watkiss Lloyd travelled through Kordofan and the Abyei region between 1904 and 1906. As discussed above, and as indicated in **Map 28** (Excursions of British Authorities), Watkiss Lloyd’s route was limited (and his travel was restricted to the dry season).¹⁵⁸¹

986. As depicted on the historical overlay, at **Map 39** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907 – Overlay), the 1907 Watkiss Lloyd Map contains information only reflecting a single route through the center of the Abyei region to Fawuel and Hasoba.¹⁵⁸² Nonetheless, it is noteworthy that, just above Tebeldiya, in the northwest of the Abyei region, Watkiss Lloyd marked two arrows “To *Dar Junge*,” one pointing due south and the second pointing southeast, directly into the heart of the Abyei region. The *goz*, located immediately above Tebeldiya, is described by Watkiss Lloyd as “Hard sandy soil Open forest.”

¹⁵⁷⁵ **Map 32** (*The Anglo-Egyptian Sudan*, Mardon, 1906.) See above at para. 308.

¹⁵⁷⁶ **Map 35** (*The Anglo-Egyptian Sudan*, Mardon, 1901 (rev. 1903) – Overlay.)

¹⁵⁷⁷ See above at paras. 287-288, 291, 305.

¹⁵⁷⁸ **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.)

¹⁵⁷⁹ **Map 37** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905) – Overlay).

¹⁵⁸⁰ **Map 38** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907); **Map 39** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907 – Overlay).

¹⁵⁸¹ See above at paras. 938.

¹⁵⁸² **Map 28** (Excursions of British Authorities); **Map 39** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907 – Overlay).

987. The 1907 Watkiss Lloyd Map also labelled the region around Turda as having “*black soil*”; as discussed in detail above, 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.¹⁵⁸³

(e) 1907 Northern Bahr el Ghazal Map

988. An April 1907 map of “Northern Bahr el Ghazal” was compiled at the Survey Office of Khartoum in April 1907 and corrected at May 1907 (“1907 Northern Bahr el Ghazal Map”).¹⁵⁸⁴ The 1907 Northern Bahr el Ghazal Map is at **Map 40** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907) and **Map 40a** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907 – Detail) and a historical overlay is at **Map 41** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907 – Overlay).

989. The 1907 Northern Bahr el Ghazal Map identifies the area between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga (the latter unnamed on the map) as “*Dar El Junge or Dinka*,” referring to the territory of the Ngok Dinka. The remaining Ngok Dinka area was unmapped, and seemingly unexplored.

990. As can be seen from the historical overlay (**Map 41** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907 – Overlay)), the 1907 Northern Bahr el Ghazal Map roughly reflects the location of the Kiir/Bahr el Arab, although it places the river at Abyei town (“*Sultan Rob’s New Village*”) significantly south of its actual location, thereby mislocating the village (although correctly placing it north of the Kiir/Bahr el Arab and between the Kiir/Bahrel Arab and Nyamora/Ragaba Umm Biaira).

(f) 1907 White Nile and Kordofan Map

991. The 1907 map of “The White Nile and Kordofan” was compiled from 1904 sheets at the Sudan Intelligence Department in 1907.¹⁵⁸⁵ It broadly places the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga in the correct locations (although the Ngol/Ragaba ez Zarga takes a fairly novel path), as illustrated in the historic overlay at **Map 43** (*The White Nile and Kordofan*, Survey Department Cairo, 1907 – Overlay).¹⁵⁸⁶ The map contains no information regarding the Ngok Dinka territories.

(g) 1910 Kordofan Lloyd Map

992. The Geographic Journal published a map of “The Sudan Province of Kordofan” in 1910 (the “1910 Kordofan Watkiss Lloyd Map”).¹⁵⁸⁷ The map, and historic overlay at **Map 45** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Overlay) identifies the areas of the Abyei region which Watkiss Lloyd explored as “*Dar Jange*,” referring to the Ngok

¹⁵⁸³ See above at para. 97.

¹⁵⁸⁴ **Map 40** (*Northern Bahr El Ghazal: Sheet 65*, Survey Office Khartoum, 1907). 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.”

¹⁵⁸⁵ **Map 42** (*The White Nile and Kordofan*, Survey Department Cairo, 1907).

¹⁵⁸⁶ **Map 43** (*The White Nile and Kordofan*, Survey Department Cairo, 1907-Overlay).

¹⁵⁸⁷ **Map 44** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910); **Map 44a** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910 – Detail). The stated purpose on the face of the map was “to illustrate the paper by Capt Watkiss Lloyd, The Cameronians (Scottish Rifles).”

Dinka.¹⁵⁸⁸ The Abyei area to the west and north west remained unexplored. Mithiang is identified in the 1910 Kordofan Lloyd Map as “*Sultan Rob’s Old Village*,” located to the north of the Kiir/Bahr el Arab.

(h) 1910 Hasoba Map

993. The Survey Office at Khartoum compiled and printed the “Anglo-Egyptian Sudan, Africa, Hasoba, Sheet 65-L,” Survey Office Khartoum,” in March 1910 (the “1910 Hasoba Map”).¹⁵⁸⁹ The map depicts the area to the east of Abyei town, in the southeast corner of the Abyei region. Although containing little detail about the Abyei region, the 1910 Hasoba Map identifies Mithiang (“*Sultan Rob’s Old Village*”) and a number of Dinka cattle camps throughout the Abyei Area, including several well north of the Kiir/Bahr el Arab toward the Ngol/Ragaba ez Zarga, one due north of Mithiang at El Nyat and another close to Hasoba. These are illustrated in the historic overlay at **Map 47** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910 – Overlay).¹⁵⁹⁰

(i) 1913 Kordofan Map

994. The Survey Office at Khartoum produced in February 1913 called “The Anglo-Egyptian Sudan, Kordofan Province” map (the “1913 Kordofan Map”).¹⁵⁹¹ As with other Sudan Government maps and records of the time, the 1913 Kordofan Map confuses the names of the rivers in the Abyei region – to wit, the Ngol/Ragaba ez Zarga is erroneously described as the “Bahr el Homr;” the Nyamora/Ragaba Umm Biairo is erroneously described as the “Bahr el Arab;” and the Kiir/Bahr el Arab is erroneously described as the “Lol.”

995. As shown in the historic overlay, the 1913 Kordofan Map correctly locates Abyei town (described as “*Sultan Rob*”) in the “V”-shaped area between what are in fact the rivers Kiir/Bahr el Arab and Nyamora/Ragaba Umm Biairo.¹⁵⁹² The territory around Abyei town, between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga and above the Ngol/Ragaba ez Zarga is labelled “*DINKA (DAR JANGE)*” in the east, while the west of the area remains blank.

(j) 1916 Achwang Map

996. The Survey Office at Khartoum compiled and printed the “Anglo-Egyptian Sudan, Achwang, Sheet 65-K,” Survey Office Khartoum,” in June 1916 (the “1916 Achwang Map”).¹⁵⁹³ This map is the sheet to the west of the 1910 Hasoba Map (65-L).

997. The 1916 Achwang Map identifies Abyei town as “*Burakol (Sultan Kuol Wad Rob)*,” a reference to Paramount Chief Kuol Arop. The area surrounding Abyei town, including north of the Kiir/Bahr el Arab and Nyamora/Ragaba Umm Biairo, is labelled “*DINKA*.” The 1916 Achwang Map indicates that much of the Abyei region remained unexplored.

¹⁵⁸⁸ **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).

¹⁵⁸⁹ **Map 46** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910); **Map 46a** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910 – Detail).

¹⁵⁹⁰ **Map 47** (*Hasoba: Sheet 65-L*, Survey Office Khartoum, 1910 – Overlay).

¹⁵⁹¹ **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913).

¹⁵⁹² **Map 49** (*Kordofan Province*, Survey Office Khartoum, 1913 – Overlay).

¹⁵⁹³ **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).

(k) 1936 Abyei Map

998. 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”).¹⁵⁹⁴ This map is the renamed and updated 1916 Achwang Map.

999. As shown by the historic overlay, on the 1936 Abyei Map, Kuol Arop’s settlement is renamed “*Abyei (Chf. Kwol Arob)*.”¹⁵⁹⁵ The 1936 Abyei Map names a number of Ngok Dinka villages along the west of the Kiir/Bahr el Arab, including Kolading and Majok. The 1936 map also marks the place of the tomb of Paramount Chief Alor Monydhang at Majok Alor, northwest of Abyei town.

(l) 1936 Ghabat El Arab Map

1000. The Survey Office at Khartoum compiled and printed the “Anglo-Egyptian Sudan, Ghabat El Arab, Sheet 65-L,” Survey Office Khartoum,” in June 1936 (the “1936 Ghabat El Arab Map”).¹⁵⁹⁶ This map is the renamed and updated 1910 Hasoba Map.

1001. 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, as illustrated on the historical overlay at **Map 55** (*Ghabat El Arab: Sheet 65-L*, Survey Office Khartoum, 1936 – Overlay).¹⁵⁹⁷ According to the legend, cattle enclosures are marked with an “m”; as discussed above, the Ngok Dinka tended to house their cattle in permanent cattle byres (*luak*) at their settlements, but the Misseriya did not.¹⁵⁹⁸ Throughout the area between the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, a multitude of cattle enclosures are marked. Similarly, the legend on the 1936 Ghabat El Arab Map explains that a “*dugdug*” is a Dinka cattle camp. Many “*dugdugs*” are marked throughout the Abyei region, including between the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga and above the Ngol/Ragaba ez Zarga.

(m) 1936 Dar El Humr Map

1002. The Sudan Survey produced the “Dar El Humr, Sheet NC-35-G (Old Number 65-G)” map in 1936, with provincial boundaries and railways updated in 1976.¹⁵⁹⁹ This is the map sheet to the immediate north of the 1936 Abyei Map (although a different numbering series).

1003. The 1936 Dar El Humr Map shows the rest house at Tebeldyia (marked R.H. according to the map legend), commonly described as the boundary between Ngok Dinka and the Misseriya. Just above latitude 10°30’N, the map contains the label “Bagarra,” as illustrated in the historical overlay at **Map 57** (*Dar El Humr: Sheet NC-35-G*, Sudan Survey, 1936 (rev. 1976) – Overlay).¹⁶⁰⁰

¹⁵⁹⁴ **Map 52** (*Abyei: Sheet 65-K*, Survey Office Khartoum, 1936); **Map 52a** (*Abyei: Sheet 65-K*, Survey Office Khartoum, 1936 – Detail).

¹⁵⁹⁵ **Map 53** (*Abyei: Sheet 65-K*, Survey Office Khartoum, 1936 – Overlay).

¹⁵⁹⁶ **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).

¹⁵⁹⁷ **Map 55** (*Ghabat El Arab: Sheet 65-L*, Survey Office Khartoum, 1936 – Overlay).

¹⁵⁹⁸ See above at paras. 206-216, 249-254. 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**.

¹⁵⁹⁹ **Map 56** (*Dar El Humr: Sheet NC-35-G*, Sudan Survey, 1936 (rev. 1976)).

¹⁶⁰⁰ **Map 57** (*Dar El Humr: Sheet NC-35-G*, Sudan Survey, 1936 (rev. 1976) – Overlay).

1004. In sum, the limited cartographic evidence available corroborates the observations of the Sudan Government officials both before and after 1905, consistently locating the Ngok Dinka in the Bahr region centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. In contrast, when they are identified, the Misseriya are placed to the north of the *goz*, consistent with accounts of their headquarters in Muglad.

(6) The Climatic and Environmental Evidence

1005. The Ngok Dinka and Misseriya oral traditions and the pre- and post-1905 documentary records are entirely consistent with, and corroborated by, evidence regarding the climatic and environmental conditions of the Abyei region and the lifestyles of the Misseriya and the Ngok. These conditions and lifestyles are discussed in detail above.¹⁶⁰¹

1006. As discussed above, the Abyei region is characterized by a dark, fertile clay, turning to a reddish clay with sand ridges further to the north in the region of Muglad.¹⁶⁰² Recent authors describe the *fertile clay soil of the area around Abyei town as the “heart” of the traditional farming area.*¹⁶⁰³ Writing in the 1950s, Cunnison described the clay soil of the Abyei area as “flat, black cracking clay,”¹⁶⁰⁴ while the 1902 Annual Report for Kordofan Province characterized the Abyei region as “very rich in cattle and crops.”¹⁶⁰⁵

1007. As also discussed above, the Ngok Dinka agro-pastoral way of life was well-adapted to the fertile soil and climatic conditions of the Bahr river basin.¹⁶⁰⁶ The Ngok staple crop (*rab/dura* or sorghum) flourished in the fertile soil of the Bahr and was ideally-suited for the region’s short growing seasons, while Ngok agricultural practices, using permanent fields near their villages, were adapted to local conditions.¹⁶⁰⁷

1008. Equally, the Ngok sorghum is well-suited to the Abyei region because it is “drought resistant”¹⁶⁰⁸ – a distinct advantage given the region’s climatic conditions (discussed above¹⁶⁰⁹).

1009. Indeed, the Harvard Development Project noted that “the local varieties [of sorghum] used by the Dinka are even better adapted to survive [drought and heat].”¹⁶¹⁰

1010. The Ngok Dinka cattle were equally well-suited physically to the conditions and diseases of the region, particularly during the rainy season. At the same time, Ngok practices

¹⁶⁰¹ See above at Section II.

¹⁶⁰² See above at para. 97.

¹⁶⁰³ D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 24 (1997), **Exhibit-FE 8/14**.

¹⁶⁰⁴ Cunnison, “*Humr and their Land*,” 35(2) SNR 50, 52 (1954), **Exhibit-FE 4/5**.

¹⁶⁰⁵ Annual Report on the Sudan, 1902, Province of Kordofan, at p. 318, **Exhibit-FE 1/19**.

¹⁶⁰⁶ See above at paras. 176-185.

¹⁶⁰⁷ See above at paras. 183-184.

¹⁶⁰⁸ See S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 92 (2004), **Exhibit-FE 12/18**.

¹⁶⁰⁹ See above 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**.

¹⁶¹⁰ See above 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**.

(e.g., constructing substantial cattle byres) were adapted to protecting their livestock from the region's climate.¹⁶¹¹

1011. In contrast, as discussed above, the soil further to the north in the area of Muglad, is a non-cracking red clay intersected by numerous sand ridges (described as the “Baggara Repeating Pattern”).¹⁶¹² That soil is ill-suited for agriculture, whether that of the Ngok or otherwise: the “**nature of the [Misseriya’s] land itself ... favours cattle rather than grain.**”¹⁶¹³ As Cunnison concluded, the character of the Misseriya’s lands around Muglad contrasts with the “traditional land of the Dinka” where it is possible to “cultivate during the rains.”¹⁶¹⁴

1012. Thus, for most of the year, the ecology of the Bahr offered little, and was instead affirmatively hostile, to the Misseriya’s nomadic, non-agricultural lifestyle.¹⁶¹⁵ Not surprisingly, the Misseriya engaged in little agriculture (thus having no reason to avail themselves of the fertile soil of the Abyei region).¹⁶¹⁶ Their only crop was millet, which was best grown in the sandier, drier soil near Muglad, rather than in the damper conditions of Abyei.¹⁶¹⁷ While cotton plantations were established during the 1950s in the area of Nyama, this was recent,¹⁶¹⁸ and Ngok participated in that development.¹⁶¹⁹

1013. Equally, 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.”¹⁶²⁰ Rather, the nomadic herders and their lifestyle were best (and only) suited to the dry, sandy regions to the North.¹⁶²¹

1014. These aspects of the Ngok and Misseriya’s culture conform with the oral tradition and documentary evidence. They provide strong circumstantial evidence confirming the Ngok occupation of the Abyei region (to which their culture was adapted) and Misseriya use of the Muglad and Mugland regions to the north (to which their culture was adapted). Equally, they provide strong evidence that neither tribe would have flourished in the other’s territories, save for limited seasonal visits.

¹⁶¹¹ See above at paras. 196-205.

¹⁶¹² See I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 16 fn 6 (1966), **Exhibit-FE 4/16**.

¹⁶¹³ See I. Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 10 (1960), **Exhibit-FE 4/8**.

¹⁶¹⁴ See I. Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 10 (1960), **Exhibit-FE 4/8**.

¹⁶¹⁵ See above at paras. 238-248.

¹⁶¹⁶ See above at paras. 234. Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 9 (1960), **Exhibit-FE 4/8** (emphasis added). 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**.

¹⁶¹⁷ See above 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**.

¹⁶¹⁸ See I. Cunnison, “*Humr and their Land*,” 35(2) SNR 50, 54 (1954), **Exhibit-FE 4/5**.

¹⁶¹⁹ See Witness Statement of Arop Deng Kuol Arop (Abyior elder), at p. 2, ¶¶3-5 who was trained as an Agriculturalist to work in and worked in cotton plantations at Nyama during the 1940s and 1950s.

¹⁶²⁰ See I. Cunnison, “*Humr and their Land*,” 35(2) SNR 50, 54 (1954), **Exhibit-FE 4/5**.

¹⁶²¹ See above at paras. 233-237.

(7) The Ngok Dinka Witness Evidence

1015. The documentary record is entirely consistent with, and corroborated by, the contemporary witness evidence of the Ngok Dinka and neighboring tribes. That evidence is set forth in 26 witness statements by members of the nine Ngok Dinka Chiefdoms, which is submitted together with this Memorial. That evidence includes statements by the Ngok Dinka Paramount Chief, together with statements from each Chief of the nine Ngok Dinka Chiefdoms and from a number of tribal elders.

1016. Specifically, the Ngok Dinka witnesses include:

- a. the current Paramount Chief of the nine Ngok Dinka Chiefdoms, Kuol Deng Kuol Arop;
- b. 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));
- c. 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));
- d. a Ngok Dinka agriculturalist (Arop Deng Kuol Arop); and
- e. a Ngok Dinka woman (Nyankiir Chol Piok Bar).

1017. 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, invests it with particular weight. Indeed, because of the limitations of the documentary record (discussed above),¹⁶²² 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 20th century (including their occupation and use of less accessible parts of the Abyei region) than is otherwise available.

1018. It is noteworthy that both the SPLM/A and GoS regarded the oral traditions of the people of the region as highly probative during proceedings before the ABC – hence, the elaborate arrangements allowing the Commission to hear 125 different witnesses (discussed above).¹⁶²³ Having heard these 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.”¹⁶²⁴ The quality of the Ngok Dinka witness

¹⁶²² See above at paras. 908-912.

¹⁶²³ See above at paras. 10-17.

¹⁶²⁴ ABC Report, Part I, at p. 42, **Appendix B**.

evidence contrasted with what the ABC described as the “*sparse details given by Misseriya witnesses*.”¹⁶²⁵

1019. The testimony of the Ngok Dinka witnesses accompanying this Memorial is similarly detailed and extensive. That testimony corroborates and elaborates upon the witness evidence that was presented to the ABC, as well as the documentary and physical record.

(a) Locations of Ngok Villages

1020. The Ngok Dinka witness evidence and oral traditions address the location of Ngok villages in comprehensive detail. As described above, Ngok villages were permanent, with year-round habitation and long-term populations residing in the same homes.¹⁶²⁶ This was critical for the harvesting of the crops (sorghum (*rab/dura*), in particular) on which the Ngok relied as a staple food source,¹⁶²⁷ and was an essential element of the Ngok Dinka culture.¹⁶²⁸ It is therefore unsurprising that the Ngok oral traditions include detailed descriptions of the locations and character of the Ngok settlements in the Abyei Area.

(i) Abyei Town

1021. Ngok oral traditions recount that what is now known as Abyei town has been the political and cultural center of the Ngok since the early 19th century, when Paramount Chief Biong Alor settled in the region where Abyei town now stands.¹⁶²⁹ Since that time, and as discussed above, the area of the now Abyei town has retained its importance, serving as the seat and burial place of five successive Paramount Chiefs of the Ngok Dinka, Arop Biong, Kuol Arop, Deng Majok, Abdallah Deng and the current Paramount Chief, Kuol Deng.¹⁶³⁰

(ii) Ngok Dinka Settlements

1022. In addition to Abyei town, Ngok oral evidence elaborates on a large number of other Ngok villages and settlements. These are best described by reference to the nine Ngok Dinka Chiefdoms, whose 1905 territory is depicted on **Map 13** (Ngok Dinka Chiefdoms, 1905).

1023. The primary settlements of each of the nine Ngok Dinka chiefdoms as at 1905 are shown on **Map 13** (Ngok Dinka Chiefdoms, 1905), and the primary settlements of each of the nine Ngok Dinka chiefdoms are depicted separately on **Maps 14 to 22**.¹⁶³¹ A brief summary of the oral testimony concerning each Ngok chiefdom is provided below.

¹⁶²⁵ ABC Report, Part I, at p. 42, **Appendix B**.

¹⁶²⁶ *See above* at paras. 206-216.

¹⁶²⁷ *See above* at paras. 176-189. Witness Statement of Arop Deng Kuol Arop (Agriculturalist and Abyior elder), at pp. 2-3, ¶¶3-7 and 12-15); Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at pp. 2-3, ¶¶6-15, at ¶7 (“There are two types of cultivation in Ngok settlements. The first is cultivation of small crops in a garden next to the *tukul*. The crops include a fast growing sorghum called *ngai*, maize, ground nuts (if the soil is sandy enough for drainage), and other small vegetable crops such as okra if conditions are suitable. The second type of cultivation is of relatively large food crops a distance away from the settlement... In the larger crops we plant different types of sorghum called *ruath*, *amarak* or *makuac*.”).

¹⁶²⁸ *See above* at paras. 176-189.

¹⁶²⁹ *See above* at paras. 883-893.

¹⁶³⁰ *See above* at paras. 894-896.

¹⁶³¹ As **Map 13** (Ngok Dinka Chiefdoms, 1905), and **Maps 14 to 22** (and all of the maps produced by the SPLM/A (aside from the maps of historical record)) only seek to locate a representative sample of the permanent settlements of the nine Ngok Dinka chiefdoms. The maps are not, and are not intended to be, an exhaustive mapping of all Ngok Dinka settlements.

1024. **Achueng:** The seat of the Chief of the Achueng in the late 19th and early 20th centuries was at Patal,¹⁶³² a settlement south of Abyei town but north of the Kiir/Bahr el Arab River. The Achueng were settled south-west of Abyei town (both above and below the Kiir/Bahr el Arab River) in settlements such as Mading Achueng¹⁶³³ and Agany Achueng.¹⁶³⁴ The Achueng were not based in Abyei town,¹⁶³⁵ but had settlements north of Abyei town in Noong¹⁶³⁶ [Arabic: Na'am], Riet,¹⁶³⁷ Alal,¹⁶³⁸ Dadaker¹⁶³⁹ and Bakar.¹⁶⁴⁰ The settlements and grazing areas of the Achueng are shown on **Map 16** (Acheung Chieftdom, 1905).

1025. **Abyior:** The traditional seat of the Abyior chief is Abyei town.¹⁶⁴¹ The Abyior are settled in Abyei town¹⁶⁴² and the nearby settlement of Noong [Arabic: Na'am],¹⁶⁴³ and then from Abyei town to the west and north-west of the Abyei Area above the River Kiir in settlements including Maker (Abyior),¹⁶⁴⁴ Rum Lou,¹⁶⁴⁵ Magak,¹⁶⁴⁶ Bar Ajak,¹⁶⁴⁷ Maper Amaal,¹⁶⁴⁸ Rumthil [Arabic: Antilla],¹⁶⁴⁹ Thigei/Chigei [Arabic Abudaba],¹⁶⁵⁰ Akot Tok,¹⁶⁵¹

¹⁶³² Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶4.

¹⁶³³ Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶8; Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶8.

¹⁶³⁴ **Map 16** (Acheung Chieftdom, 1905). Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶8; Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶8.

¹⁶³⁵ **Map 16** (Acheung Chieftdom, 1905). Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶9.

¹⁶³⁶ **Map 16** (Acheung Chieftdom, 1905). Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶4 ("I was born in Noong... sometime around the mid-1930s."), at ¶9 ("North of Abyei town, Noong was a village of the Achueng."); Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶¶3-4 ("My father was born in Noong during the time of Arop Biong and I think it was sometime in the late 1800s. He was very old when he died in 1976..."), at p. 5, ¶7 ("These are the places from my lifetime (before displacement), my father, my grandfather and his father."), and ¶9 ("North of Abyei town Achueng would be settled at Noong (which was a settlement of Achueng, but we let Abyior families settle there because it is on high ground)...").

¹⁶³⁷ **Map 16** (Acheung Chieftdom, 1905). Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶3 ("I was born in the Achueng settlement of Riet during the 1940s."), and ¶9; Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶9.

¹⁶³⁸ **Map 16** (Acheung Chieftdom, 1905). Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶6 ("My age set was initiated in an area along the Alal River."), at ¶8 ("The following are some of the Achueng permanent settlements that I know of and have been told by my father and grandfather."), and ¶9 ("Going further north and to the northwest of Noong... and then Alal...").

¹⁶³⁹ Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶9; Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶3 ("I was marked at Dadaker a short time before the conflict in 1965.") and ¶9.

¹⁶⁴⁰ Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶7 ("This was during my early life, and the times of my father, grandfather, great-grandfather and his father before him. The permanent settlements of the Achueng ran... north to Alal and to Bakar.") and at ¶9 ("Bakar was the biggest Achueng settlement in the north..."); Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶9.

¹⁶⁴¹ **Map 14** (Abyior Chieftdom, 1905). Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 2, ¶¶4-5. Abyior town is also the seat of the Paramount Chief of the Ngok Dinka.

¹⁶⁴² **Map 14** (Abyior Chieftdom, 1905). Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶12 ("The Abyior lands encompass Abyei town as well as Noong"); Witness Statement of Alor Kuol Arop (Abyior elder), at p. 2, ¶10; Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶14 ("The lands of the Abyior Chieftdom include the now quite large towns of Abyei and Noong").

¹⁶⁴³ **Map 14** (Abyior Chieftdom, 1905). Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶12 ("The Abyior lands encompass Abyei town as well as Noong"); Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶14 ("The lands of the Abyior Chieftdom include the now quite large towns of Abyei and Noong").

¹⁶⁴⁴ **Map 14** (Abyior Chieftdom, 1905). Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13 ("Names of other settlements that existed in the Abyior Chieftdom at the turn of the 20th century included... Maker"); Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16.

¹⁶⁴⁵ Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16.

¹⁶⁴⁶ Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13 ("Names of other settlements that existed in the Abyior Chieftdom at the turn of the 20th century included... Magak"); Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16.

¹⁶⁴⁷ Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13 ("Names of other settlements that existed in the Abyior Chieftdom at the turn of the 20th century included... Bar Ajak"); Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16.

¹⁶⁴⁸ **Map 14** (Abyior Chieftdom, 1905). Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13 ("Names of other settlements that existed in the Abyior Chieftdom at the turn of the 20th century included... Maper Amaal").

Mijok Alor (very close to Meiram),¹⁶⁵² Kol Aruth [Arabic: Grinti],¹⁶⁵³ Kol Arouth (near to Meiram),¹⁶⁵⁴ Wun Deng Awak [Arabic: Umm Sakina]¹⁶⁵⁵ and Dhony Dhoul (near

¹⁶⁴⁹ **Map 14** (Abyior Chiefdom, 1905). 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 and Rumthil [Arabic: Antilla] in the north.”); Witness Statement of Deng Chier Agoth (Abyior elder), at p. 4, ¶¶9, 21.

¹⁶⁵⁰ **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 20th century included... Chigei/Thigei”); Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16.

¹⁶⁵¹ 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 20th century included... Akot Tok”); Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16: Mourik of the Anyiel chiefdom is buried at Akot Tok and this is a site of ritual significance for the Ngok: Witness Statement of Kuol Deng Kuol Arop (Paramount Chief of Ngok Dinka), at p. 6, ¶28.

¹⁶⁵² 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 20th century included... Mijok Alor”); Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16. The Paramount Chief Alor Monydhang is buried at Majok Alor, where there remains a visible shrine: Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 6, ¶28 (“One of these grave sites – that of Alor at Majok Alor – still has a visible shrine. There is an altar there where Ngok Dinka used to slaughter animals by way of sacrifice.”).

¹⁶⁵³ **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Deng Chier Agoth, at pp. 3-4, ¶¶11, 21. (Note that Witness Statement misspells Kol Aruth as Kol Roth.)

¹⁶⁵⁴ **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Deng Chier Agoth (Abyior elder), at pp. 2-3, ¶3 (“My grandfather was born in Kol Arouth [Arabic: Meiram], in about 1900.”), at ¶16 (“To the west, during the time of my father and grandfather the Abyior lands extend towards what is now the Darfur border, where Abyior would sometimes fight with the Reizegat. The Arab railway town was built in the 1950s near many existing Abyior settlements. As traditional Ngok homes are built in clusters of three to five homes, about 40 metres apart, there were numerous settlements. In this area, there were the Abyior settlements of Mijok Alor (very close to El Meriam), Akot Tok, Mabior (ahead of Akot Tok), Matnhom and Maper Amal, Amiin and Chigei/Thigei, Yar [Arabic: Dawas...”); Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶11 (“Returning home [from grazing] we would go to Meiram in the west. Meiram was the border with the Aweil Dinka and Abyior had settlements there... My father, grandfather and those before him would follow this route too.”); Witness Statement of Alor Kuol Arop (Abyior elder), at p. 2, ¶10 (“We would go further past Meiram to a place called Umm Bilael. Umm Bilael was not Ngok Dinka lands... There were permanent Anyiel settlements in Meiram.”); Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 5, ¶¶24-25 (“I saw Misseriya as traders in Deinga [Arabic: Muglad] around 1975. I was working as a collector in the market up there before I became chief. Even when I was working up in Deinga there were not many Misseriya in Meiram, to the west. The only Misseriya were those working on the railway. There were Dinka working on the railway too. But now they try and claim Meiram as their own.”).

¹⁶⁵⁵ **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.”).

Tebeldiya).¹⁶⁵⁶ Since at least the time of the Anglo-Egyptian Condominium, Tebeldiya has been considered the border between the Ngok and Misseriya.¹⁶⁵⁷ The oral evidence describes the Ngok and Misseriya meeting in Tebeldiya before the arrival of the British.¹⁶⁵⁸ The settlements and grazing areas of the Abyior are shown on **Map 14** (Abyior Chiefdom, 1905).

1026. **Bongo**: The traditional seat of the Bongo chief was at Mabek¹⁶⁵⁹ [Arabic: Abu Azala]. Near Mabek is the Bongo settlement of Kech,¹⁶⁶⁰ which since discovery of oil in the area of the settlement has been given the Arabic name of Diffra (which means to “push away. The

¹⁶⁵⁶ **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 Tebeldiya.”); 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 Tebeldiya), 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 Tebeldiya 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 Tebeldiya marked the border between the Ngok and the Misseriya. A post was actually put up between two tebeldiya 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 Tebeldiya, 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 Tibeldiya. There was no settlement there [in Tebeldiya] 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 Tebeldiya. The Misseriya would take over responsibility for the road from Tebeldiya (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.

¹⁶⁵⁷ **Map 14** (Abyior Chiefdom, 1905); **Map 56** (*Dar El Humr: Sheet NC-35-G*, Sudan Survey, 1936 (rev. 1976)) depicts the rest house with the marking “R.H.”. Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶10; Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶¶14-15 (“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.”); Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 5, ¶25 (“later during the Condominium there was a British policy to prevent tribes mixing with each other in a way that would create conflicts. The British would put down tribal markers. One of these markers is the post in concrete along the road from Abyei town to Deringa [Arabic: Muglad] at a place called Tebeldiya, which marks the border between the Ngok and Misseriya. The British introduced some rules in some areas to ensure that no Misseriya nomads were permitted to enter Ngok lands before the second harvest, in January.”); Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶16. (“Tebeldiya is a place marked by a tebeldiya tree. It is where the British marked the border between the Ngok and the Misseriya lands.”). See also a photo of Mrs Tibbs, wife of Michael Tibbs, District Commissioner for Dar Misseriya District, at the Tebeldiya rest house circa 1953, **Figure 25, Appendix H.**

¹⁶⁵⁸ See Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶15 (“we met with Misseriya there before the rest house was built.”).

¹⁶⁵⁹ **Map 19** (Bongo Chiefdom, 1905); **Map 11** (Sudan: Oil Sector). Witness Statement of Mijak Biong Jieny (Bongo elder and sub-chief), at p. 2, ¶¶3 and 7; Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at pp. 2-3, ¶¶3-10; Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 3, ¶15.

¹⁶⁶⁰ **Map 19** (Bongo Chiefdom, 1905). Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 2, ¶3; Witness Statement of Mijak Biong Jieny (Bongo elder and sub-chief), at p. 2, ¶7; Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 11, ¶54.

Government is trying to push the Ngok Dinka away to get the oil.”)¹⁶⁶¹ To the north of Mabek, the Bongo settled in Ahany¹⁶⁶² (toward Nyama¹⁶⁶³). South of Mabek, Bongo were found at Langar¹⁶⁶⁴ [Arabic: Goleh] and Todac¹⁶⁶⁵ and settled in the eastern part of Abyei town.¹⁶⁶⁶ South from Abyei town, the Bongo had settlements, such as Gok Bongo,¹⁶⁶⁷ Duop¹⁶⁶⁸ and Kol-Makuuei,¹⁶⁶⁹ near the Kiir/Bahr el Arab River. The Bongo also had settlements in the Upper Ngol area,¹⁶⁷⁰ including Thim Thoi,¹⁶⁷¹ toward Dakjur, and up to Bakura,¹⁶⁷² in the direction of Ajaj. The settlements and grazing areas of the Bongo are shown on **Map 19** (Bongo Chiefdom, 1905).

1027. **Anyiel:** The Anyiel chiefdom is in the centre of the Abyei Area,¹⁶⁷³ with the traditional seat of the Anyiel chief at Malual Ador,¹⁶⁷⁴ which is north of Abyei town and near Langar [Arabic: Goleh].¹⁶⁷⁵ Langar and Bakar¹⁶⁷⁶ are the more significant of the Anyiel’s northern settlements. To the south of Malual Ador are the Anyiel settlements of Alal (on the Alal River),¹⁶⁷⁷ Todac¹⁶⁷⁸ and Dokura,¹⁶⁷⁹ and the Anyiel also have settlements south of Abyei town.¹⁶⁸⁰ The settlements and grazing areas of the Anyiel are shown on **Map 18** (Anyiel Chiefdom, 1905).

1028. **Manyuar:** The Manyuar chiefdom is in the center of the Ngoks’ historic territories, with settlements both north and south of Abyei town. In the 19th and 20th centuries, Manyuar settlements were traditionally located in the central northern regions of the Abyei Area, in

¹⁶⁶¹ **Map 11** (Sudan: Oil Sector); **Map 19** (Bongo Chiefdom, 1905). Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at pp. 2, 5, ¶¶3, 26 (“After the displacement in 1965 many of our places were given Arab names. The Government even gave arab names to places that did not exist, places that were close to the oil. The arabs would only go there because of the oil.”).

¹⁶⁶² Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 5, ¶10.

¹⁶⁶³ **Map 19** (Bongo Chiefdom, 1905). 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.”).

¹⁶⁶⁴ **Map 19** (Bongo Chiefdom, 1905). Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶10.

¹⁶⁶⁵ **Map 19** (Bongo Chiefdom, 1905). Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶10; Witness Statement of Mijak Biong Jieny (Bongo elder and sub-chief), at p. 2, ¶8.

¹⁶⁶⁶ **Map 19** (Bongo Chiefdom, 1905). Witness Statement of Mijak Biong Jieny (Bongo elder and sub-chief), at p. 2, ¶8.

¹⁶⁶⁷ Witness Statement of Mijak Biong Jieny (Bongo elder and sub-chief), at p. 2, ¶¶3, 8.

¹⁶⁶⁸ **Map 19** (Bongo Chiefdom, 1905). Witness Statement of Mijak Biong Jieny (Bongo elder and sub-chief), at p. 2, ¶8.

¹⁶⁶⁹ **Map 19** (Bongo Chiefdom, 1905). Witness Statement of Mijak Biong Jieny (Bongo elder and sub-chief), at p. 2, ¶8.

¹⁶⁷⁰ Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 2, ¶9; Witness Statement of Mijak Biong Jieny (Bongo elder and sub-chief), at p. 2, ¶7.

¹⁶⁷¹ Witness Statement of Mijak Biong Jieny (Bongo elder and sub-chief), at p. 2, ¶¶7-8.

¹⁶⁷² Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at pp. 2-3, ¶¶5, 10.

¹⁶⁷³ **Map 18** (Anyiel Chiefdom, 1905). Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶6.

Some Anyiel are known to have settled at Akot Tok, to the west of the Abyei Area and within the Abyior chiefdom: Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyiel), at p. 3, ¶12. Akot Tok is near to Meiram, and some oral tradition places Anyiel in Meiram: Witness Statement of Alor Kuol Arop (Abyior elder) at p. 2, ¶10 (“There were permanent Anyiel settlements in Meiram.”).

¹⁶⁷⁴ Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyiel), at pp. 2-3, ¶¶4, 12.

¹⁶⁷⁵ **Map 18** (Anyiel Chiefdom, 1905). Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyiel), at pp. 2-3, ¶¶4, 12; Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶¶3-4 (“My father was born in Langar during the time of Arop Biong and the Mahdiyya.”), at p. 2, ¶5 (“The settlement of Langar was the centre of our Chiefdom”), and at ¶6.

¹⁶⁷⁶ Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶6.

¹⁶⁷⁷ **Map 18** (Anyiel Chiefdom, 1905). Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶¶5-6.

¹⁶⁷⁸ **Map 18** (Anyiel Chiefdom, 1905). Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyiel), at p. 3, ¶¶12-13; Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶¶4, 6-7.

¹⁶⁷⁹ **Map 18** (Anyiel Chiefdom, 1905). Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyiel), at p. 3, ¶¶12-13; of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶¶6-7.

¹⁶⁸⁰ . Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶6.

Nyama¹⁶⁸¹ and Thuba.¹⁶⁸² South of Thuba, the Manyuar were also located at Ahany,¹⁶⁸³ Tajalei,¹⁶⁸⁴ Wun Goc,¹⁶⁸⁵ while south of Abyei town the Manyuar had settlements at Pandit¹⁶⁸⁶ and Mabek,¹⁶⁸⁷ down to Akur¹⁶⁸⁸ which bordered with the Twic Dinka. The settlements and grazing areas of the Manyuar are shown on **Map 21** (Manyuar Chiefdom, 1905).

1029. **Mareng:** The traditional seat of the Mareng Chief is Nyob Arik,¹⁶⁸⁹ which is east of Abyei town just below the River Lou, and before that (during the time of Arop Biong) Ajith Lual, which is further north.¹⁶⁹⁰ The Mareng also had settlements at Golmai,¹⁶⁹¹ Amuk,¹⁶⁹² Lou¹⁶⁹³ (on the River Lou) and Nyob Arik, all of which are above the Kiir/Bahr el Arab River, and at Mijak Manyuar¹⁶⁹⁴ (and nearby Wejwej¹⁶⁹⁵) and Jamena,¹⁶⁹⁶ which lie on the Kiir/Bahr

¹⁶⁸¹ **Map 21** (Manyuar Chiefdom, 1905). 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.”); *see* Witness Statement of Arop Deng Kuol Arop (Abyior elder), at p. 2, ¶¶3-5 (“Although there were no other Ngok boys training with me, there were still many Ngok families living in the area [of Nyama in the late 1940s and 1950s]. Both Ngok and Misseriya would use the area to grow cotton, but when the rainy season came those Misseriya with cattle would return to the north.”); Cunnison, “*Humr and their Land*,” 35(2) SNR 50, 54 (1954) (cotton cultivation had only recently been undertaken), **Exhibit-FE 4/5**.

¹⁶⁸² **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2, ¶¶4-5 (“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.”), at ¶7 (“Manyuar were traditionally in Thuba, but there were Mareng there too.”) and at ¶8 (“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.”).

¹⁶⁸³ Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2, ¶7.

¹⁶⁸⁴ **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2, ¶7.

¹⁶⁸⁵ Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2, ¶¶4, 6, 7 and 9.

¹⁶⁸⁶ Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2, ¶7.

¹⁶⁸⁷ . Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2, ¶7.

¹⁶⁸⁸ **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 2, ¶7.

¹⁶⁸⁹ Witness Statement of Mijak Kuol Lual Deng (Chief of Mareng), at p. 2, ¶¶3 and 5 (“Nyob Arik... This is a Dinka name that has to do with the colour of a particular cow.”); Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶6.

¹⁶⁹⁰ Witness Statement of Chor Deng Akouon (Mareng elder), at p. 2, ¶8.

¹⁶⁹¹ Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶6.

¹⁶⁹² **Map 22** (Mareng Chiefdom, 1905). 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, ¶8.

¹⁶⁹³ **Map 22** (Mareng Chiefdom, 1905). Witness Statement of Kuol Lual Deng Akonon (Mareng elder), at p. 2, ¶8; 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, ¶8.

¹⁶⁹⁴ Witness Statement of Kuol Lual Deng Akonon (Mareng elder), at p. 2, ¶8; Witness Statement of Chor Deng Akouon (Mareng elder), at p. 2, ¶8.

¹⁶⁹⁵ Witness Statement of Kuol Lual Deng Akonon (Mareng elder), at p. 2, ¶8; Witness Statement of Chor Deng Akouon (Mareng elder), at p. 2, ¶¶3, 4, 8.

¹⁶⁹⁶ Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶6.

el Arab River. The Mareng also had settlements further north at Nyama¹⁶⁹⁷ and around Nyama at Ruba,¹⁶⁹⁸ Thur¹⁶⁹⁹ and Kaba¹⁷⁰⁰ (north of the Ngol/Ragaba ez Zarga River). The settlements and grazing areas of the Mareng are shown on **Map 22** (Mareng Chiefdom, 1905).

1030. **Alei:** The seat of the Alei Chief during the reign of Arop Biong and in the early 19th century was at Thuba,¹⁷⁰¹ located south of Nyama. Although this was where the Chief Chol Lual had his seat, most Alei lived further north at Nyama and Thur [Arabic: Turda].¹⁷⁰² During the Mahdiyya, the Alei were temporarily displaced from their homes around Nyama and Thur by Misseriya armed by the Mahdi. With the reconquest, the Alei were able to

¹⁶⁹⁷ **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Wieu Dau Nguth (Mareng elderelder), at p. 2, ¶6; Witness Statement of Malual Alei Deng (Mareng elderelder), at p. 2, ¶¶3, 7 and 8; Witness Statement of Alor Kuol Arop (Abyior elderelder), 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 elderelder), 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 elderelder), 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.”).

¹⁶⁹⁸ **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Malual Alei Deng (Mareng elderelder), at p. 2,

^{¶8}
¹⁶⁹⁹ **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Malual Alei Deng (Mareng elderelder), at p. 2,

^{¶8}
¹⁷⁰⁰ Witness Statement of Wieu Dau Nguth (Mareng elderelder), at p. 2, ¶6; Witness Statement of Malual Alei Deng (Mareng elderelder), at p. 2, ¶8; Witness Statement of Chor Deng Akouon (Mareng elderelder), at p. 2, ¶¶5 and 9.

¹⁷⁰¹ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶10 (“During the Chieftaincy of Chol Lual, in the late 1800s, the Chief’s family settled further south at Thuba, although Alei settlements remained in the north [at Thur [Arabic: Turda].”); Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at p. 2, ¶¶3-4 (“I was born in 1933... My father was born in the Alei settlement of Thur [Arabic: Turda].”), and at ¶8 (“... 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.”).

¹⁷⁰² **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶10 (“During the Chieftaincy of Chol Lual, in the late 1800s, the Chief’s family settled further south at Thuba, although Alei settlements remained in the north [at Thur [Arabic: Turda].”); Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at p. 2, ¶¶8-10; Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 11 ¶54.

return to their homes and resettle in Nyama and Thur.¹⁷⁰³ These oral accounts are consistent with the documentary record.¹⁷⁰⁴ The settlements and grazing areas of the Alei are shown on **Map 17** (Alei Chiefdom, 1905).

1031. During the 20th century, some of the Alei spread further south to the Ngol/Ragaba ez Zarga area,¹⁷⁰⁵ at Pawol¹⁷⁰⁶ and the nearby settlements of Dakjur¹⁷⁰⁷ [Arabic: Dembaloya] and Pandeng¹⁷⁰⁸ [Arabic: Bedheny]. West from Pawol, Alei were settled at Malual Alei (which is the name of an Alei Chief buried among ten Dhony Dhoul (Tebeldiya) trees),¹⁷⁰⁹ Thim Thoi,¹⁷¹⁰ Ahany¹⁷¹¹ and Mabek.¹⁷¹² Despite these movements, Alei continued to reside in Nyama and Thur.¹⁷¹³

¹⁷⁰³ Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at pp. 2-3, ¶¶9-10 (“In Thur [Arabic: Turda] and Nyama there was conflict between the Alei and the Misseriya. The Alei 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... and settled in the Ngol... 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.”). This is consistent with the oral tradition of the Achaak: Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶13. It is also consistent with the oral tradition of the Mareng: Witness Statement of Adol Kuot Malual (Manyuar elderelder), at p. 2, ¶¶4-5 (“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.”), at ¶7 (“Manyuar were traditionally in Thuba, but there were Mareng there too.”), at ¶8 (“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.”).

¹⁷⁰⁴ The Governor of Kordofan submitted a 1903 “account of his recent inspection of Kordofan Mudiria.” The report included a description of the Ngok Dinka as “*large herds of cattle*” including “*herds of Dinka cattle grazing right in the Arab country, where they were afraid to go last year.*” Sudan Intelligence Report No. 104, **Appendix E**, at p. 18, **Exhibit-FE 1/21**. That account not only provides inferential evidence of the Ngok grazing their cattle into the *goz* but confirms that as at 1903 the Ngok had uninhibited movement in their lands, and (at least to a certain degree) the Messeriya’s lands. See also Daly Expert Report, at pp. 49-50.

¹⁷⁰⁵ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶11; Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at p. 3, ¶11.

¹⁷⁰⁶ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶¶4-5 and 11; Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at p. 3, ¶11.

¹⁷⁰⁷ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶4; Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at pp. 2-3, ¶¶3 and 11.

¹⁷⁰⁸ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at pp. 2-3, ¶¶4-6, 11 and 15; Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at pp. 2-3, ¶¶3 and 11.

¹⁷⁰⁹ Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶11; Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at p. 3, ¶11.

¹⁷¹⁰ Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶11; Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at p. 3, ¶11.

¹⁷¹¹ Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶11; Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at p. 3, ¶11.

¹⁷¹² **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶11; Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at p. 3, ¶¶4 and 11.

¹⁷¹³ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶12 (“But even though the Alei Chief had moved further south, there were still some Ngok settlements around Nyama (an area where several sections would intermingle, including Alei, Achaak and Mareng) and our traditional grazing lands extended through the Gok...”). See further at Witness Statement of Peter Nyuat Agok Bol (Alei elderelder and sub-chief), at p. 3, ¶12 (“In the early 1950s when I was a young man some Alei families went north to Deinga, but most remained in Nyama, Pawol (Fawal) and the Ngol area. There were many Misseriya in Deinga at this time, but only Ngok were in Nyama and Pawol (Fawal), Dakjur and the Ngol area, where we were living peacefully.”).

1032. **Achaak**: The traditional seat and center of the Achaak chief is Miding¹⁷¹⁴ [Arabic: Heglig]. To the west, Achaak were at Nyama,¹⁷¹⁵ Ruba¹⁷¹⁶ and Kol Lang,¹⁷¹⁷ to the north-east Achaak were permanently settled at Michoor,¹⁷¹⁸ Nyadak Ayueng,¹⁷¹⁹ Niag,¹⁷²⁰ and Mardhok¹⁷²¹ and at Miding¹⁷²² [Arabic: Heglig] and Anyak¹⁷²³ in the east. In the Ngol/Ragaba

¹⁷¹⁴ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Chol Por Chol (Chief of Achaak), at p. 2, ¶4 (“My father was born in Miding [Arabic: Heglig] in the mid-1940s. My grandfather, the Chief of the Achaak before my father, was born in Miding also. It is the traditional seat of our family. Since I have been born we have been living in other tribes’ lands and in refugee camps or abroad.”); Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at pp. 2-3, ¶¶3-4, 9, 12, 14 (“I was probably born sometime around 1946... My grandfather and great-grandfather were born in Miding [Arabic: Heglig]... Our main settlements included Miding [Arabic: Heglig]... All of these places were permanent settlements of the Achaak Chiefdom at the time of my grandfather, the time of Paramount Chief Arop Biong and when the British arrived... Achaak would spend the rainy season on high ground cattle campsites near our settlements... when Miding was full of water we would go to a place called the *tooc* Miding, which was higher ground north of Miding [Arabic: Heglig]. At the time of my great-grandfather, we also took the cattle to a high place named Niag, and there were also Achaak settlements in this area.”); Witness Statement of Mijak Kuot Kur (Achaak elderelder), at pp. 2-3, ¶¶7, 11 (“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.”) See Witness Statement of Mijok Bol Atem (Diil elderelder), at p. 2, ¶10 (“I considered both Miding [Arabic: Heglig] and Keilak to be Achaak lands.”); Witness Statement of Kuol Deng Kuol Arop (Paramount Chief) at p. 11, ¶54.

¹⁷¹⁵ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Mijak Kuot Kur (Achaak elderelder) at p. 3, ¶¶10-11 (“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.”).

¹⁷¹⁶ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Mijak Kuot Kur (Achaak elderelder), at p. 3, ¶¶10-11 (“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.”); Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶14 (“Achaak would spend the rainy season on high ground cattle campsites near our settlements, which included... Ruba (near Nyama)...”).

¹⁷¹⁷ Witness Statement of Mijak Kuot Kur (Achaak elderelder), at p. 3, ¶¶10-11 (“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.”); Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶¶11-12 (“There were permanent Achaak settlements further north at Pariang, Puoth, Dhiny Dhuol Bet (west of Miding), Michoor (northwest of Miding), Mardhok (north of Miding) and Kol Lang (further north still)... All of these places were permanent settlements of the Achaak chiefdom at the time of my grandfather, the time of Paramount Chief Arop Biong and when the British arrived.”) *Kol* is the Dinka word for pool of water, and *Lang* means tree: see Witness Statement, Ajak Malual Belieu (Achueng Chief), at p. 2, ¶9; Witness Statement of Deng Chier Agoth (Abyior elderelder), at p. 3 ¶11.

¹⁷¹⁸ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶¶11-12 (“There were permanent Achaak settlements further north at Pariang, Puoth, Dhiny Dhuol Bet (west of Miding), Michoor (northwest of Miding), Mardhok (north of Miding) and Kol Lang (further north still)... All of these places were permanent settlements of the Achaak chiefdom at the time of my grandfather, the time of Paramount Chief Arop Biong and when the British arrived.”).

¹⁷¹⁹ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Mijak Kuot Kur (Achaak elderelder), at p. 3, ¶11.

¹⁷²⁰ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶14 (“At the time of my great-grandfather, we also took the cattle to a high place named Niag, and there were also Achaak settlements in this area.”).

¹⁷²¹ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶¶11-12 (“There were permanent Achaak settlements further north at Pariang, Puoth, Dhiny Dhuol Bet (west of Miding), Michoor (northwest of Miding), Mardhok (north of Miding) and Kol Lang (further north still)... All of these places were permanent settlements of the Achaak chiefdom at the time of my grandfather, the time of Paramount Chief Arop Biong and when the British arrived.”); Witness Statement of Mijak Kuot Kur (Achaak elderelder) at pp. 2-3, ¶¶10-11 (“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.”), at ¶4 (“My great-great-grandfather is buried in the Ngol area, either at Mardhok or Anyak...”).

ez Zarga River area, the Achaak also had settlements west of Miding at Ajaj¹⁷²⁴ and Pariang¹⁷²⁵ and their southern boundaries around Dakjur¹⁷²⁶ and Pawol.¹⁷²⁷ Although it appears that the Achaak were temporarily displaced from their more northern settlements during the Madhiyya,¹⁷²⁸ they had returned to and reestablished their permanent homes during Arop

¹⁷²² **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Chol Por Chol (Chief of Achaak), at p. 2, ¶4 (“My father was born in Miding [Arabic: Heglig] in the mid-1940s. My grandfather, the Chief of the Achaak before my father, was born in Miding also. It is the traditional seat of our family. Since I have been born we have been living in other tribes’ lands and in refugee camps or abroad.”); Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at pp. 2-3, ¶¶3-4, 9, 12, 14 (“I was probably born sometime around 1946... My grandfather and great-grandfather were born in Miding [Arabic: Heglig]... Our main settlements included Miding [Arabic: Heglig]... All of these places were permanent settlements of the Achaak Chiefdom at the time of my grandfather, the time of Paramount Chief Arop Biong and when the British arrived... Achaak would spend the rainy season on high ground cattle campsites near our settlements... when Miding was full of water we would go to a place called the *tooc* Miding, which was higher ground north of Miding [Arabic: Heglig]. At the time of my great-grandfather, we also took the cattle to a high place named Niag, and there were also Achaak settlements in this area.”); Witness Statement of Mijak Kuot Kur (Achaak elderelder), at pp. 2, 3, ¶¶7, 11 (“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.”); Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶13.

¹⁷²³ Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶9 (“There were many traditional Ngok settlements throughout our Achaak lands. Our main settlements included Miding [Arabic: Heglig], Anyak (which is northeast of Dakjur and southeast of Miding)... All of these places were permanent settlements of the Achaak chiefdom at the time of my grandfather, the time of Paramount Chief Arop Biong and when the British arrived.”); Witness Statement of Mijak Kuot Kur (Achaak elderelder), at p. 2, ¶7 (“Around the lates 1800s and early 1900s the Achaak marking ceremonies were held in the Ngol area and places including Anyak, Dakjur... and up to Nyama.”).

¹⁷²⁴ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶14 (“Achaak would spend the rainy season on high ground cattle campsites near our settlements, which included... Ajaj”); Witness Statement of Mijak Kuot Kur (Achaak elderelder), at p. 3, ¶¶10-11 (“When the British came the Achaak were at Nyama, Ruba, Kol Lang... Ajaj, Pawol, Mardhok and Miding); Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶10 (“These are places 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 places of Bongo during my father’s and grandfather’s times.”)

¹⁷²⁵ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶¶11-12 (“There were permanent Achaak settlements further north at Pariang, Puoth, Dhiny Dhuol Bet (west of Miding), Michoor (northwest of Miding), Mardhok (north of Miding) and Kol Lang (further north still)... All of these places were permanent settlements of the Achaak chiefdom at the time of my grandfather, the time of Paramount Chief Arop Biong and when the British arrived.”).

¹⁷²⁶ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶¶3, 4, 9-10, for example at ¶9 (“Also, Dakjur [Arabic: Dembaloya], Pawol and Puoth were major Achaak settlements during my own and my grandfathers time.”); Witness Statement of Mijak Kuot Kur (Achaak elderelder), at p. 2, ¶3 (“My age set was initiated in 1963 in Dakjur.”), at ¶7 (“Around the lates 1800s and early 1900s the Achaak marking ceremonies were held in the Ngol area and places including Anyak, Dakjur... and up to Nyama.”); Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 11, ¶54.

¹⁷²⁷ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶9 (“There were many traditional Ngok settlements throughout our Achaak lands. Our main settlements included Miding [Arabic: Heglig], Anyak (which is northeast of Dakjur and southeast of Miding). Also, Dakjur [Arabic: Dembaloya], Pawol and Puoth were major Achaak settlements during my own and my grandfather’s time.”); Witness Statement of Mijak Kuot Kur (Achaak elderelder), at p. 3, ¶¶10-11 (“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.”).

¹⁷²⁸ Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶13 (“My great-grandfather and the Achaak before him were also settled in these places, but during my great-grandfather’s time, fighting with the Arabs forced them to retreat from our more northern settlements to settlements around Pawol. However, during my grandfather’s time, the time of Arop Biong, the Achaak and the Ngok Dinka fought back and resettled those places.”).

Biong's reign prior to 1905.¹⁷²⁹ The settlements and grazing areas of the Achaak are shown on **Map 15** (Achaak Chiefdom, 1905).

1033. **Diil**: The traditional seat of the Diil chief is Rum Ameer,¹⁷³⁰ which is located south-east of Abyei town on the Kiir/Bahr el Arab River. Rum Ameer, Mabok and Mareng Diil are all permanent settlements of the Diil along the Kiir/Bahr el Arab River.¹⁷³¹ The Diil were found north at Thurguruk and Baar, but Dakjur was the border with the Achaak.¹⁷³² To the west, Diil were found near Abyei town, and Baar was the main permanent settlement of the Diil to the northeast.¹⁷³³ The Diil were also settled below the Kiir/Bahr el Arab River at places such as Marol¹⁷³⁴ and Riangleil.¹⁷³⁵ The settlements and grazing areas of the Diil are shown on **Map 20** (Diil Chiefdom, 1905).

1034. As discussed below, Ngok oral traditions concerning the locations of Ngok Dinka settlements are corroborated by a number of other elements of these traditions. In particular, descriptions of birth places, burial sites, locations of other sites of cultural significance (age set initiation places) and traditional grazing lands coincide with and corroborate the Ngok's oral descriptions of the locations of their villages.

(b) Locations of Ngok Birth Places

1035. The Ngok oral traditions record the birth places of historic figures (Paramount Chiefs and Chiefs) and family members. In Ngok culture, women traditionally gave birth within their homes ("*tukul*"), so there is a natural connection with the place of birth. Further, a Ngok Dinka's birthplace, together with his or her ancestral lines, locates him or her socially within his or her chiefdom and the Ngok as a whole, it places him or her under the leadership of his or her section chief and, importantly for Ngok males, determines age set initiation groupings.¹⁷³⁶ As a consequence, oral traditions regarding birthplaces also serve to locate Ngok homes and villages.

1036. **Abyior**: The Abyior chiefdom has centered around Abyei town since the late 18th century. The birthplace of the line of Abyior chiefs are recorded in Ngok oral traditions and are recorded in the evidence of Kuol Alor Makuac Biong, current Chief of Abyior, who was

¹⁷²⁹ Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶13. This is consistent with the oral history of the Alei chiefdom: Witness Statement of Peter Nyuat Agok Bol (Alei elderelder) at pp. 2, 3, ¶¶9, 10 and 11 and that of the Mareng chiefdom: Witness Statement of Adol Kuot Malual (Manyuar elderelder) at p. 2, ¶¶4 and 5 ("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."), at ¶7 ("Manyuar were traditionally in Thuba, but there were Mareng there too."), at ¶8 ("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.").

¹⁷³⁰ **Map 20** (Diil Chiefdom, 1905). Witness Statement of Arop Kuol Kwon (Chief of Diil), at p. 2, ¶¶5, 8; Witness Statement of Mijok Bol Atem (Diil elderelder), at p. 2, ¶3.

¹⁷³¹ **Map 20** (Diil Chiefdom, 1905). Witness Statement of Arop Kuol Kwon (Chief of Diil), at p. 2, ¶¶5, 8.

¹⁷³² **Map 20** (Diil Chiefdom, 1905). Witness Statement of Mijok Bol Atem (Diil elderelder), at p. 2, ¶9.

¹⁷³³ **Map 20** (Diil Chiefdom, 1905). Witness Statement of Mijok Bol Atem (Diil elderelder), at p. 2, ¶9.

¹⁷³⁴ **Map 20** (Diil Chiefdom, 1905). Witness Statement of Mijok Bol Atem (Diil elderelder), at p. 2, ¶9.

¹⁷³⁵ Witness Statement of Mijok Bol Atem (Diil elderelder), at p. 2, ¶9.

¹⁷³⁶ Witness Statement of Mijak Kuot Kur (Achaak elderelder), at p. 2, ¶6 ("The age set is a group of young men who have reached a certain age and are ready to enter manhood. The age set is important to build the community and solidarity with each other. It is also important because the age set organises the young men into stronger groups to protect the community.").

born near Noong. Kuol Dongbek (who was also Paramount Chief of the Ngok Dinka) was born at Miding [Arabic: Heglig]; Monydhang Kuol (also Paramount Chief of the Ngok Dinka) was born at Pachol); Alor Monydhang (also Paramount Chief of the Ngok Dinka) was born at Mijok Alor; Biong Alor (also Paramount Chief of the Ngok Dinka) was born at Kiir, just south of Abyei town; Makuac Biong was born in what is now known as Abyei town; and Alor Makuac (the father of the current Abyior Chief) was born in Abyei town.¹⁷³⁷

1037. There is evidence from other Abyior that they were born either in or around Abyei town.¹⁷³⁸ As discussed above, the Abyior chiefdom spreads north-west from Abyei town to Meiram,¹⁷³⁹ and Abyior elder Deng Chier Agoth's grandfather was born near to Meiram [Dinka: Kol Arouth] in the late 1800s.¹⁷⁴⁰

1038. **Bongo:** 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 also born in Bakura, near to Puoth (also in the Ngol area).¹⁷⁴¹

1039. **Achaak:** 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."¹⁷⁴² 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 were born in Miding [Arabic: Heglig].¹⁷⁴³

1040. **Alei:** The Alei have traditionally occupied the north of the Ngok lands. An Alei elder relates that his father was born in Thur [Arabic: Turda], north of Nyama, in the late 19th or early 20th century, and that he was born in the 1930s at Patal, near Dakjur (in the Ngol area).¹⁷⁴⁴ The same elder's grandfather was born between El Odayya and Muglad.¹⁷⁴⁵ The recent line of the Alei Chiefs were born in the Ngol/Ragaba ez Zarga River area near Dakjur and Pandeng [Arabic: Bedheny].¹⁷⁴⁶

1041. **Achueng:** The Achueng traditionally lived in the south-west of the Abyei Area, and the birth places of chiefs and elders confirms this. Achueng elder Jok Deng Kek was born in Riet, north of Abyei town and south of the Ngol/Ragaba ez Zarga River, in the 1940s.¹⁷⁴⁷ His

¹⁷³⁷ **Map 14** (Abyior Chiefdom, 1905); **Map 23** (Ngok Dinka Migration to Abyei Area). Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), p. 2, ¶4.

¹⁷³⁸ **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Deng Chier Agoth (Abyior elderelder), at p. 2, ¶3, who was born in the area of what is now Abyei town in about 1930, and so was his father; Arop Deng Kuol Arop (Abyior elderelder) was born in the area of what is now Abyei town in about 1929. Witness Statement of Arop Deng Kuol Arop, at p. 2, ¶3; Alor Kuol Arop (Abyior elderelder) was born in Abyei town in around 1914 or 1915: Witness Statement of Arop Deng Kuol Arop, at p. 2, ¶3.

¹⁷³⁹ **Map 14** (Abyior Chiefdom, 1905). See above at para. 1025.

¹⁷⁴⁰ **Map 14** (Abyior Chiefdom, 1905). See Witness Statement of Deng Chier Agoth (Abyior elderelder), at p. 2, ¶3.

¹⁷⁴¹ **Map 19** (Bongo Chiefdom, 1905). See Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 2, ¶¶3-5.

¹⁷⁴² **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Chol Por Chol (Chief of Achaak), at p. 2, ¶4. 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.").

¹⁷⁴³ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶¶3-4.

¹⁷⁴⁴ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Peter Nyuat Agok Bol (Alei elderelder), at pp. 2-3, ¶¶4, 8-11.

¹⁷⁴⁵ Witness Statement of Peter Nyuat Agok Bol (Alei elderelder), at p. 2, ¶4.

¹⁷⁴⁶ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶¶4-6.

¹⁷⁴⁷ **Map 16** (Acheung Chiefdom, 1905). Witness Statement of Jok Deng Kek (Achueng elderelder), at p. 2, ¶3.

father was born in Noong [Arabic: Na'am] during the time of Arop Biong, in the late 1800s and his grandfather was born in an Achueng settlement near Abyei town.¹⁷⁴⁸

1042. **Manyuar:** Recent generations of Manyuar Chiefs were born south of Abyei town, and other Manyuar were born south of Abyei town.¹⁷⁴⁹ The Manyuar were also traditionally settled further north, and a Manyuar elder's grandfather was born in Thuba,¹⁷⁵⁰ while the elder was born in a settlement north of Abyei town called Wun Goc.¹⁷⁵¹ The Mareng Chiefs in the 19th century were born in settlements near to Abyei town,¹⁷⁵² and other members of the Mareng chiefdom were born in similar locations.¹⁷⁵³

1043. **Anyiel:** The seat of the Anyiel Chief has traditionally been Malual Ador, which is a settlement north of Abyei town near Langar [Arabic: Goleh].¹⁷⁵⁴ An Anyiel elder records his father as having been born in the Anyiel settlement of Langar in the late 1800s, during the reign of Paramount Chief Arop Biong and the time of the Mahdiyya, and his grandfather as having been born in Todac, which is north of Abyei town but south of Langar.¹⁷⁵⁵

1044. **Diil:** The Diil were traditionally located in the south-east of the Abyei Area, as confirmed by the current Chief of the Diil,¹⁷⁵⁶ whose father and grandfather were born in Rum Ameer, and by the Diil elder Mijok Bol Atem, who was born in the late 1930s near Rum Ameer.¹⁷⁵⁷ His father, grandfather and great-grandfather were born in the south-east of the Abyei Area in places above and below the Bahr el Arab/Kiir River.¹⁷⁵⁸

1045. **Mareng:** Mareng were born near what is now Abyei town,¹⁷⁵⁹ Kaba,¹⁷⁶⁰ and near the Kiir/Bahr el Arab to the east of Abyei town.¹⁷⁶¹

1046. In sum, oral traditions regarding the birthplaces of Ngok chiefs and others are consistent with the detailed oral evidence regarding the locations of Ngok villages. This testimony highlights the occupation and use of settlements around Abyei town, the Ngol/Ragaba ez Zarga and in areas such as Kol Arouth (near Meiram), Thur [Arabic: Turda] and Miding [Arabic: Heglig] during the late 19th century and 20th century. The cumulative geographic spread of the various villages and settlements identified as birthplaces of Ngok Chiefs, elders and others is notable in its detail, as illustrated on **Map 13** (Ngok Dinka Chiefdoms, 1905), further evidencing the widespread occupation and use of the Abyei region by the Ngok.

¹⁷⁴⁸ **Map 16** (Acheung Chiefdom, 1905). Witness Statement of Jok Deng Kek (Achueng elderelder), at p. 2, ¶¶4 and 5.

¹⁷⁴⁹ Witness Statement of Adol Kuot Malual (Manyuar elderelder), at p. 2, ¶4.

¹⁷⁵⁰ **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Adol Kuot Malual (Manyuar elderelder), at p. 2, ¶5.

¹⁷⁵¹ Witness Statement of Adol Kuot Malual (Manyuar elderelder), at p. 2, ¶4.

¹⁷⁵² Witness Statement of Kuol Lual Deng Akonon (former Chief of Mareng), at p. 2, ¶¶3 and 5 and his son, current Chief of Mareng, Witness Statement of Mijak Kuol Lual Deng, at p. 2, ¶3.

¹⁷⁵³ Witness Statement of Malual Alei Deng (Mareng elderelder), at p. 2, ¶¶3 and 4.

¹⁷⁵⁴ **Map 18** (Anyiel Chiefdom, 1905). Witness Statement of Akonon Ajourng Deng Tiel (Chief of Anyiel), at p. 2, ¶4. His father and grandfather, both Anyiel Chiefs lived in Malual Ador and it is most likely they were born there or nearby.

¹⁷⁵⁵ **Map 18** (Anyiel Chiefdom, 1905). Witness Statement of Malok Mien Ayiek (Anyiel elderelder), at p. 2, ¶4.

¹⁷⁵⁶ **Map 20** (Diil Chiefdom, 1905). Witness Statement of Arop Kwol Kwon (Chief of Diil), at p. 2, ¶5.

¹⁷⁵⁷ **Map 20** (Diil Chiefdom, 1905). Witness Statement of Mijok Bol Aten (Diil elderelder), at p. 2, ¶3.

¹⁷⁵⁸ Witness Statement of Mijok Bol Atem (Diil elderelder), at p. 2, ¶¶3 and 4.

¹⁷⁵⁹ Witness Statement of Kuol Lual Deng Akonon (Chief of Mareng), at p. 2, ¶¶3, 5.

¹⁷⁶⁰ Witness Statement of Wieu Dau Nguth (Mareng elderelder), at p. 2, ¶3.

¹⁷⁶¹ Witness Statement of Kuol Lual Deng (Chief of Mareng), at p.2, ¶3; Witness Statement of Malual Alei Deng (Mareng elderelder), at p. 2, ¶¶3, 4.

(c) Locations of Burial Places

1047. The locations of the burial sites of the Ngok Dinka Paramount Chiefs are discussed in detail above.¹⁷⁶² In addition, the burial places of other notable Ngok Dinka are preserved in Ngok oral traditions, and provide evidence of the locations of Ngok settlements. (As also noted above, the Ngok bury their dead in the immediate vicinity of their homes, providing a link between burial sites and locations of settlements.¹⁷⁶³)

1048. **Abyior:** The burial places of Abyior chiefs and leaders (as can be seen above from burial places of the Paramount Chiefs) are consistently around Abyei town and to the west of Abyei town.¹⁷⁶⁴

1049. **Alei:** The grandfather of an elder of the Alei is buried in the Ngol/Ragaba ez Zarga River area, east of Mabek [Arabic: Abu Azala]¹⁷⁶⁵ and the grandfather of the current Chief of the Alei is buried “in front of his *luak* (cattle byre) in the traditional Ngok manner” in Pandeng [Arabic: Bedheny],¹⁷⁶⁶ also in the Ngol area. Oral traditions recount that Chief Chol of the Alei was also buried in Mabek, during the Turkiyya.¹⁷⁶⁷

1050. **Achaak:** The ancestors of the Alei’s neighbours in the east, the Achaak, are buried in their traditional settlements in the eastern areas of the Ngok lands and in the Ngol Area.¹⁷⁶⁸

1051. **Bongo:** The grandfather of the current Chief of the Bongo is buried in Mabek, a Bongo settlement.¹⁷⁶⁹

1052. **Mareng:** The Chiefs of the Mareng from the late 19th and early 20th centuries, Deng Akonon Lual and his son Lual Deng Akonon, are buried in the Mareng settlement of Nyob-Arik (about two hours by foot east of Abyei, near Wejwej).¹⁷⁷⁰ The Chief of the Mareng at

¹⁷⁶² See above at paras. 894-896.

¹⁷⁶³ See above at para. 169; Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo) p. 4 ¶17 (“The Ngok Dinka custom for a chief’s burial is different from other people. We bury the chief in front of his *luak* (cattle byre) at his place of residence. We dig a hole and cut a special tree (either a *Dong* or *Akoc* tree) to lay at the bottom of the hole. We would then slaughter a bull, skin it, then it is put down before we lay the dead body in the hole. The chief would then be put in the grave and the skin from the bull would be put over him to cover his ears and his right hand would be put across his body. The people do not cry if it is the body of a chief, and we do not let the cattle go to graze. We just tie the cattle in the night so they cannot graze. Even in the morning the cattle is not let out to graze. This is a sign that we are mourning, even our cattle. We do not eat. People stop eating, and so do the cattle. That is for the chief. If the deceased is an ordinary person, we bury him near to his house, possibly slaughtering a bull and putting down its skin in the grave, but letting the cattle and people eat.”) and at p. 4, ¶18 (“The Misseriya bury their dead wherever they are moving when they die... Their burial places give no indication at all where their homes are.”).

¹⁷⁶⁴ **Map 14** (Abyior Chiefdom, 1905); **Map 23** Ngok Dinka Migration to Abyei Area. Witness Statement of Deng Chier Agoth (Abyior elderelder), at p. 2, ¶3, whose father and grandfather are buried in Abyei town.

¹⁷⁶⁵ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Peter Nyuat Agok Bol (Alei elderelder), at p. 2, ¶4.

¹⁷⁶⁶ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Belbel Chol Akuei Deng (Chief of Alei), at p. 2, ¶6.

¹⁷⁶⁷ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 4, ¶16.

¹⁷⁶⁸ Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶4 (“My father’s father is buried in Kwok and my great-grandfather is died and is buried in Akouch.”); Witness Statement of Mijak Kuot Kur (Achaak elderelder), at p. 2, ¶4 (“my grandfather is buried at Yak Agany... my great-grandfather, Kur Yak, is buried at Ladhok (near to Mabok Diil). My great-great grandfather is buried in the Ngol area, either at Mardhok or Anyak to the north-east, but I am not certain which of these two.”).

¹⁷⁶⁹ **Map 19** (Bongo Chiefdom, 1905); Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 2, ¶5; See also at p. 4, ¶16 (“It is very simple to identify where a Ngok chief has been buried because the ground above him sinks into a shallow hole. It is easy to identify these features to recognise where a Ngok house has been, even after it has been destroyed or left for many years. Most houses will have three or four graves if there are relatives in your house.”), at p. 4, ¶17.

¹⁷⁷⁰ Witness Statement of Kuol Lual Deng Akonon (former Chief of Mareng), at p. 2, ¶8.

the time of Arop Biong, Chief Lual Kuol, lived and is buried at Ajith Lual, which is north of Nyob-Arik.¹⁷⁷¹

1053. **Anyiel:** An Anyiel elder testifies that his grandfather was buried in the traditional Anyiel settlement of Todac during the Mahdiyya.¹⁷⁷²

1054. **Manyuar:** The father of an elder of the Manyuar was also buried in the area of the Manyuar's traditional lands,¹⁷⁷³ and the oral evidence is that the Manyuar of the elder's grandfather's generation were centred around Thuba, to the south of Nyama.¹⁷⁷⁴

1055. **Diil:** Consistent with the Ngok's oral traditions of their settlement locations, the father, grandfather and great-grandfather of a Diil elder are all buried in traditional Diil settlements in the south-east of the Abyei Area.¹⁷⁷⁵

1056. **Achueng:** Again, consistent with their traditional settlement places, Achueng were buried at Kol Adet and Patal (south of Abyei town).¹⁷⁷⁶

1057. The oral traditions about death and burial are consistent with the documentary record and the evidence of the Ngok's occupation of the Abyei Area in 1905. The location of Ngok burial sites, and the cultural significance of those burial sites to the Ngok, highlight the consistent character of permanence about the Ngok's occupation and use of the Abyei Area.

(d) Locations of Ngok "Age Set" Initiation Sites

1058. Ngok oral traditions regarding the locations of initiation sites for different "age sets" provide another basis for identifying the historic extent of the Ngok Dinka territory. As discussed above, age sets and age set initiation are a critical aspect of Ngok culture and society.¹⁷⁷⁷ At the age set initiation, all of the male members of a particular generational age set are "marked" with distinctive cutting, symbolizing their coming of age and there are traditional ceremonies.¹⁷⁷⁸

¹⁷⁷¹ Witness Statement of Kuol Lual Deng Akonon (former Chief of Mareng), at p. 2, ¶8 ("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 in Ajith, all they had was a chicken. So they slaughtered it. This is how it got its name. After Lual Kuol's death, the Mareng moved south to places called Lou and Wejwej... During the time of Arop Biong, the Mareng chief lived in Ajith Lual.")

¹⁷⁷² **Map 18** (Anyiel Chiefdom, 1905). Witness Statement of Malok Mien Ayiek (Anyiel elderelder), at p. 2, ¶4.

¹⁷⁷³ Witness Statement of Adol Kuot Malual (Manyaur elderelder), at p. 2, ¶6.

¹⁷⁷⁴ **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Adol Kuot Malual (Manyaur elderelder), at p. 2, ¶¶5 and 7.

¹⁷⁷⁵ Witness Statement of Mijok Bol Atem (Diil elderelder), at p. 2, ¶4.

¹⁷⁷⁶ Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶4.

¹⁷⁷⁷ See above at paras. 158-163.

¹⁷⁷⁸ See above at para. 161; Witness Statement of Malok Mien Ayiek, at p. 3, ¶11 ("For the Ngok Dinka, each age set has a junior and senior set with it. The interval between each set initiation was 9 years. The senior set would be initiated and then 9 years later the junior set would be initiated (or marked). Marked means that we cut our foreheads. So, one full age set covers about 18 years. I was initiated sometime around 1957 as part of the junior set of that age set."); Witness Statement of Mijak Kuot Kur, at p. 3, ¶¶ 16 and 17 ("The age set is given to someone in the tribe to name it and then it becomes his responsibility. He is like a special father. It is not necessarily the chief who names the age set. Anyone can name the age set. The person who names the age set decides where the age set will be initiated. Normally the age set is initiated in the village of the one who is naming the age set. There are junior and senior components to an age set and each junior or senior component is nine years long. Therefore, each age set is eighteen years combined.")

1059. Each of the nine Ngok Dinka Chiefdoms would generally perform its own initiation ceremony (some Chiefdoms would also split into sub-chiefdoms for the age set ceremony).¹⁷⁷⁹ The location would be a place of significance for them, not far from their local communities (though in a place where the age set ceremonies would take place in private).¹⁷⁸⁰

1060. The initiation sites are closely associated with, and will be near to, the place of residence of the members of the age set and the age set “sponsor” or leader, thus enabling identification of Ngok villages through the sites of generational initiation rites.¹⁷⁸¹ The witness testimony of age set initiation sites from around the turn of the 20th century therefore corroborates the settlement of a number of permanent Ngok villages.

1061. An elder from the Achaak testifies:

“I know about the age sets and where the men of the Achaak were marked through oral history told to me by my elders. Around the late 1800s and early 1900s the Achaak marking ceremonies were held in the Ngol area and places including Anyak, Dakjur, Marial-Achaak and up to Nyama. I know from our oral tradition that the initiations were generally in this area, and were not much further south than Miding [Arabic: Heglig].”¹⁷⁸²

1062. The Chiefs and elders of the various Ngok Chiefdoms describe a number of different age set initiation locations:

- a. **Achaak:** The Executive Chief of the Achaak corroborates the locations of Achaak age sets in the Ngol area (the area north of the River Ngol toward Nyama in the north-west and Miding in the east): “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.”¹⁷⁸³
- b. **Bongo:** 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 River Ngol.¹⁷⁸⁴
- c. **Diil:** The father and grandfather of Diil elder were marked near the Diil settlement of Mareng Diil, near the River Kiir.¹⁷⁸⁵
- d. **Abyior:** Abyior elder and son of Paramount Chief Kuol Arop, Alor Kuol Arop (born in around 1914 or 1915) was marked in Abyei town.¹⁷⁸⁶
- e. **Mareng:** The Mareng were centred around Nyama and places south of there such as Thuba and Kaba,¹⁷⁸⁷ so for example the father and grandfather of a current

¹⁷⁷⁹ See Witness Statement of Mijak Kuot Kur, at p. 2, ¶7. Some Chiefdoms, including Abyior, use other formalities for age-setting including instructions in responsible social behaviour, military training and rituals to mark the symbolic promotion into adulthood., F. Deng *The Man Called Deng Majok*, 24, (1986), **Exhibit-FE 7/4**. See also above at para. 163.

¹⁷⁸⁰ See Witness Statement of Mijak Kuot Kur, at p. 2, ¶7.

¹⁷⁸¹ See above at para. 163.

¹⁷⁸² Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 2, ¶7.

¹⁷⁸³ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶5.

¹⁷⁸⁴ **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.

¹⁷⁸⁵ Witness Statement of Mijak Bol Atem (Diil elder), at p. 2, ¶5.

¹⁷⁸⁶ **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Alor Kuol Arop (Abyior elder), at p. 2, ¶6.

elder were initiated in Kaba.¹⁷⁸⁸ The Mareng were also settled further south at the same time during the early 20th century, and there were age sets initiated at Wejwej near the River Lou.¹⁷⁸⁹

f. **Manyuar:** Manyuar elder Adol Kuot Malual (born in the early 1940s) recalls being told that his grandfather was initiated in Thuba.¹⁷⁹⁰

g. **Achueng:** The father of the current Achueng Chief was initiated in Achueng lands south of Abyei town.¹⁷⁹¹ The Achueng were also north of Abyei town and the father (born in the late 1800s) and grandfather of a current Achueng elder were initiated near the settlements of Noong and Kol Lang respectively.¹⁷⁹²

h. **Anyiel:** Anyiel were also marked in the area north of Abyei town.¹⁷⁹³

i. **Alei:** The evidence records examples of Alei being marked around Dakjur and Pariang (in the upper Ngol area).¹⁷⁹⁴

1063. Taken together, the oral history regarding the locations of Ngok age set initiation sites provides further corroboration of the locations of the Ngok Dinka villages over the past century. These initiation sites coincide with the locations of Ngok villages, birth places and burial sites.

(e) Location of Ngok Pastoral Lands for Seasonal Cattle Grazing

1064. The locations of Ngok Dinka seasonal grazing lands for their cattle herds are also a central element of Ngok oral traditions, and reveal the integral system of management of natural resources within their territory. As discussed above, cattle and the seasonal grazing migrations of the Ngok cattle herds are an important feature of Ngok culture.¹⁷⁹⁵ Again, corroborated by the documentary record, Ngok oral traditions describe with impressive consistency and detail the locations of the pastoral lands and water sources for the tribes' cattle.

1065. The effect of the Sudanese climate on the river system in the Abyei Area heavily influenced the Ngok treatment of their cattle. As discussed in detail above, the climate of the Abyei region varies from rainy seasons that flood the lands around the river systems, to dry seasons that leave many river beds dry.¹⁷⁹⁶ As also discussed above, the Ngok have developed seasonal grazing patterns and other practices that enable their cattle to survive and flourish under these conditions.¹⁷⁹⁷

¹⁷⁸⁷ See above at para. 1029.

¹⁷⁸⁸ Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶4.

¹⁷⁸⁹ Witness Statement of Kuol Lual Deng Akonon (Mareng elder), at p. 2, ¶¶4 and 5.

¹⁷⁹⁰ **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Adol Luot Malual (Manyuar elder), at p. 2, ¶5.

¹⁷⁹¹ Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶6.

¹⁷⁹² **Map 16** (Acheung Chiefdom, 1905). Witness Statement of Jok Deng Kak (Achueng elder), at p. 2, ¶¶4 and 5.

¹⁷⁹³ Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶4.

¹⁷⁹⁴ **Map 17** (Alei Chiefdom, 1905). Witness Statement of Ring Makauc Dhel Yak (Achaak Executive Chief and elder) p. 2 ¶5; Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 2, ¶5.

¹⁷⁹⁵ See above at paras. 205-206.

¹⁷⁹⁶ See above at paras. 75-80, 89-105.

¹⁷⁹⁷ See above at paras. 196-205.

1066. Oral testimony by Ngok Dinka describes the locations of the seasonal grazing lands and water sources for the tribes' cattle from at least the 19th century, through 1905, and thereafter. In many instances, these accounts are provided by Ngok who were part of seasonal cattle camps, travelling the same routes used by their fathers, grandfathers and great-grandfathers.

1067. When the wet season begins in the Abyei region in late May, the Ngok cattle herders travelled with their cattle away from the Kiir/Bahr el Ghazal and Ngol/Ragaba ez Zarga river systems, to avoid the mud, flies and mosquitoes.¹⁷⁹⁸ As discussed below, the cattle were taken either toward and into the *goz*, running north from a latitude around Dhony Dhoul/Tebeldiya/Nyama to Muglad, or toward the north-east, to Miding [Arabic: Heglig] and toward Keilak. The wet season grazing routes of the Ngok are depicted on **Map 25** (Abyei Area: Grazing Patterns in the Wet Season), while the light shaded areas on **Map 13** (Ngok Dinka Chiefdoms, 1905), and the light shaded areas on each of the individual Ngok chiefdom maps, **Maps 14 to 22**, also depict the territory used by cattle camps from each of the nine Ngok Dinka chiefdoms during the wet season.

1068. There were a number of routes to the north and east for the wet season movement of the Ngok cattle camps. Most sections of the Ngok would take their cattle to the *goz*, heading toward Nyama,¹⁷⁹⁹ Dhony Dhoul¹⁸⁰⁰ and Tebeldiya. For some, Dhony Dhoul and Tebeldiya would mark the northernmost point in their journey.¹⁸⁰¹ Nonetheless, many cattle camps would proceed further north into the *goz* toward Dhelum¹⁸⁰² and Deinga¹⁸⁰³ [Arabic: Muglad].

¹⁷⁹⁸ See above at paras. 196-205. See also S. Ali El Tayab, Agricultural and Natural Resources, at p 3, **Exhibit- FE 6/5**.

¹⁷⁹⁹ **Map 13** (Ngok Dinka Chiefdoms, 1905); **Map 25** (Abyei Area: Grazing Patterns in the Wet Season). Witness Statement of Adol Kuot Malual (Manyaur elder), at p. 2, ¶7 and **Map 21** (Manyaur Chiefdom, 1905); Witness Statement of Ajak Malual Beliu (Chief of Acheung), at p. 3, ¶10 and **Map 16** (Acheung Chiefdom, 1905).

¹⁸⁰⁰ **Map 13** (Ngok Dinka Chiefdoms, 1905); **Map 25** (Abyei Area: Grazing Patterns in the Wet Season). Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶39; 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 Deng Chier Agoth (Abyior elder), at p. 2, ¶9 (“before 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 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); Witness Statement of Ajak Malual Beliu (Chief of Acheung), 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 (Acheung 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).

¹⁸⁰¹ **Map 25** (Abyei Area: Grazing Patterns in the Wet Season). Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶7 and **Map 18** (Anyiel Chiefdom, 1905).

¹⁸⁰² **Map 25** (Abyei Area: Grazing Patterns in the Wet Season). Witness Statement of Chor Deng Akouon (Mareng elder), at p. 3, ¶11 and **Map 22** (Mareng Chiefdom, 1905); Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 3, ¶12 and **Map 15** (Achaak Chiefdom, 1905); Witness Statement of Wieu Dau Nguth (Mareng elder) and **Map 22** (Mareng Chiefdom, 1905), at p. 2, ¶7; Witness Statement of Ajak Malual Beliu (Chief of Acheung), at p. 3, ¶10 and **Map 16** (Acheung Chiefdom, 1905).

¹⁸⁰³ **Map 13** (Ngok Dinka Chiefdoms, 1905); **Map 25** (Abyei Area: Grazing Patterns in the Wet Season). Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶39; Witness Statement of Chor Deng Akouon (Mareng elder), at p. 3, ¶11 and **Map 22** (Mareng Chiefdom, 1905); Witness Statement of Adol Kuot Malual (Manyaur elder), at p. 3, ¶12 and **Map 21** (Manyaur Chiefdom, 1905).

1069. In the north-west of the Abyei Area, Abyior cattle camps would sometimes graze to Wun Deng Awak (an Abyior settlement in the north-west of the Abyei Area)¹⁸⁰⁴ and then to Raath (1½ days walk north from Wun Deng Awak).¹⁸⁰⁵ Abyior would sometimes head west following the Kiir and Ngol river systems directly to Meiram,¹⁸⁰⁶ where Ngok settlements were located.¹⁸⁰⁷

1070. Alternatively, rather than moving toward the *goz* to graze, some Chiefdoms' cattle camps would take an eastern route toward Lake Kielak and the Nuba Mountains.¹⁸⁰⁸ This would also allow the Ngok to avoid the mud, flies and mosquitoes brought by the rains. The Ngok witnesses testify that there were no Misseriya in these regions.¹⁸⁰⁹ The lands of the Achaak Chiefdom bordered those of the Nuba¹⁸¹⁰ and the Achaak would take their cattle to the north-eastern reaches of the Abyei Area.¹⁸¹¹ The Diil, located in the south-east of the Abyei Area, had a very close relationship with the Achaak and would graze their cattle through the Achaak lands in the north-eastern regions of the Abyei Area all the way to

¹⁸⁰⁴ **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Alor Kuol Arop (Abyior elder), at pp. 2, 3 ¶¶10 and 11; Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 3 ¶10. See Witness Statement of Kuol Alor Makual Biong (Chief of Abyior), at p. 3 ¶¶12 and 13.

¹⁸⁰⁵ **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Alor Kuol Arop (Abyior elder), at pp. 2, 3, ¶¶10 to 12: Abyior would go north to Nyama then to Wun Deng Awak (an Abyior settlement), then to Raath (border with the Misseriya) ("I could walk for four days north of Wun Deng Awak and still see Ngok grazing with cattle.").

¹⁸⁰⁶ **Map 14** (Abyior Chiefdom, 1905). Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶11 ("We would also take the cattle in the rainy season to graze in the west towards Abyior settlements near the river tributary Kol Arouth [Arabic: Meiram] where my grandfather was born. Still today there are remains of settlements...").

¹⁸⁰⁷ Witness Statement of Deng Chier Agoth (Abyior elder), at pp. 2, 3, ¶3 ("My grandfather was born in Kol Arouth [Arabic: Meiram], in about 1900."), at ¶16 ("To the west, during the time of my father and grandfather the Abyior lands extend towards what is now the Darfur border, where Abyior would sometimes fight with the Reizegat. The Arab railway town was built in the 1950s near many existing Abyior settlements. As traditional Ngok homes are built in clusters of three to five homes, about 40 metres apart, there were numerous settlements. In this area, there were the Abyior settlements of Mijok Alor (very close to El Meriam), Akot Tok, Mabior (ahead of Akot Tok), Matnhom and Maper Amal, Amiin and Chigei/Thigei, Yar [Arabic: Dawas..."); Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶11 ("Returning home [from grazing] we would go to Meiram in the west. Meiram was the border with the Aweil Dinka and Abyior had settlements there... My father, grandfather and those before him would follow this route too."); Witness Statement of Alor Kuol Arop (Abyior elder), at p. 2, ¶10 ("We would go further past Meiram to a place called Umm Bilael. Umm Bilael was not Ngok Dinka lands... There were permanent Anyiel settlements in Meiram."); Witness Statement of Nyol Pagout Deng Ayel (Chief of Bongo), at p. 5, ¶¶24 and 25 ("I saw Misseriya as traders in Deinga [Arabic: Muglad] around 1975. I was working as a collector in the market up there before I became chief. Even when I was working up in Deinga there were not many Misseriya in Meiram, to the west. The only Misseriya were those working on the railway. There were Dinka working on the railway too. But now they try and claim Meiram as their own.").

¹⁸⁰⁸ **Map 25** (Abyei Area: Grazing Patterns in the Wet Season); **Map 13** (Ngok Dinka Chiefdoms, 1905). Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶39. 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 Likir] 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).

¹⁸⁰⁹ Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶7 ("The Achaak Chiefdom is the easternmost of the nine Ngok Dinka Chiefdoms. The lands of the Achaak border those of the Dhong [Nuba] at Lake Keilak and the mountains to the east. There were no other peoples between us.").

¹⁸¹⁰ Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶7.

¹⁸¹¹ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶14 ("we also took cattle to a high place named Niag, and there were also Achaak settlements in this area.").

Keilak.¹⁸¹² Mareng¹⁸¹³ and Alei¹⁸¹⁴ would also graze enroute to Keilak. For example, the Alei would take a route from Turda/Nyama to Keilak passing through a place known to the Ngok as Kol Lang (*Kol* means pool of water and *Lang* trees). Kol Lang 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.¹⁸¹⁵

1071. Further, some of the Ngok Chiefdoms were able to take advantage of pastures on high ground that were near their settlements. For example, Bongo cattle camps remained at Rumthil [Arabic: Antilla], Dokura and Maker.¹⁸¹⁶ Anyiel cattle went to the high ground close to the Anyiel settlements of Dokura and Todac,¹⁸¹⁷ while Achaak took cattle to higher pastures near to their permanent settlements at Ajaj, Ruba, Michoor, *tooc* Miding (the Achaak's name for the higher ground north of the Achaak settlement of Miding) and Niag.¹⁸¹⁸

1072. Some other Chiefdoms took advantage of the higher pastures in the Achaak lands. For example, the Mareng took cattle from Nyama and Thur [Arabic: Turda] toward Miding, where the Achaak gave permission for Mareng to construct *luaks* for their cattle and stay in *tukuls* within their settlement.¹⁸¹⁹ The Manyuar also took cattle east to the Achaak settlement of Miding [Arabic: Heglig].¹⁸²⁰

1073. As the rains subsided and the dry season began in Abyei in November,¹⁸²¹ the Ngok cattle camps would return to their permanent settlements from their wet season grazing pastures. The dry season grazing routes of the Ngok Dinka are depicted on **Map 26** (Abyei Area: Grazing Patterns in the Dry Season), and the light shaded areas on **Map 13** (Ngok Dinka Chiefdoms, 1905), and the light shaded areas on each of the individual Ngok Chiefdom maps, **Maps 14 to 22**, also depict the territory used by cattle camps from each of the nine Ngok Dinka chiefdoms during the dry season. The journey would often see the cattle camps return to their homes through the settlement of Meiram¹⁸²² in the west of the Abyei Area.¹⁸²³ Upon returning to their settlements, the cattle herders would find that the

¹⁸¹² **Map 20** (Diil 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.”).

¹⁸¹³ **Map 22** Mareng Chiefdom, 1905. Witness Statement of Chor Deng Akouon (Mareng elder), at p. 3, ¶11.

¹⁸¹⁴ Alei would go from Nyama to Kol Lang [Arabic: Abu Likir] to Keilak. Witness Statement of Peter Nyuat Agok Bol (Alei elder), at p. 2, ¶8 and **Map 17** (Alei Chiefdom, 1905).

¹⁸¹⁵ **Map 19** Bongo Chiefdom, 1905. Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3 ¶11.

¹⁸¹⁶ **Map 19** (Bongo Chiefdom, 1905). Witness Statement of Mijak Biong Jieny (Bongo sub-chief), at p. 3, ¶9.

¹⁸¹⁷ **Map 18** (Anyiel Chiefdom, 1905). Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶7.

¹⁸¹⁸ **Map 15** (Achaak Chiefdom, 1905). Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), p. 3, ¶14.

¹⁸¹⁹ **Map 22** (Mareng Chiefdom, 1905). Mareng cattle camps would proceed from Nyama and Thur [Arabic Turda] to Miding [Arabic: Heglig]: Witness Statement of Kuol Lual Deng Akonon (Mareng elder), at p. 2, ¶9; Witness Statement of Mijak Kuol Lual Deng (Chief of Mareng), at p. 2, ¶8; Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶7. During the time of Mijak Kuol Lual Deng's grandfather, likely the late 19th or early 20th century, the Achaak gave the Mareng permission to camp with their cattle at their settlement at Miding [Arabic: Heglig], and permitted them to build *luaks* for their cattle and to stay in *tukuls* in Miding: Witness Statement of Mijak Kuol Lual Deng (Chief of Mareng), at p. 2, ¶8.

¹⁸²⁰ **Map 21** (Manyuar Chiefdom, 1905). Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 3, ¶12.

¹⁸²¹ S. Ali El Tayab, *Agricultural and Natural Resources, Abyei District, West Regional South Kordofan Province*, 3 (1978), **Exhibit-FE 6/5**.

¹⁸²² **Map 25** (Abyei Area: Grazing Patterns in the Wet Season). See *above* at 1025

¹⁸²³ Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶7. Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyiel), at p. 3, ¶13.

crops were harvested (which would ensure that the cattle did not damage them) and they would then assist with replanting.¹⁸²⁴

1074. As the dry season unfolded and the river systems receded, the Ngok cattle camps would head south, towards the Kiir/Bahr el Arab River and further south to the area known as the *tooc* where pastures remained lush even during the height of the dry season.¹⁸²⁵ This sometimes involved travelling to the lands of the Twic Dinka, and the two tribes would mingle.

1075. These oral accounts are consistent with the documentary record. As discussed above, Wilkinson, travelling in February during the height of the dry season, records that after he reached the first Dinka village in the district known as Bongo “all the inhabitants had left and were grazing their herds of cattle where grass and water were to be found.”¹⁸²⁶ This is a reference to the Ngok cattle migrating south for the dry season (although, as noted above, it is inaccurate to suggest that “all the inhabitants had left,” as only young men (and sometimes women) would accompany the seasonal cattle camps¹⁸²⁷). He then goes on to describes “much dura” being cultivated around the settlements of Sultan Rob.

1076. At the same time, there is also evidence that the Misseriya cattle herds remained in the Misseriya’s centre at and north of Muglad during the rainy season, only crossing the *goz* and coming south to the Bahr region during the dry season (see a depiction of the Misseriya’s grazing patterns at **Map 25** (Abyei Area: Grazing Patterns in the Wet Season) and **Map 26** (Abyei Area: Grazing Patterns in the Dry Season). Thus:

- a. The records of Wilkinson and Mahon locate Misseriya in the Bahr region during the dry months,¹⁸²⁸ however neither appears to mention the temporary seasonal nature of the Misseriya’s use, which was only for dry season grazing.
- b. Cunnison notes in 1954 (having spent 1952 to 1954 with the Humr) that the Humr “cattle do not have the facility for moving in the mud that Dinka cattle possess. Thus they arrive in Babanusa even before the heavy rains have started.”¹⁸²⁹ Cunnison also described how the Misseriya moved with their cattle south of Muglad to the Bahr, the “*water course, forest and meadows inhabited by the Dinka*, where the Misseriya cattle spend their summers.”¹⁸³⁰

¹⁸²⁴ Witness Statement of Alor Kuol Arop (Abyior elder), at p. 3, ¶15. Witness Statement of Adol Kuot Malual (Manyaur elder), at p. 3, ¶14; Witness Statement of Nyankiir Chol Piok Bar (Ngok woman), at p. 2, ¶8.

¹⁸²⁵ **Map 25** (Abyei Area: Grazing Patterns in the Wet Season); **Map 13** (Ngok Dinka Chiefdoms, 1905). Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶39; Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 3, ¶14; Witness Statement of Wieu Dau Nguth (Mareng Elder), at p. 2, ¶7; Witness Statement of Alor Kuol Arop (Abyior elder), at p. 3, ¶13; Witness Statement of Deng Chier Agoth (Abyior elder), at p. 2, ¶8; Witness Statement of Adol Kuot Malual (Manyaur elder), at p. 3, ¶13 (“To the *tooc*, where we met Twic Dinka... The older members of the community would go to Nyama where there was water”); Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶7; Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyiel), at p. 3, ¶13; Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 3, ¶10.

¹⁸²⁶ C. Gleichen (ed.) *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. 2, 155 (1905), **Exhibit-FE 2/15**.

¹⁸²⁷ See above at paras. 119, 205.

¹⁸²⁸ See C. Gleichen (ed.) *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government*, Vol. 2, 155 (1905), **Exhibit-FE 2/14**; Sudan Intelligence Report No. 104, **Appendix E**, at p. 20, **Exhibit-FE 1/21**.

¹⁸²⁹ I. Cunnison *The Humr and their Land*, 54 (1954), **Exhibit-FE 4/5**.

¹⁸³⁰ 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 105 (11th-12th January 1962), **Exhibit-FE 4/11** (emphasis added).

c. A more recent author notes: “[B]esides the Dinka (Ngok) livestock [which are resident in the region], during the summer the Misseriya Humr bring their livestock to the [Abyei] area. They usually spend the summer in this Bahr area where there is enough water and grass for their cattle.”¹⁸³¹

d. Tibbs recorded that the Misseriya’s “move south to Bahr would start in shita (December)” “into the territory of the southern Nilotic tribe, the Ngok Dinka,” numbering “30,000 centred on Abyie [sic].”¹⁸³²

1077. The Ngok oral traditions recognise the Misseriya’s use of Ngok lands for seasonal grazing.¹⁸³³ Consistent with the reports of Cunnison, Tibbs and others, Ngok oral traditions recount that the Misseriya came only for the dry season and never settled permanently: “They only stayed in Ngok areas for the dry season, and they would bring with them their temporary homes.”¹⁸³⁴ Likewise, “[t]hey [the Misseriya] would come only for the dry season in December and they would go in April. It was a seasonal movement. The Mareng cattle were in a different area by the time the Misseriya came through with their cattle.”¹⁸³⁵

1078. 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.

1079. An Abyior elder testifies as to one example from the time of Paramount Chief Kuol Arop:

“When they passed through the Abyior lands the leader of the Misseriya ferik (cattle camp) would contact our Abyior elders, my grandfather Kuol Arop, to ask permission to pass through as well as to hunt and graze in the area. My grandfather used to tell us this when we were young so that we would grow up understanding the relationship between our people and the visitors to the lands and know how to deal with one another in the traditional way. I also understand from our oral history that in my grandfather’s time the Misseriya did not come down to the Abyei area in large numbers at all.”¹⁸³⁶

¹⁸³¹ A. El Tayab, *Agricultural and Natural Resources Abyei District, West Region Southern Kordofan Province*, 6, (1978), **Exhibit-FE 6/5** (emphasis added).

¹⁸³² M. Tibbs & A. Tibbs, *A Sudan Sunset* 57-58 (1999), **Exhibit-FE 8/17** (emphasis added).

¹⁸³³ Witness Statement of Kuol Lual Deng Akonon (former Chief of Mareng), at p. 3, ¶10 (“I remember first seeing the Misseriya come onto our lands... [during] the time of Kuol Arop Biong.”); Witness Statement of Arop Deng Kuol Arop (Abyior elder), at p. 4, ¶23 (“When they passed through the Abyior lands the leader of the Misseriya ferik (cattle camp) would contact our elders, my grandfather [Paramount Chief] Kuol Arop, to ask permission to pass through as well as to hunt and graze in the area. My grandfather used to tell us this when we were young so that we would grow up understanding the relationship between our people and the visitors to our lands and know how we deal with each other in the traditional way.”). The evidence from the Diil section is that they never saw Misseriya grazing cattle until the 1950s: Witness Statement of Mijok Bol Atem (Diil elder), at p. 3, ¶15. This may be explicable by the fact the Diil are the southernmost tribe and the Misseriya did not venture as far south as the Diil during the dry season until the 1950s.

¹⁸³⁴ Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 4, ¶19; Witness Statement of Malok Mien Ayiek (Achueng elder), at p. 2, ¶9 (“We never saw them in our lands with anything other than temporary huts or shelters.”).

¹⁸³⁵ Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2 ¶8.

¹⁸³⁶ Witness Statement of Arop Deng Kuol Arop (Abyior elder and Agriculturalist), at p. 4, ¶23; Witness Statement of Akonon Ajuong Deng Tiel (Chief of Anyiel), at p. 4, ¶¶20 and 21.

1080. Ngok oral testimony from the period of Paramount Chief Deng Majok describes the Misseriya seeking permission from the Paramount Chief before bring cattle to Ngok lands to graze:

- a. “When the Misseriya entered our lands, they would usually have someone in the village present them to the Chief where they would ask permission. They would find the local chief and tell them where they wanted to graze and would promise to leave with the rainy season. The Chief would then go to the Paramount Chief and he would be the one to give authority for the Misseriya to come onto our lands. This was the custom from the time of my father and grandfather and before I was displaced.”¹⁸³⁷
- b. “it was around January when they [Misseriya] used to come to move further south in search of cattle feed and water. Even once they did start to bring their cattle into the Bongo lands to graze, the Misseriya would do so according to our cultivation cycle only.”¹⁸³⁸

1081. This evidence of the seasonal migration patterns of the Misseriya and Ngok cattle herds coincides with the pre-1905 records and subsequent documentation (during the course of the 20th century), locating the Ngok territories between the Kiir/Bahr el Arab River and the *goz*, with the Misseriya travelling south of the *goz* only during the dry season.

(f) Maintenance of Road from Abyei Town to the North

1082. The extent of Ngok occupation and use of the Abyei region can also be inferred from arrangements that were made during the 20th century for maintenance of a road that ran from the south of the Ngok (in the lands of the Twic Dinka), into Ngok territories and up to Abyei town through Tebeldiya (where there was a rest house) to Muglad.¹⁸³⁹ The course of the road north from Abyei town, through Tebeldia to Muglad is identified on **Map 7** (Abyei Area).

1083. There is substantial oral evidence that maintenance of the Abyei/Muglad road was divided between the Ngok and the Misseriya, with the Ngok responsible for clearing and maintenance from Abyei town north to Tebeldiya (located in the north-west of the Abyei Area, near to the Ngok settlement of Dhony Dhoul¹⁸⁴⁰), and the Messiriya responsible for maintenance further to the north:

- a. “The road that was built extending from Abyei town to the far north was maintained by the people whose territory it passed through. The Ngok, including the Anyiel, had to clear the road up to Tebeldiya. My father and his father before him have cleared the same road that I cleared when I was younger. Members from all of the Ngok Dinka chiefdoms, except the Diil and Achaak, helped to clear this road. The Arabs or Misseriya cleared the same road but only further north, up past Tebeldiya.”¹⁸⁴¹
- b. “Although the Achaak took our cattle directly through the open land from Nyama to Dhelum, there was a road in the west that ran from Abyei town to Deinga

¹⁸³⁷ Witness Statement of Adol Kuot Malual (Manyuar elder), at p. 3, ¶¶15 to 17. Witness Statement of Mijok Bol Atem (Diil elder), at p. 3, ¶16.

¹⁸³⁸ Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3 ¶23.

¹⁸³⁹ See **Figure 25** (rest house at Tebeldiya), **Appendix H**.

¹⁸⁴⁰ See *above* at para. 1025; **Map 13** (Ngok Dinka Chiefdoms, 1905).

¹⁸⁴¹ Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶8.

[Arabic: Muglad] in the north. Under the colonial administration, the whole of the Ngok Dinka, not just the Bongo, cleared the road up as far north as Dhony Dhoul. Work was organised by age set and every age set had to help to collect bulls to carry out the work, and the work was long. When the road extended further south, the Ngok Dinka began clearing that road as well to where the Twic lived. This was below the River Kiir, but above the River Lol. I was collected to go and help in the clearing. If there is no road in your section's territory you are called to help in areas where the people are few or one section alone cannot do all the work. In Tebeldiya there was a British center. There was no problem when the Ngok Dinka met the Misseriya in Tebeldiya.”¹⁸⁴²

c. “The Ngok lands went as far north as Tebeldiya. ... [If] 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 Tebeldiya. The Misseriya would take over responsibility for the road from Tebeldiya (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).”¹⁸⁴³

1084. Although the testimony relates to events occurring during the mid-20th century, it serves to reinforce the Ngok, Misseriya and governing authorities' understandings of the pre-existing Ngok locations and territory and there is nonetheless no reason to conclude that materially different circumstances existed at the beginning of the 20th century (for the reasons explained above¹⁸⁴⁴).

(8) In the Early 20th Century, the Nine Ngok Dinka Chiefdoms Occupied and Used All of the Territory Extending North From the Current Bahr el Ghazal/Kordofan Boundary to approximately Latitude 10°35'N.

1085. In sum, a wide range of evidence demonstrates that the “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” encompasses the traditional homeland of the Ngok people, centered on the Bahr river basin formed by the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga Rivers, extending north from the current Kordofan/Bahr el Ghazal boundary to a latitude of 10°35'N, and east from the current Darfur/Kordofan boundary to the Ngok settlement of Miding [Arabic: Heglic] and beyond. For the most part, this was the essential finding of the experts on Sudanese history, ethnography, politics and culture who comprised the ABC.

1086. In turn, the ABC Experts' finding is confirmed by a large number of specific, first-hand observations in pre-1905 Sudan Government records; by subsequent documents (all created well before the current dispute arose); by oral traditions (also often recorded before the current dispute arose); by cartographic evidence; by geographic, environmental and other evidence; and by a wealth of contemporary witness testimony. This wide range of different

¹⁸⁴² Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 3, ¶12.

¹⁸⁴³ Witness Statement of Nyol Pagout Deng (Chief of Bongo), at p. 3, ¶¶14 and 15.

¹⁸⁴⁴ See above at paras. 228-232, 897-903.

sources consistently provides very similar descriptions of the location and nature of the Ngok Dinka territories with a host of corroborative detail.

1087. The evidentiary materials begin with oral traditions of both Ngok and Misseriya, reported over a number of years by different sources (Henderson, Sabah, Deng and a wide range of Ngok Dinka witnesses). All of these sources consistently describe the Ngok living in the Bahr river basin centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez-Zarga Rivers and extending to the northern edge of the *goz*.

1088. These oral traditions are consistent with a number of pre-1905 reports by early Sudan Government administrators, uniformly placing the Ngok between the Ngol/Ragaba al-Zarga and Kiir/Bahr el Arab river systems. Although the early administrators' understanding of the Bahr river basin and Ngok lands was limited (even in the dry season), they nonetheless provided unequivocal and detailed reports, typically based on first-hand observations, over a number of years (1902, 1903, 1904, 1905 and subsequently) by a number of reporters (Mahon, Wilkinson, Watkiss Lloyd, as well as Browne). These reports are consistent with one another, and with both the previous oral traditions and subsequent documentary and oral evidence.

1089. Documentary records from after 1905 corroborate and elaborate on the pre-1905 Government reports. Again, written over a period of several decades (1910-1960) by a number of different authors (Henderson, Court Treatt, Tibbs, Robertson, Howell, Cunnison, Santandrea, Sudan Ministry of Agriculture, the Harvard Development Project), these reports again uniformly located the Ngok Dinka between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems, extending north to the *goz*.

1090. Cartographic evidence corroborates the pre-and post-1905 documentary records. The map evidence consistently locates the Ngok Dinka in the Bahr region centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. In contrast, the cartography does nothing to place the Misseriya in this region.

1091. The witness testimony of 26 Ngok Dinka Chiefs, elders and others corroborates and expands on the documentary and other evidence. The Ngok testimony is highly detailed and consistently places the nine Ngok Dinka Chiefdoms both south and north from Abyei town, permanently inhabiting the areas between the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab river systems west to the current Kordofan/Darfur border with Darfur, north of Abyei town to Nyama and east near to Miding [Arabic: Heglig] and Mardhok. The Ngok testimony recounts, among other things, tribal oral traditions that describe the historic homeland of the nine Chiefdoms, as well as a subsequent continuity of occupation and usage of that territory.

1092. The documentary and oral evidence is also confirmed by environmental and climatic evidence, which demonstrates that the Ngok Dinka particular agro-pastoral lifestyle was well-adapted to the specific environmental conditions of the Abyei region (particularly its soil, rainy/dry season conditions). In contrast, the Misseriya's lifestyle was equally well-adapted to the drier climate to the north, but not to the damper conditions to the south. These characteristics of the Ngok and the Misseriya have been consistently observed and recorded, well before the current dispute arose, by a range of different sources.

1093. Thus, a wide range of diverse evidence, from a substantial number of unrelated sources, uniformly describes the Ngok Dinka as occupying permanent villages throughout the region centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga river systems, extending

north from the current Bahr el Ghazal/Kordofan boundary up to an approximate latitude of 10°35'N, extending east from current Darfur/Kordofan boundary to Ngok settlement of Miding [Arabic: Heglig] and beyond. This is for the most part, what the ABC Experts found, after an extensive and expert analysis. These conclusions are plainly correct and fully establish the extent of the Ngok Dinka historic homeland in the Abyei Area.

1094. The principal aspect of the ABC Report where the evidence before this Tribunal would call for a different conclusion involves the northern boundary of the Abyei Area. As discussed below, the evidence demonstrates Ngok Dinka usage and permanent occupation of the area extending north to latitude 10°35'N (and not mid-way between latitude 10°10'N and 10°35'N, as found by the ABC).¹⁸⁴⁵

2. The Abyei Area, as Defined in the Abyei Protocol and Arbitration Agreement, Encompasses All of the Territory Occupied and Used by the Ngok Dinka in 1905

1095. The “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” encompasses all of the territory occupied and used by the Ngok Dinka in 1905, as described above. This definition does not encompass *some* of the historic territory of the Ngok Dinka, or *some* of the nine Ngok Dinka Chiefdoms, but *all* of that territory and all of those Chiefdoms. That is evident from the language of the parties’ agreements (including particularly the Abyei Protocol), the drafting history of the parties’ agreements, and the purposes of these agreements.

a) Language of Abyei Protocol

1096. 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.”¹⁸⁴⁶ The natural grammatical meaning of this language encompasses the territory of the nine Ngok Dinka Chiefdoms *that were* collectively transferred to Kordofan in 1905.¹⁸⁴⁷ That is confirmed by Article 1.1.2’s reference to all of the territory of the nine Ngok Dinka Chiefdoms as it existed in 1905 and not to just a part of that territory.¹⁸⁴⁸ In any event, even if one were to interpret Article 1.1.2 as referring to only a particular part of the Ngok Dinka territory that was transferred to Kordofan in 1905, it is clear from the Sudan Government’s 1905 transfer instruments that they encompassed all of the territory of the nine Ngok Dinka Chiefdoms and that the GoS and SPLM/A intended to refer to all such Ngok Dinka territory.¹⁸⁴⁹

1097. Article 1 of the Abyei Protocol provided:

“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.*

¹⁸⁴⁵ See below at paras. 1190-1197.

¹⁸⁴⁶ Abyei Protocol, Art. 1.1.2, **Appendix C**.

¹⁸⁴⁷ See below at paras. 1102-1109.

¹⁸⁴⁸ See below at paras. 1110-1111.

¹⁸⁴⁹ See below at paras. 1112-1121.

1.1.3 The Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.¹⁸⁵⁰

1098. The Abyei Protocol also records the parties' commitment "to adopt [the Principles of Agreement] as the basis for the resolution of *Abyei Conflict*."¹⁸⁵¹

1099. As discussed above, and 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.¹⁸⁵²

1100. In turn, the parties agreed in Article 5.1 of the Abyei Protocol to the establishment of the ABC for the purposes of:

"[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*."¹⁸⁵³

1101. The crucial phraseology of 'area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' is repeated in the Abyei Annex, ABC Terms of Reference and ABC Rules of Procedure documents agreed between the parties.¹⁸⁵⁴

1102. The phrase used in Article 1.1.2 of the Abyei Protocol – "*the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905*" – has a natural grammatical meaning when read autonomously. That reading is supported by the rules of English grammar, making it clear that Article 1.1.2 refers to the collective transfer of the nine Ngok Dinka Chiefdoms in their entirety.

1103. Considered linguistically, the grammatical rule of proximity would be applied to the language of Article 1.1.2. In order to appreciate how the rule is applied, it is necessary to break the Article 1.1.2 language down into its constituent grammatical parts.

1104. The Article 1.1.2 phrase 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") which is then consequently postmodified by a non-finite clause ("transferred to Kordofan in 1905"). The pertinent question is how the non-finite clause relates to the preceding two constituents of the noun phrase.

¹⁸⁵⁰ Abyei Protocol, Art. 1.1, **Appendix C** (emphasis added).

¹⁸⁵¹ Abyei Protocol, footnote to heading "Principles on Agreement on Abyei," at p. 2, **Appendix C** (emphasis added).

¹⁸⁵² See above at para. 480; Witness Statement of Lt. Gen. Sumbeiywo, at p. 12, ¶61; Witness Statement of Minister Deng Alor Kuol, at p. 11, ¶64.

¹⁸⁵³ Abyei Protocol, Art. 5.1, **Appendix C** (emphasis added).

¹⁸⁵⁴ Article 1 of the Abyei Annex confirms that "...there shall be established by the Parties 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*." Abyei Annex, Art. 1, **Appendix D** (emphasis added). Article 1.1 of the Terms of Reference reiterates that "[t]he Abyei Area is defined in the Abyei Protocol in article 1.1.2 as '*The area of the Nine Ngok Dinka chiefdoms transferred to Kordofan in 1905*'", ToR, Art. 1.1, **Appendix E** (emphasis added). Article 1.1 of the Rules of Procedure also notes that "[T]he Abyei Area is defined in the Abyei Protocol in Article 1.1.2 as '*The area of the Nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905*'. The ABC shall confirm this definition." RoP, Art. 1.1, **Appendix F** (emphasis added).

1105. It is natural (and grammatically correct) to interpret a postmodifying construction in a noun phrase as relating to the immediately previous noun. This is referred to as the grammatical rule of proximity. Using a famous English nursery rhyme as an example:

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

1106. In theory, any of the “that” clauses in the sentence above could relate to “the dog,” but such a reading is unnatural and patently absurd. The natural reading without the benefit of further context is to take each “that” clause as defining the immediately preceding noun. This is a simple and straightforward application of the rule of proximity.

1107. Applied to the language of Article 1.1.2, the natural reading is to relate the postmodifying construction of “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. It is therefore the “chiefdoms” which are referred to as having been “transferred to Kordofan” in Article 1.1.2, not the “area.”

1108. Consistent with this, the term “area” in Article 1.1.2 serves to quantitatively describe the nine Ngok Dinka Chiefdoms being transferred, signposting and emphasizing that the nine Ngok Dinka Chiefdoms are capable of being properly defined and demarcated. The phrase makes perfect sense grammatically and is obviously the most plausible definition.

1109. Thus, considered from the perspective of its ordinary meaning, and applying basic rules of English grammar, Article 1.1.2 clearly means “the area of the nine Ngok Dinka chiefdoms *that were* transferred to Kordofan in 1905” (rather than, for example, “that part of the area of the nine Ngok Dinka chiefdoms that was transferred to Kordofan in 1905”). If the draftsman of the phrase, or indeed the parties who agreed to this language, 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 should have read “*that part of the area* of the nine Ngok Dinka chiefdoms *that was* transferred to Kordofan in 1905.”

1110. 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 “*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 elsewhere, this makes perfect sense in light of the unified, cohesive character of the Ngok Dinka and the centralized political and cultural character of the Paramount Chief.¹⁸⁵⁵)

1111. The language of Article 1.1.2 would not admit of a definition of the Abyei Area that excluded some of the “nine” Ngok Dinka Chiefdoms. In particular, as illustrated on **Maps 15, 17 and 19**,¹⁸⁵⁶ *three* of the nine Ngok Dinka chiefdoms (specifically the Alei, Achaak and Bongo¹⁸⁵⁷) are located entirely to the north of the Kiir/Bahr el Arab River. An interpretation of Article 1.1.2 that excluded one or more of these Chiefdoms would be entirely irreconcilable with the plain language of Article 1.1.2 (“*nine* Ngok Dinka chiefdoms”) and

¹⁸⁵⁵ See above at paras. 140-155 and below at para. 1125.

¹⁸⁵⁶ **Map 15** (Achaak Chiefdom, 1905); **Map 17** (Alei Chiefdom, 1905); **Map 19** (Bongo Chiefdom, 1905).

¹⁸⁵⁷ See above at paras. 1015-1063 and below at paras. 1130 - 1132.

with the purposes of the provision (discussed below¹⁸⁵⁸). 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 some (or some parts) of the Ngok Chiefdoms were included within the Abyei Area.

1112. 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 relevant Sudan Government transfer documents in 1905 addressed the issue. 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 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. “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.”¹⁸⁵⁹
- b. “*The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei* are now included in Kordofan...”¹⁸⁶⁰
- c. “In the north *the territories of Sultan Rob* and Sheikh Gokwei have been taken from this Province and added to Kordofan.”¹⁸⁶¹

1113. In each of these Sudan Government reports, 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 people 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.¹⁸⁶²

1114. 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 to the Government’s reports (discussed below) during the course of their negotiation of the Abyei Protocol.¹⁸⁶³ 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 nine Ngok Dinka Chiefdoms, and their territory, which is what was transferred by the Sudan Government’s 1905 instruments.

1115. Even if Article 1.1.2 was interpreted – contrary to its linguistic structure and obvious intention – as referring to the area of the Ngok Dinka lands which was transferred by the Sudan Government to Kordofan in 1905, the same result would apply. That is because it is clear that the Sudan Government’s 1905 instruments relating to the transfer all proceeded on the identical and explicit basis that “Sultan Rob” and all of his “territories” or “country” were being transferred to Kordofan from Bahr el Ghazal.

¹⁸⁵⁸ See below at paras. 1123-1147.

¹⁸⁵⁹ Sudan Intelligence Report, No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

¹⁸⁶⁰ Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13** (emphasis added).

¹⁸⁶¹ Annual Report of the Sudan 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13** (emphasis added).

¹⁸⁶² On the contrary, as discussed above, the whole point 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 above at paras. 346-357.

¹⁸⁶³ See below at paras. 1169-1170.

1116. Thus, as noted above, 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* . . .”¹⁸⁶⁴ 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.”¹⁸⁶⁵

1117. In each of the Sudan Government’s transfer instruments, 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. Thus, even if Article 1.1.2 of the Abyei Protocol were interpreted as referring to only that part of the area of the nine Ngok Dinka chiefdoms that was transferred to Kordofan in 1905, the parties’ obvious intention would have been to refer to the area of the Ngok Dinka that was the subject of the Sudan Government’s 1905 instruments. As the terms of those instruments make clear, they were each intended to transfer Sultan Rob and all his territory to Kordofan based on the premise that Sultan Rob and all of his territory was previously included in or administered from Bahr el Ghazal.

1118. In any event, it also bears emphasis (as noted 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.¹⁸⁶⁶ As discussed above, some Sudan Government records referred to the Kiir/Bahr el Arab River 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 Sudan Government was uncertain where the “Bahr el Arab” lay and was (in 1905) in the process of realizing that its understanding of the river’s location was badly mistaken.¹⁸⁶⁷

1119. 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. 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 Kordofan/Bahr el Ghazal boundary. That is corroborated by the fact (discussed above¹⁸⁶⁸) that there was no effort to alter the Kordofan/Bahr el Ghazal boundary in 1905 (or for several years thereafter).

1120. Furthermore, limiting the 1905 transfer to only those Ngok territories lying south of the Kiir/Bahr el Arab 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. As discussed above, by 1905, the Sudan Government had only had the opportunity to identify approximate and provisional boundaries, based on inadequate knowledge of the region.¹⁸⁶⁹ The Sudan Government not only fully recognized this, but also recognized (in early 1905) that it had

¹⁸⁶⁴ See above at paras. 346-357. See also Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13** (emphasis added).

¹⁸⁶⁵ See above 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).

¹⁸⁶⁶ See above at paras. 315-330.

¹⁸⁶⁷ See above at paras. 337-343.

¹⁸⁶⁸ See above at paras. 355-357.

¹⁸⁶⁹ See above at paras. 331-336.

been mistaken about the identity and location of the Bahr el Arab River, which was provisionally regarded as the Kordofan/Bahr el Ghazal boundary.¹⁸⁷⁰

1121. In these circumstances, it would be perverse to conclude that the putative location of the Kordofan/Bahr el Ghazal boundary in early 1905 serves to truncate or divide the territory of the nine Ngok Dinka Chiefdoms. Rather, if one were to consider the area of the Ngok Dinka that was transferred to Kordofan in 1905, the only plausible definition of that area would be in the specific Sudan Government instruments announcing and effecting that transfer in 1905 – not admittedly approximate and provisional boundaries referred to in other communications at the time, which the Sudan Government itself recognized were inaccurate and subject to change.

1122. In sum, looking to both rules of English grammar and the natural meaning of the parties' language, Article 1.1.2 of the Abyei Protocol plainly defines the Abyei Area as the territory of the nine Ngok Dinka Chiefdoms as they existed in 1905, when Sultan Rob and the Ngok Chiefdoms were transferred to Kordofan. That conclusion is compelled by the language (“*the* area of the *nine* Ngok Dinka chiefdoms...”) and grammatical structure of Article 1.1.2, as well as by the terms of the Sudan Government's transfer instruments in 1905. Neither Article 1.1.2 nor the Sudan Government's transfer instruments provide any textual support for defining the Abyei Area as only some of the Ngok Dinka territory or some of the nine Ngok Dinka Chiefdoms.

b) Purposes of Abyei Protocol

1123. 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 in 1905. Indeed, it would contradict the most fundamental purposes of the Abyei Protocol (and CPA) 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.

1124. First, the central purpose of 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, on the question whether or not they would be included in the South or the North, simultaneous to the main Southern Referendum.¹⁸⁷¹

1125. 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 the southern Sudan¹⁸⁷² – 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 only including *some* of the Ngok Dinka and *some* of their historic territories. That would contradict the basic principles of self-determination underlying the Abyei Protocol,¹⁸⁷³ as well as the SPLM/A's consistent assertion that the Ngok Dinka were a unitary and highly cohesive political and cultural entity.¹⁸⁷⁴

¹⁸⁷⁰ See above at paras. 337-343.

¹⁸⁷¹ Abyei Protocol, Art. 8, **Appendix C**. See above at para. 490.

¹⁸⁷² See above at paras. 417-423 and 445-486.

¹⁸⁷³ See above at paras. 473-486. See also ABC Paper, *The Popular Demand of Ngok-Dinka on Abyei Question*, dated 10 October 2002, at p. 4 (“It is absolutely necessary to have a referendum for Ngok-Dinka people of Abyei area to determine whether they should be part of southern Sudan or not”), **Exhibit-FE 9/18**.

¹⁸⁷⁴ See above 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**.

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 Dinka people.¹⁸⁷⁵ This cultural unity, and affinity with southern Sudan, was powerfully demonstrated by the role of the Ngok Dinka in Anya Nya, in the SPLM/A and in the Southern Sudanese government.

1126. Second, 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 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 century¹⁸⁷⁶ – *could not be within the Abyei Area*. It is inconceivable that the Abyei Protocol could have produced such a result, akin to defining France to exclude Paris or Austria to exclude Vienna.

1127. The conclusion that the Abyei Area cannot be limited to territory south of the Kiir/Bahr el Arab River is confirmed by the fact that Article 7 of the Abyei Annex provides that, if the ABC’s presentation of the ABC Report is delayed, then “the Presidency shall take necessary action to put the Abyei Area special status into effect *with Abyei town as its seat* subject to any adjustment or confirmation by the ABC final report.”¹⁸⁷⁷ It is scarcely plausible that Abyei town would have been selected as the default seat for the Abyei Area if it were not regarded as being within the Abyei Area at all.

1128. It is also significant that the “Abyei” Protocol, “Abyei” Annex, “Abyei” Boundaries Commission, “Abyei” Conflict and “Abyei” Area were all named as they were by virtue of Abyei town. It is Abyei town – the historic center of Ngok Dinka political, cultural and commercial affairs – that gives its name to the entire area. Again, the suggestion that the Abyei Area does not include Abyei or Abyei town itself is hardly serious.

1129. That is further confirmed by the fact that Article 1.1.1 of the Abyei Protocol provides that the Abyei Area is “a bridge between the north and the south, linking the people of Sudan.”¹⁸⁷⁸ If the Abyei Area were in fact limited to only regions south of the Kiir/Bahr el Arab River, it would not in fact constitute the historic “*bridge between the north and the south*,” as contemplated by the parties. Rather, on this view, the Abyei Area would amount to but one (southern) shore of the northern and southern territories of Sudan – but not the intended “bridge” or “link” between North and South. Only a definition of the Abyei Area which encompassed the entire Bahr river system, where the Ngok and the Misseriya encountered one another’s cattle herds during the dry seasons, is consistent with Article 1.1.1’s definition of the Abyei Area as a “*bridge*” between north and south.

1130. Third, 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

¹⁸⁷⁵ See above at paras. 111-113, 133-163 and 206-216.

¹⁸⁷⁶ See above at paras. 961-967.

¹⁸⁷⁷ Abyei Annex, Art. 7, **Appendix D**.

¹⁸⁷⁸ Abyei Protocol, Art. 1.1.1, **Appendix C**.

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.¹⁸⁷⁹

1131. 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. 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,¹⁸⁸⁰ 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.

1132. 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.

1133. Fourth, the foregoing absurdities are underscored by the character of the provincial Sudanese boundaries in 1905. As discussed above, particularly insofar as Bahr el Ghazal and Kordofan were concerned, those boundaries were in the process of development and remained indefinite, vague and approximate, as well as provisional and mistaken.¹⁸⁸¹ These administrative 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,”¹⁸⁸² based on little or no information of Sudan’s people and territories,¹⁸⁸³ while also being regarded as provisional and subject to repeated alterations.¹⁸⁸⁴

1134. 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 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 would result in denying the Ngok portions of their historic homelands based on what is at its highest a modern extrapolation of an uncertain approximation.

1135. Worse, it would do so based upon only a provisional approximation, which was fully recognized to be ad hoc and temporary by the Sudan Government administrators who referred to it. Invoking a boundary of this character, imposed by colonial administrators detached from the Sudanese people and territory, to divide the Ngok lands in two and deprive substantial numbers of the Ngok people of their right of self-determination would work a deep injustice that the parties could never have intended.

1136. It also bears repetition that the relevant Sudan Government records from 1905 referring to the transfer of the Ngok Dinka Chiefdoms proceeded on the basis that Sultan Rob

¹⁸⁷⁹ See above at paras. 1015-1063 and **Map 15** (Achaak Chiefdom, 1905) and **Map 17** (Alei Chiefdom, 1905) and **Map 19** (Bongo Chiefdom, 1905).

¹⁸⁸⁰ See above at paras. 111-113, 133-163 and 206-216.

¹⁸⁸¹ See above at paras. 315-343.

¹⁸⁸² See above at para. 356.

¹⁸⁸³ See above at paras. 331-336.

¹⁸⁸⁴ See above at paras. 355-357.

and all of the Ngok territories were being transferred from Bahr el Ghazal to Kordofan. Thus, as noted above, 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*...”¹⁸⁸⁵ 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.”¹⁸⁸⁶

1137. These records leave no doubt but that the Sudan Government administrators specifically involved in the transfer of the Ngok Dinka considered that the Ngok were being transferred from Bahr el Ghazal to Kordofan. Particularly given the uncertain, provisional character of the more general Bahr el Ghazal/Kordofan boundary, there is no basis for ignoring or contradicting this specific Sudan Government understanding and action. The 1905 records make it clear that the Sudan Government intended to, and understood its actions to, transfer the Ngok Dinka as a people into Kordofan from Bahr el Ghazal. It would be extraordinary, and unjustifiable, to disregard the Sudan Government’s intentions and understanding of its own action.

1138. This conclusion is made even clearer when one considers the mistaken character of the Kiir/Bahr el Arab River boundary in question. As discussed above,¹⁸⁸⁷ and in the expert report of Professor Daly,¹⁸⁸⁸ there can be no question but that the Sudan Government’s references to the Kiir/Bahr el Arab River in the early 20th century were errors. The Sudan Government references proceeded on the basis that the Bahr el Arab River was in fact the Ngol/Ragaba ez Zarga River – approximately thirty miles to the north.

1139. Thus, not only was the general Sudan Government boundary between Kordofan and Bahr el Ghazal treated as approximate and provisional, but it was also “wrong,” in the sense that it was not placed where the Sudan Government administrators thought it was located. Again, to invoke a boundary of this character as grounds for dividing the Ngok’s historic homelands would be both anomalous and arbitrary.

1140. Fifth, the witness testimony of the individuals involved in drafting the Abyei Protocol, including Article 1.1.2, precisely collaborates the foregoing interpretations. Thus:

a. Lieutenant General Lazaro Sumbeiywo (IGAD mediator): General Sumbeiywo testifies that “There was never any suggestion by either party that the language of Article 1(b) would divide the territory of the Ngok Dinka Chiefdoms as it existed historically in 1905 into different parts ... *Neither the SPLM/A nor the GoS could have imagined a situation where, for example, only some of the nine Ngok Dinka Chiefdoms or a part of their territory in 1905 would be included in the to be defined Abyei Area.*”¹⁸⁸⁹

b. Mr. Jeffrey Millington (Chargé d’Affairs at the U.S. Embassy in Khartoum, and the U.S. Department of State representative to IGAD): Mr. Millington explains “[i]t was my understanding, and it was certainly our intention when drafting ... *to include a definition of the area that would encompass all of the territory of the nine Ngok Dinka Chiefdoms in their entirety.*”¹⁸⁹⁰

¹⁸⁸⁵ Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13** (emphasis added).

¹⁸⁸⁶ Annual Report of the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13** (emphasis added).

¹⁸⁸⁷ See above at paras. 337-343.

¹⁸⁸⁸ Daly Expert Report, at pp. 32-33.

¹⁸⁸⁹ Witness Statement of Lt. Gen. Sumbeiywo, at p. 11, ¶53 (emphasis added).

¹⁸⁹⁰ Witness Statement of Jeffrey Millington, at p. 3, ¶9 (emphasis added).

c. Minister Deng Alor (Chief SPLM/A negotiator of the Abyei Protocol): Minister Deng Alor asserts that “[T]his definition achieved our objective of ensuring that any delimitation of the Abyei Area *would include the entire traditional “area of the nine Ngok Dinka Chiefdoms” as it existed in 1905* at the time of the transfer to Kordofan.”¹⁸⁹¹

d. Minister Deng Alor also states “[I] clearly understood the formulation of the words “transferred to Kordofan in 1905” *to mean the entire traditional territory of the Ngok Dinka as it existed in 1905, and not some sub-part of the territory.*”¹⁸⁹²

1141. 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.

1142. Finally, it was for these reasons that 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 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,”*¹⁸⁹³
or

b. *“boundaries that existed in 1905 between the Misseriya and Ngok Dinka,”*¹⁸⁹⁴
or

c. *“area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan from Bahr el-Ghazal province in 1905,”*¹⁸⁹⁵ or

d. *“area of the Nine Ngok Dinka Chiefdoms, which were transferred to Kordofan Province from Bahr El-Ghazal Province in 1905.”*¹⁸⁹⁶

1143. 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.

1144. 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

¹⁸⁹¹ Witness Statement of Minister Deng Alor Kuol, at p. 10, ¶54 (emphasis added).

¹⁸⁹² Witness Statement of Minister Deng Alor Kuol, at p. 10, ¶56 (emphasis added).

¹⁸⁹³ ABC Report, Part II, App. 4, at p. 41, **Exhibit-FE 15/1**.

¹⁸⁹⁴ ABC Report, Part II, App. 4, at p. 53, **Exhibit-FE 15/1**.

¹⁸⁹⁵ ABC Report, Part II, App. 4, at p. 79, **Exhibit-FE 15/1** (emphasis added).

¹⁸⁹⁶ ABC Report, Part II, App. 4, at p. 58, **Exhibit-FE 15/1** (emphasis added).

Protocol, and with General Sumbeiywo, who oversaw the negotiations of the CPA and the Abyei Protocol.¹⁸⁹⁷ 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.

1145. 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.¹⁸⁹⁸

1146. 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.

1147. In sum, for all of these reasons, the purposes of Article 1.1.2 and the other provisions of the Abyei Protocol require defining the Abyei Area to include all of the territory of the nine Ngok Dinka Chiefdoms in 1905. Indeed, it would contradict the most fundamental purposes of the Abyei Protocol (and CPA) 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.

c) Drafting History of Abyei Protocol

1148. The Commission's interpretation of Article 1.1.2's definition of the Abyei Area is also supported by the drafting history of the CPA, including particularly the Abyei Protocol and related documents.¹⁸⁹⁹ These materials show that the SPLM/A consistently insisted upon the political/cultural unity of the Ngok Dinka people and demanded a right to self-determination for those people and the Abyei Area.¹⁹⁰⁰ The drafting materials also show that the parties intended that the Abyei Area would encompass the territory of all nine of the Ngok Dinka chiefdoms as it actually existed in 1905, and not that this territory be artificially divided in two.¹⁹⁰¹

1149. The drafting materials also show that the parties had differing views about the historic scope of the Ngok Dinka territory, and in particular that the GoS was concerned that the

¹⁸⁹⁷ See above at paras. 453 and 458. Witness Statement of Lt. Gen. Sumbeiywo, at p. 1, ¶1.

¹⁸⁹⁸ See above 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.

¹⁸⁹⁹ Drafting materials are relevant as a supplementary aid, in cases of ambiguity. Vienna Convention on the Law of Treaties, Art. 32, **Exhibit-I.10**; see also P. Daillier & A. Pellet, *Droit International Public* ¶169 (7th ed. 2002) L.G.D.J. ("No interpretation of a treaty can be undertaken without due regard to the circumstances, and to other norms, when these [norms] also apply to the same social realities... This is formulated in Article 32 of the Vienna Convention, which includes amongst its "supplementary means of interpretation", the *travaux préparatoires* as well as the circumstances in which the treaty was concluded."), **Exhibit II.3**.

¹⁹⁰⁰ See below at paras. 1148-1183.

¹⁹⁰¹ See below at paras. 1150-1183.

Ngok had expanded to the north following 1905.¹⁹⁰² As a consequence, the parties agreed to define the Abyei Area by reference to the territory of all nine Ngok Dinka Chiefdoms – whatever that territory might have been – as it existed in 1905 when the Chiefdoms were transferred to Kordofan.

1150. The drafting of the Abyei Protocol took place against a lengthy history. As discussed above, the southern Sudanese have for more than three decades insisted on the political, cultural and ethnic identity of the Ngok Dinka in the Abyei Area.¹⁹⁰³ These aspirations were reflected in the 1972 Addis Ababa Accords, which provided generally that the boundaries between the Southern Provinces and the North would be as they stood on 1 January 1956 (the date of Sudanese independence), but also that any area within the northern Provinces which was decided by a referendum of the people in that area to be “*culturally and geographically a part of the Southern Complex*” could join the South.¹⁹⁰⁴

1151. In practice, this meant that the areas which had been part of the South at the beginning of 1956 but had *subsequently* been transferred (after 1956) to other (Northern) regions, were eligible to be retransferred at the commencement of the legislation implementing the Addis Ababa Agreement.¹⁹⁰⁵ In addition, and critically, certain other regions, including Abyei, which were culturally similar and geographically proximate to the South, were to hold referenda on whether their citizens wanted to remain in the North or join the South.¹⁹⁰⁶ The Addis Ababa Accords’ treatment of the Abyei issue thus rested on the unsurprising premise that the Ngok Dinka territory was to be treated as a whole, rather than divided into pieces, and was to be defined by reference to the cultural attributes of the populace and geographic proximity to the South.

1152. After implementation of the Addis Ababa Accords, the Ngok Dinka and other citizens of the Abyei region repeatedly requested the central GoS government to conduct the agreed-upon referendum. Numerous petitions were adopted in Abyei town (the center of the Ngok Dinka community and of the Abyei region’s administration) between 1973 and 1982, while the Southern People’s Regional Assembly passed a resolution in 1981 requesting the central government to arrange and carry out the referendum.¹⁹⁰⁷ Nonetheless, these requests were ignored by the GoS and no referendum was ever conducted.¹⁹⁰⁸

1153. In due course, the North and South commenced renewed hostilities in 1982, leading to another two decades of civil war. As discussed above, that conflict had particularly devastating consequences for the Abyei region and the Ngok Dinka.¹⁹⁰⁹

1154. The second Sudanese civil war was ultimately brought to a halt by the CPA in 2005.¹⁹¹⁰ The status and future of the Abyei Area was central to the resolution of the parties’ disputes and the negotiation of the peace accords.¹⁹¹¹

¹⁹⁰² See below at paras. 1165.

¹⁹⁰³ See above at paras. 403-407, 417-419 and 450-486.

¹⁹⁰⁴ The Draft Organic Law to Organize Regional Self-Government in the Southern Provinces of the Democratic Republic of the Sudan, Chapter II, Art. 3, at para iii (1972) (a core component of “The Addis Ababa Agreement”), **Exhibit-FE 5/6**.

¹⁹⁰⁵ D. Johnson, *The Root Causes Of Sudan’s Civil Wars* 44 (2003), **Exhibit-FE 11/6**.

¹⁹⁰⁶ D. Johnson, *The Root Causes Of Sudan’s Civil Wars* 44 (2003), **Exhibit-FE 11/6**.

¹⁹⁰⁷ Wakosen, *The Politics of Southern Self-Government 1972-1983* in M. Daly & A. Sikainga (eds.), *Civil War in the Sudan* 33 (1993), **Exhibit-FE 8/8**.

¹⁹⁰⁸ Wakosen, *The Politics of Southern Self-Government 1972-1983* 33 in M. Daly and A. Sikainga (eds.), *Civil War in the Sudan* 33 (1993), **Exhibit-FE 8/8**.

¹⁹⁰⁹ See above at paras. 431-444.

1155. The SPLM/A's emphasis on the self-determination of the Ngok Dinka in the Abyei region was consistent with the Addis Ababa Accords and with the position held by the Ngok and the southern Sudanese more generally for more than three decades. These aspirations of the Ngok for self-determination over their historic homelands in the Abyei region remained constant throughout the subsequent efforts by the parties to resolve their disagreements over the subject.

1156. During negotiations of the CPA over the course of 2002 to 2005, a number of papers were prepared by the parties specifically addressing the Abyei issue. All of these papers proceeded from the premise that the Ngok Dinka were a single, cohesive cultural unit and then emphasized the historical and cultural bonds between the Ngok Dinka and the South. The SPLM/A position was that, given their historical and cultural unity and affinities, the Ngok Dinka people were entitled to a vote, to determine where their collective future would lie.

1157. Thus, in October 2002, the "Abyei Peace Committee" submitted a position paper to IGAD stating that the Ngok Dinka of Abyei are "***indisputably part of the Dinka people of southern Sudan and present a natural extension of their shared land, tradition and culture.***"¹⁹¹²

1158. On 12 November 2002, the Bahr el Ghazal Region's Consultative Coordinating Committee wrote: "the ***Ngok-Dinka of Abyei is homogeneously, culturally, historically, ethnically, traditionally and socially part and parcel of the Muonjang (Dinka) nationality of the Sudan,*** and geographically located in the South Sudan."¹⁹¹³ The Bahr el Ghazal Region's Consultative Coordinating Committee paper noted that "The Ngok Dinka of Abyei area has been part and parcel of Mounjang (Dinka) nationality from time immemorial."¹⁹¹⁴ It noted further that "The 1972 Addis Ababa Agreement, which ended the 17 years war, acknowledged the existence of Abyei as part of South Sudan and provided a referendum for Ngok Dinka of Abyei for self-determination."¹⁹¹⁵

1159. On 10 January 2003, the Ngok Dinka of Abyei area wrote a letter to General Sumbeiywo, again emphasizing the same conclusion: "***Ngok Dinka of Abyei area are indisputably part of the Dinka people of southern Sudan and present a natural extension of their shared land, tradition and culture.***"¹⁹¹⁶

1160. In a letter dated 4 March 2003, the SPLM/A emphasized that "[t]he people of these [three conflict] areas strongly demand ***the right to determine their future through a***

¹⁹¹⁰ See above at para. 445.

¹⁹¹¹ See Witness Statement of Lt. Gen. Sumbeiywo, at p. 12, ¶62 ("It was clear that the issue of the Conflict Areas (and Abyei in particular) were absolutely central to any final settlement between the parties").

¹⁹¹² APC Paper, *The Popular Demand of Ngok-Dinka on Abyei Question*, dated 10 October 2002, at p. 4, **Exhibit-FE 9/18**.

¹⁹¹³ Bahr El Ghazal Region's Consultative and Coordinating Committee (CCC)'s Position Paper on the Abyei issue, dated 12 November 2002, at p. 2, **Exhibit-FE 10/2**, (emphasis added).

¹⁹¹⁴ Bahr El Ghazal Region's Consultative and Coordinating Committee (CCC)'s Position Paper on the Abyei issue, dated 12 November 2002, at p. 1, **Exhibit-FE 10/2**.

¹⁹¹⁵ Bahr El Ghazal Region's Consultative and Coordinating Committee (CCC)'s Position Paper on the Abyei issue, dated 12 November 2002, at p. 1, **Exhibit-FE 10/2**.

¹⁹¹⁶ Memorandum from Ngok-Dinka People of Abyei Area to General Sumbeiywo, *Ngok Dinka Speak: On Restoration of Abyei Area to southern Sudan*, dated 10 January 2003, at p. 3, **Exhibit-FE 10/9**.

*referendum*¹⁹¹⁷ and “have called for an Interim Period through which the *right of self-determination* shall be exercised after a given period agreed upon in this negotiations.”¹⁹¹⁸

1161. All of these papers submitted by the people of the Abyei area proceeded from the premise that the Ngok Dinka were a single cultural unit and then emphasized the historical and cultural bonds between the Ngok Dinka and the South. The SPLM/A position was that the Ngok Dinka were entitled to a vote, to determine where their future would lie – and in particular to a right of self-determination.

1162. In March 2003, Dr. Zachariah Bol, a Ngok Dinka representative, gave a presentation on the Mahdist revolution, the Anglo-Egyptian Rule and the period after independence. He described killings of Ngok Dinka in the 1970s, concluding that “the central Government was masterminding the destabilisation of the Ngok Dinka.”¹⁹¹⁹ Dr. Bol emphasized that the Ngok Dinka struggle did not indicate opposition to Sudanese unity, but instead a commitment to the right of self-determination.¹⁹²⁰

1163. The parties thereafter addressed the status of Abyei in October 2003 at the Naivasha talks, with the SPLM/A delegation focusing on the traditional, historic extent of the Ngok Dinka homelands.¹⁹²¹ At the meeting on 10 October 2003, the parties agreed that there was a need to define “what Abyei meant to the parties.”¹⁹²² The SPLM/A maintained that it understood Abyei “to mean the area as delimited by the 1905, 1952 up to 1983 borders [sic],”¹⁹²³ stating that the “*population of this area was exclusively Dinka Ngok*, with a spattering of other nationalities such as the Falata and Misseriya Arabs and others as traders.”¹⁹²⁴ The SPLM/A also submitted that “*up to 1905, Abyei was administratively and politically a part of the South*,”¹⁹²⁵ and that “[t]he Ngok Dinka believed that the national government favored the Misseriya Arabs and gave them state support and therefore power which the Misseriya then used to: alienate, discriminate, and displace the Ngok Dinka from their original lands.”¹⁹²⁶

1164. For its part, the GoS committee expressed concern that the Ngok Dinka had expanded their territories to the north during the 20th century, stating that “Abyei represented a larger area than the *traditional Abyei that only included the Ngok Dinka*.”¹⁹²⁷ The GoS’s expressed concern was that the “traditional Abyei,” which was predominately Ngok Dinka, and not

¹⁹¹⁷ Letter from N. Deng Nhial to Lt. Gen. Sumbeiywo, dated 4 March 2003, at p. 2, **Exhibit-FE 10/17** (emphasis added).

¹⁹¹⁸ Letter from N. Deng Nhial to Lt. Gen. Sumbeiywo, dated 4 March 2003, at p. 2, **Exhibit-FE 10/17** (emphasis added).

¹⁹¹⁹ Z. Bol Deng, *The Problem of the Ngok Dinka of Abyei*, dated 5 March 2003, at p. 4, **Exhibit-FE 10/18**.

¹⁹²⁰ Z. Bol Deng, *The Problem of the Ngok Dinka of Abyei*, dated 5 March 2003, at p. 6. (“This does not mean that the Ngok are against unity of the Sudan as is wrongly believed, for unity is not a prerogative of some people in the Sudan. It is for all of us to nourish. Peace and unity must come hand in hand with justice. Justice can only mean freedom to determine one’s own future. That is why self-determination is at the core of these negotiations. The people of Abyei must decide [to] which province they belong in the Sudan long before self determination is implemented in the Southern Sudan.”), **Exhibit-FE 10/18**.

¹⁹²¹ Witness Statement of Minister Deng Alor Kuol, at p. 6, ¶31.

¹⁹²² Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 1, **Exhibit-FE 10/38**. See also Witness Statement of Lt. Gen. Sumbeiywo, at p. 7, ¶35.

¹⁹²³ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 1, **Exhibit-FE 10/38**. See also Witness Statement of Lt. Gen. Sumbeiywo, at p. 6, ¶31.

¹⁹²⁴ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 1, **Exhibit-FE 10/38** (emphasis added).

¹⁹²⁵ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 2, **Exhibit-FE 10/38**.

¹⁹²⁶ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 2, **Exhibit-FE 10/38**.

¹⁹²⁷ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 2, **Exhibit-FE 10/38** (emphasis added). See also Statement of Lt. Gen. Sumbeiywo, at p. 7, ¶32; Witness Statement of Minister Deng Alor Kuol, at p. 6, ¶¶33-34.

alleged modern expansions over the past century, be included in the definition of the Abyei Area.

1165. At the October 2003 Naivasha meetings, the SPLM/A suggested that the Abyei region be transferred to the South without any referendum, while guaranteeing the Misseriya a “right of access to pastures and water in Abyei.”¹⁹²⁸ The GoS opposed this, stating its concern that “executive restoration of Abyei to be part of the south was for the moment unfeasible due to the fact that *Abyei is now larger than it used to be.*”¹⁹²⁹ The GoS position at Naivasha reflected its asserted belief that the Ngok Dinka had expanded the historic scope of their homelands after 1905, by moving north into areas previously inhabited by the Misseriya and others.

1166. By the end of the initial October 2003 meetings, the parties had nonetheless reached a measure of agreement on the Abyei issues. Recognizing that the parties had different views about the historical scope of the Ngok Dinka territories in the Abyei region, they agreed that “indeed *Abyei had geographical (to be shown by maps still to be provided) and demographic delimitation* and this delimitation could be subject to wider confirmation and consultation by the people in the area.”¹⁹³⁰ Despite this, the further definition of the Abyei area, and whether it would remain in Western Kordofan or be annexed to Bahr el Ghazal remained in the “disagreed category.”¹⁹³¹

1167. On 21 October 2003, the SPLM/A prepared a draft agreement which proposed that Abyei be annexed to Bahr el Ghazal. The SPLM/A draft defined Abyei as follows:

“the term Abyei shall be understood to mean *the Dinka Ngok Area, which was administratively annexed to Kordofan in 1905.* It is also the Area referred to in the 1972 Addis Ababa Agreement and which was administered between 1974 and 1977 from the President’s Office.”¹⁹³²

The SPLM/A draft rested on the premise that the Abyei Area constituted the entire “Dinka Ngok Area,” which the SPLM/A considered to have been annexed to Kordofan in 1905 and subsequently referred to in the Addis Ababa Agreement. (The SPLM/A position was precisely consistent with the Sudan Government’s records of the Ngok Dinka transfer in 1905, which (as discussed above) expressly provided that “Sultan Rob” and his people had been located in Bahr el Ghazal and were then transferred to Kordofan.¹⁹³³)

1168. As the witness statement of Minister Deng Alor Kuol, the SPLM/A lead negotiator in the CPA negotiations in respect of Abyei makes clear, “the reference to ‘annexed to Kordofan in 1905’ was inserted to identify the point in time when it was clarified that the entirety of the nine Ngok Dinka chiefdoms were placed under the colonial administrative

¹⁹²⁸ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 3, **Exhibit-FE 10/38**.

¹⁹²⁹ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 3, **Exhibit-FE 10/38** (emphasis added). See also Witness Statement of Lt. Gen. Sumbeiywo, p. 7, ¶34. The GoS was nonetheless willing to accept any administrative status for Abyei, including transferring it to Bahr el Ghazal, as long as Sudan remained a single country. Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 3, **Exhibit-FE 10/38**.

¹⁹³⁰ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 3, **Exhibit-FE 10/38** (emphasis added). See also Witness Statement of Lt. Gen. Sumbeiywo, p. 7, ¶35.

¹⁹³¹ The Three Conflict Areas: Points of Agreement and Disagreement, dated 20 October 2003, at p. 2, **Exhibit-FE 10/39**.

¹⁹³² Draft Agreement between the Government of Sudan (GoS) and The Sudan People’s Liberation Movement/Army (SPLM/SPLA) on the Three Areas of Abyei, The Nuba Mountains and Southern Blue Nile (FUNJ Region), dated 21 October 2003, at p. 1, **Exhibit-FE 10/40** (emphasis added).

¹⁹³³ See above at paras. 346-357. Witness Statement of Lt. Gen. Sumbeiywo, at p. 8, ¶¶36-37.

jurisdiction of the northern state of Kordofan. This was a definable point in time when the Ngok Dinka lands were politically unified, so it was useful from that perspective.¹⁹³⁴

1169. A month later, on 28 November 2003, the Ngok Dinka submitted another paper to IGAD addressing the definition of “the Abyei Area.”¹⁹³⁵ The paper emphasized that Abyei Area consisted of the territory inhabited traditionally by the nine Ngok chiefdoms:

“By Abyei area we mean: *The land inhabited by the Ngok Dinka under successive chieftanship of Sulton Arob Biong, Chief Kuol Arob, Chief Deng Majok, Chief Abdaella Deng Majok, and currently under three amirs (Kuol Deng Majok, Makwac Abiem Bagat, Nyol Pagwot Deng), which is composed of nine subtribes, namely (in alphabetical order):*... 1. Abiyor 2. Achaak 3. Achueng 4. Alei 5. Anyiel 6. Bango 7. Diil 8. Manyuar 9. Mareng ... Sharing borders with the Ruweng Dinka to the east, the Missiriya Homr to the north, Abiem Dinka to the West and Twic Dinka to the south.”¹⁹³⁶

1170. The Ngok 28 November paper also set out in some detail the historical details of how the Ngok Dinka came to be governed by Kordofan province.¹⁹³⁷ In particular, the paper noted the “known historical fact that Abyei area became part of Kordofan Province as a result of a colonial administrative decision in 1905,”¹⁹³⁸ specifically citing the 1905 Sudan Intelligence Report No. 128 (discussed above¹⁹³⁹) and the Annual Reports of Kordofan and Bahr el Ghazal in 1905 (also discussed above¹⁹⁴⁰).

1171. The 28 November paper made clear the Ngok Dinka understanding that the Sudan Government’s 1905 transfer decision (termed an “arbitrary colonial administrative decision”¹⁹⁴¹) resulted in the inclusion of the *entire* Ngok Dinka people, and the *entire* area of the Ngok Dinka, within Kordofan, and not merely some portion of the Ngok Dinka and their territories. Thus, the paper concluded

“*We the Ngok Dinka* are historically, ethnically, culturally, geographically and politically part and parcel of the Southern complex. This reality was unfortunately distorted by an arbitrary decision of colonial administration in 1905.”¹⁹⁴²

The paper did not take the view that *some* of “we, the Ngok Dinka” were arbitrarily included in Kordofan in 1905, but rather – consistent with the historical Sudan Government records discussed above – that *all* of the Ngok Dinka were transferred to Kordofan from the South.

1172. On 24 January 2004, the GoS submitted a document titled “GOS Elaborated Position on Abyei” to the IGAD.¹⁹⁴³ The GoS claimed Abyei had been part of Kordofan since the

¹⁹³⁴ Witness Statement of Minister Deng Alor Kuol, at p. 7, ¶41.

¹⁹³⁵ Position of the Ngok Dinka (Abyei Area) Paper, dated 28 November 2003, **Exhibit-FE 11/1**. See also Witness Statement of Minister Deng Alor Kuol, at pp. 7-8, ¶44; Witness Statement of Lt. Gen. Sumbeiywo, at p. 8, ¶38.

¹⁹³⁶ Position of the Ngok Dinka (Abyei Area) Paper, dated 28 November 2003, at p. 1, **Exhibit-FE 11/1** (emphasis added).

¹⁹³⁷ Position of the Ngok Dinka (Abyei Area) Paper, dated 28 November 2003 at pp. 2-3, **Exhibit-FE 11/1**.

¹⁹³⁸ Position of the Ngok Dinka (Abyei Area) Paper dated 28 November 2003, at p. 2, **Exhibit-FE 11/1**.

¹⁹³⁹ See above at para. 351, citing Sudan Intelligence Report, No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8**.

¹⁹⁴⁰ See above at paras. 352-353, citing Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, **Exhibit-FE 2/13**; Annual Report of the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, **Exhibit-FE 2/13**.

¹⁹⁴¹ Position of the Ngok Dinka (Abyei Area) Paper, dated 28 November 2003, at p. 2, **Exhibit-FE 11/1**.

¹⁹⁴² Position of the Ngok Dinka (Abyei Area) Paper, dated 28 November 2003 at p. 5, **Exhibit-FE 11/1** (emphasis added).

introduction of modern boundaries in Sudan “*regardless of historical reasons and motivations*.”¹⁹⁴⁴ The GoS maintained that “*the Machakos Protocol and other agreed texts had unequivocally affirmed the boundaries of Southern Sudan as being those of the three Provinces as they stood in 1-1-1956*.”¹⁹⁴⁵ The GoS did not put forward any position on the scope or definition of the Abyei Area, maintaining its stance that the 1956 Sudanese boundaries were non-negotiable.

1173. One month later, in February 2004, the “Abyei Civil Society Organizations” released a paper entitled “Abyei Area: The Standard Test for Commitment to Peace in the Sudan.” The paper again defined the territory by reference to the homelands of all nine Ngok Dinka chiefdoms: “**Abyei area** is the homeland of **Ngok-Dinka** people comprising **nine** tribal sections of **Abior, Achak, Achueng, Alei, Anyil, Bongo, Diil, Mareng and Man-nyuar**.”¹⁹⁴⁶

1174. As with all earlier SPLM/A and Ngok submissions, the paper rested on the premise that the Abyei Area was the entire Ngok Dinka homeland (“homeland of **Ngok-Dinka** people comprising **nine** tribal sections”), and not just one part of it or just a few of the sub-tribes’ territories. The paper also expressed the SPLM/A’s historical view that the Ngok had originally been administered from Bahr el Ghazal Province and that they had been subsequently moved administratively to Kordofan: “The British colonial administrators established their contact with local community and leaders of Ngok Dinka since the start of the twentieth century *while Abyei area was still be administered as part of Bahr el Ghazal Province in southern Sudan*”¹⁹⁴⁷ and “the Dinka areas that were moved administratively *were initially part of Bahr el Ghazal Province*.”¹⁹⁴⁸

1175. On 15 March 2004, the GoS provided the IGAD with a document entitled “Draft Framework for Resolution of Outstanding Issues.”¹⁹⁴⁹ The GoS noted that finalizing a comprehensive peace agreement required “resolving the outstanding issues in power sharing *and settling the Abyei question*.”¹⁹⁵⁰ The GoS further noted that the “Abyei area shall be accorded a special administrative status [with] co-existence and dual linkages between the North and the South,” and that it shall be administered by an executive council.¹⁹⁵¹ The GoS also proposed that “if Southern Sudan opts for secession, the residents of Abyei area shall have dual nationality in both of the two states.”¹⁹⁵² Once again, the GoS refused to put forward a definition of the Abyei Area, instead maintaining its insistence that Sudan’s 1956 boundaries were inviolate.

1176. In March 2004, U.S. Senator Danforth met with the parties to present a U.S. proposal entitled “Principles on Agreement on Abyei.”¹⁹⁵³ Tracking the previous SPLM/A draft

¹⁹⁴³ Witness Statement of Lt. Gen. Sumbeiywo, p. 9, ¶40; Witness Statement of Minister Deng Alor Kuol, p. 8, ¶46.

¹⁹⁴⁴ GOS Elaborated Position on Abyei, dated 24 January 2004, at p. 1, **Exhibit-FE 11/10**.

¹⁹⁴⁵ GOS Elaborated Position on Abyei, dated 24 January 2004, at p. 1, **Exhibit-FE 11/10**.

¹⁹⁴⁶ *Abyei Area: The Standard Test For Commitment to Peace in the Sudan* by Abyei Civil Society Organizations dated February 2004, at p. 2, **Exhibit-FE 12/2** (emphasis added).

¹⁹⁴⁷ *Abyei Area: The Standard Test For Commitment to Peace in the Sudan* by Abyei Civil Society Organizations, dated February 2004, at p. 4, **Exhibit-FE 12/2** (emphasis added).

¹⁹⁴⁸ *Abyei Area: The Standard Test For Commitment to Peace in the Sudan* by Abyei Civil Society Organizations, dated February 2004, at p. 4, **Exhibit-FE 12/2** (emphasis added).

¹⁹⁴⁹ Witness Statement of Lt. Gen. Sumbeiywo, at p. 10, ¶45.

¹⁹⁵⁰ GoS, Draft Framework for Resolution of Outstanding Issues, at pp. 3, **Exhibit-FE 12/3**.

¹⁹⁵¹ GoS, Draft Framework for Resolution of Outstanding Issues, at p. 14, **Exhibit-FE 12/3**.

¹⁹⁵² GoS, Draft Framework for Resolution of Outstanding Issues, at p. 15, **Exhibit-FE 12/3**.

¹⁹⁵³ *Principles of Agreement on Abyei* (undated) presented on 19 March 2004, **Exhibit-FE 12/4**. See also Witness Statement of Lt. Gen. Sumbeiywo, at p. 10, ¶46. Witness Statement of Minister Deng Alor Kuol, at p. 9, ¶52.

agreements, the Danforth proposal defined the Abyei Area as the “area of the nine Ngoc [sic] Dinka Chiefdoms transferred to Kordofan in 1905.”¹⁹⁵⁴

1177. In adopting this formulation, the U.S. draft followed the SPLM/A proposals and, in particular, at Article I(b), the SPLM/A’s reference to the Sudan Government’s 1905 transfer of the Ngok Dinka chiefdoms to Kordofan. The Danforth Proposal described the special administrative status that would be accorded to Abyei upon the signing of the peace agreement. The Danforth proposal also provided for a referendum to be held in the Abyei Area to determine whether the residents of the Area wished to join the South or remain a special administrative unit within the North.¹⁹⁵⁵

1178. On 19 March 2004, the SPLM/A responded to the U.S. proposal on Abyei, stating that the document was an acceptable basis for breaking the impasse in negotiations. The SPLM/A then generated a Draft Agreement (dated 21 March 2004) which again defined the Abyei Area as

“the land owned and inhabited by the nine sections of the Ngok Dinka (Abyor, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mannyuar, Mareng) and which was administratively carved out of Bahr el Ghazal Province and annexed to Kordofan Province in 1905 for security and administrative reasons. It is the Area referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President’s Office during the currency of the said Agreement.”¹⁹⁵⁶

1179. The 21 March Draft Agreement repeated the SPLM/A’s understanding that the 1905 transfer of the Ngok Dinka territory to Kordofan encompassed all of “the land” owned and inhabited by the “nine sections of the Ngok Dinka (Abyor, Achaak, Achueng, Alei, Anyiel, Bongo, Diil, Mannyuar, Mareng),” constituting the nine Ngok Dinka chiefdoms. The Draft Agreement also repeated the SPLM/A’s understanding, based on the Condominium’s 1905 transfer instruments, that the territory of the nine Ngok Dinka sections had previously (prior to 1905) been part of Bahr el Ghazal Province, and was annexed to Kordofan in 1905.

1180. The recitation of the proposed U.S. definition of the Abyei Area in the 21 March Draft Agreement consisted of two elements: (a) a definition based on “the land owned and inhabited by the nine Ngok Dinka sections of Abyor, Alei, Achaak, Anyiel, Achueng, Bongo, Diil, Mannyuar, Mareng”; and (b) the parties’ historical understanding that the Ngok Dinka historic homeland had been annexed to Kordofan in 1905 (and then referred to again in the Addis Ababa Agreement and administered by the Sudanese President’s Office between 1974 and 1978). Importantly, there was no suggestion in the text of the Draft Agreement that only a portion of “*the land owned and inhabited by the nine Ngok Dinka sections*” constituted the Abyei Area. Rather, the draft proceeded on the basis that all of the Ngok Dinka territory had been the subject of the Sudan Government’s transfer decision in 1905 (which, as discussed above, was correct¹⁹⁵⁷) and that the relevant issue was identifying what the scope of the Ngok Dinka territory was in 1905.

¹⁹⁵⁴ *Principles of Agreement on Abyei* (undated) presented on 19 March 2004, at p. 1, **Exhibit-FE 12/4**.

¹⁹⁵⁵ *Principle of Agreement of Abyei* (undated) presented on 19 March 2004, at pp. 1-2, **Exhibit-FE 12/4**.

¹⁹⁵⁶ Draft Agreement Between the Government of the Sudan (GoS) and the Sudan People’s Liberation Movement on The Outstanding Issues of the Three Conflict Areas and Power Sharing, dated 21 March 2004, p. 3, **Exhibit-FE 12/7a**. See also Witness Statement of Lt. Gen. Sumbeiywo, at pp. 11-12, ¶58.

¹⁹⁵⁷ See above at paras. 1115-1121.

1181. That is confirmed by the provisions in the 21 March Draft Agreement that the Abyei Area is also the territory “referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President’s Office during the currency of the said Agreement.” As with the reference to the 1905 transfer decision, these statements provided the SPLM/A’s historical understanding of the Addis Ababa Accords and the President’s administration, but were not meant to limit or truncate the historical territory occupied by the Ngok Dinka.

1182. The 21 March Draft Agreement was followed by drafts from the parties of what would become the Abyei Protocol.¹⁹⁵⁸ The first two drafts defined Abyei as: “the land owned and inhabited by the nine Ngok Dinka sections of Abyor, Alei, Achaak, Anyiel, Achueng, Bongo, Diil, Mannyuar, Mareng. It is the Area referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President’s office.”¹⁹⁵⁹ The third draft defined Abyei as “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. It is the Area referred to in the 1972 Addis Ababa Agreement and which was administered from 1974 to 1978 under the President’s Office.”¹⁹⁶⁰ The 20 May and 21 May 2004 joint drafts tracked the U.S. proposal exactly and defined the Abyei Area as the “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”¹⁹⁶¹

1183. With this negotiating history, the parties agreed to Article 1 of the Abyei Protocol. As noted above, the Abyei Protocol set out three general principles in Article 1.1: (a) “*Abyei is a bridge between the north and south*, linking the people of Sudan”; (b) the territory of Abyei “is defined as *the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905*”; and (c) the “Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.”¹⁹⁶²

1184. The final text of the Abyei Protocol, and particularly Article 1.1.2, was tailored to give effect to the long-standing unity of the Ngok Dinka people (politically, culturally and commercially) and the Ngok Dinka aspiration as a people for self-determination. The text of Article 1.1.2 referred specifically to “the area” (not some of the area) of all “nine Ngok Dinka chiefdoms” (not merely some of the chiefdoms), which formed the traditional homelands of the Ngok Dinka people. The text did not allow for the possibility that some of the nine Ngok Dinka chiefdoms (whether the three chiefdoms of the Alei, Achaak and Bongo or otherwise) would not be included at all in the Abyei Area, but instead contemplates that the territory of all nine Chiefdoms were included within, and comprised, the Area.

¹⁹⁵⁸ Witness Statement of Minister Deng Alor Kuol, p. 11, ¶¶63 and 64.

¹⁹⁵⁹ Draft 1 Agreement between The Government of Sudan (GoS) and the Sudan People’s Liberation Movement/Army on The Resolution of Abyei Conflict, Based on the USA Principles of Agreement on Abyei dated March 2004 (Art. 2.1). **Exhibit-FE 12/8**; Draft Agreement Between The Government of Sudan (GoS) and The Sudan People’s Liberation Movement/Army on the Resolution of Abyei Conflict, Based on the USA Principles of Agreement on Abyei, dated May 2004 (Article 2.1), **Exhibit-FE 12/9**.

¹⁹⁶⁰ Draft Agreement Between The Government of Sudan (GoS) and The Sudan People’s Liberation Movement/Army on Abyei Area, (Art. 1.1) **Exhibit-FE 12/10**.

¹⁹⁶¹ Draft Protocol between the Government of the Sudan and the Sudan People’s Liberation Movement/Army on the Resolution of the Abyei Conflict, dated 20 May 2004, (Art. 1.1.2) **Exhibit-FE 12/11**; Joint Draft Protocol Between the Government of the Sudan and the Sudan People’s Liberation Movement/Army on the Resolution of the Abyei Conflict, dated 20 May 2004, (Art. 1.1.2) **Exhibit-FE 12/12**; Joint Draft Protocol Between the Government of the Sudan and the Sudan People’s Liberation Movement/Army on the Resolution of the Abyei Conflict, dated 21 May 2004, (Art. 1.1.2) **Exhibit-FE 12/13**; Joint Draft Protocol between the Government of the Sudan and the Sudan People’s Liberation Movement/Army on the Resolution of the Abyei Conflict, dated 21 May 2004, (Art. 1.1.2) **Exhibit-FE 12/14**.

¹⁹⁶² Abyei Protocol, Art. 1.1, **Appendix C** (emphasis added).

1185. The text of Article 1.1.2 underscored the repeatedly stated objectives of the SPLM/A and the Ngok Dinka people during the negotiations of the Abyei Protocol and CPA. Throughout these negotiations, the SPLM/A emphasized the cultural unity and cohesion of the Ngok Dinka people and the Ngok aspiration for self-determination. Absolutely fundamental to both of these objectives was that the Ngok be enabled – as a whole people – to exercise the right of self-determination.¹⁹⁶³ Not once was it suggested, nor could it have been conceivable, that only a portion of the Ngok Dinka, or only some of the nine Ngok Dinka Chiefdoms, be entitled to rights of self-determination.

1186. At the same time, the text of Article 1.1.2 also referred to the territory of the nine Ngok Dinka Chiefdoms as it existed in 1905, when those chiefdoms were transferred to Kordofan administration – thus ensuring that any extension of Ngok Dinka lands in subsequent years would not prejudice the Misseriya or the North. This directly addressed the only concern that the GoS had expressed during the parties’ negotiations – namely that the Abyei Area not be expanded beyond its historic limits to include what the GoS considered to be Ngok Dinka movements north after 1905.¹⁹⁶⁴

1187. Moreover, by referring to the nine Ngok Dinka chiefdoms that were transferred to Kordofan in 1905, the parties’ definition excluded arguments that other Ngok Dinka tribes in Sudan should be taken into account. In particular, the reference to these nine Ngok Chiefdoms excluded from the Abyei Area the territories of the so-called “Eastern Ngok Dinka” (divided into eleven sections living near the Sobat River in the Upper Nile).¹⁹⁶⁵ Thus, the reference to the nine Ngok Dinka Chiefdoms transferred to Kordofan was not only an inclusive, but also an exclusive, description.

1188. It is therefore no surprise that the principal participants in the drafting and negotiation of Article 1.1.2’s definition of the Abyei Area agree as to its meaning. As discussed above, Lieutenant General Lazaro Sumbeiywo (the lead IGAD mediator), Mr. Jeffrey Millington (the Chargé d’Affairs at the U.S. Embassy in Khartoum, and the U.S. Department of State representative to IGAD) and Minister Deng Alor Kuol (the lead SPLM/A negotiator) all agree that Article 1.1.2 was never intended to divide the historic territory of the Ngok Dinka, as it stood in 1905, into pieces.¹⁹⁶⁶

1189. There is nothing in the drafting history of the Abyei Protocol that suggests in any way that the parties intended to divide the historical homelands of the nine Ngok Dinka tribes, as they stood in 1905, into pieces based upon Sudanese provincial boundaries. The parties instead defined the Abyei Area by reference to the Ngok Dinka historic homeland, as it existed in 1905, but not taking into account any subsequent expansion. The parties also had the repeatedly-stated historic understanding that the Sudan Government’s transfer decision in 1905 affected all of the Ngok Dinka territory, and there is no evidence that they for a moment intended to truncate the Ngok Dinka traditional homeland by reference to the provincial Sudanese boundaries in 1905.

¹⁹⁶³ See Witness Statement of Minister Deng Alor Kuol, at p. 12, ¶65. (“The fundamental purpose of Article 1.1.2 was clear to us at the SPLM/A. It was designed to ensure that all Ngok Dinka who were living in the territory of the nine Ngok Dinka Chiefdoms as they existed in 1905 were given the right to self-determination in a referendum.”).

¹⁹⁶⁴ Minutes of IGAD Peace Talks, Naivasha, dated 10 October 2003, at p. 3 (“executive restoration of Abyei to be part of the south was for the moment unfeasible due to the fact that *Abyei is now larger than it used to be.*”), **Exhibit-FE 10/38** (emphasis added).

¹⁹⁶⁵ See above at paras. 116 and 150.

¹⁹⁶⁶ See above at paras. 1140-1141. See Witness Statement of Lt. Gen. Lazaro Sumbeiywo, at p. 11, ¶53; Witness Statement of Mr. Jeffrey Millington, at p. 3, ¶9; Witness Statement of Minister Deng Alor, at p. 10, ¶¶54 and 56.

3. 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

1190. As noted above, 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.”¹⁹⁶⁷

1191. As discussed above, 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.¹⁹⁶⁸ 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.”¹⁹⁶⁹ The ABC therefore concluded that the Abyei Area’s northern boundary fell midway between latitudes 10°10'N and 10°35'N.¹⁹⁷⁰

1192. In contrast, the record before this Tribunal contains a more detailed evidentiary showing that the Ngok Dinka occupied and used the territory extending north to latitude 10°35'N. That evidentiary showing is outlined above and 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.¹⁹⁷¹ In particular, the evidence shows that the Ngok Dinka maintained permanent settlements in this area, using the land for their traditional lifestyle, and that the area was regarded by the Ngok Dinka, Sudan Government and other neighboring tribes as Ngok Dinka territory.¹⁹⁷²

1193. The area of the nine Ngok Dinka Chiefdoms in 1905 included all of the lands which the Ngok people occupied and used. As discussed above, it is clear that those lands were, in some instances, also used by other tribes (including particularly the Misseriya),¹⁹⁷³ but that in no way alters the fact that this area was Ngok Dinka territory. As discussed above, 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.¹⁹⁷⁴ 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.¹⁹⁷⁵

1194. There is no historical evidence at all that the Misseriya’s seasonal use of the Ngok Dinka territory 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

¹⁹⁶⁷ Abyei Arbitration Agreement, Art. 2(c), **Appendix A**.

¹⁹⁶⁸ *See above* at para. 528(i).

¹⁹⁶⁹ ABC Report, Part II, App. 4, at p. 44, **Exhibit-FE 15/1**.

¹⁹⁷⁰ ABC Report, Part I, at pp. 21-22, **Appendix B**.

¹⁹⁷¹ *See above* at Section VIII(1).

¹⁹⁷² *See above* at Section VIII(1).

¹⁹⁷³ *See above* at paras. 238-248 and 968-977.

¹⁹⁷⁴ *See above* at paras. 168-216.

¹⁹⁷⁵ *See above* at paras. 217-227 and 233-254.

south all participating in a regional system of southern cattle-herding migrations in the dry season.¹⁹⁷⁶

1195. These seasonal migratory patterns were fully 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.”¹⁹⁷⁷ It was through this mechanism, of guaranteed rights of access and usage, that questions of the Misseriya’s (and others’) 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.

1196. As a consequence, the definition of the Abyei Area encompasses all of the Ngok Dinka areas, regardless whether the use of those areas was shared 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.

1197. In sum, if the Tribunal reaches 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 of the goz (at latitude 10°35’N).

B. Alternatively, an Excess of Mandate by the ABC Experts Does Not Preclude this Tribunal from Relying upon the Commission’s Determinations

1198. Alternatively, and again assuming solely for the sake of argument that the ABC Experts exceeded their mandate, it would be appropriate for the Tribunal to rely upon the Commission’s determinations concerning the scope of the Abyei Area. The ABC was an expert body, which performed extensive and careful work, in the manner (rightly) deemed useful by the parties, and which rendered a thoughtfully reasoned Report. Absent extraordinary circumstances, that Report should generally guide this Tribunal’s conclusions.

1199. The Commission heard very extensive oral testimony from the residents of the Abyei Area (including 104 witnesses in 14 public meetings).¹⁹⁷⁸ Equally important, the ABC’s five experts spent an extended amount of time with the 10 party-appointed members of the Commission, many of whom were involved in the negotiation of the CPA and the Abyei Protocol. On the SPLM/A side, Minister Deng Alor had been the lead negotiator of the Abyei Protocol. On the GoS side, both Ambassador Dirdeiry and Mr. Assalih Solaha had been intimately involved in the Abyei Protocol negotiations.¹⁹⁷⁹

¹⁹⁷⁶ See above at paras. 202-203. The regional system of cattle migrations are depicted at: **Map 25** (Abyei Area: Grazing Patterns in the Wet Season) and **Map 26** (Abyei Area: Grazing Patterns in the Dry Season).

¹⁹⁷⁷ Abyei Protocol, Art. 1.1.3, **Appendix C**.

¹⁹⁷⁸ See above at paras. 512. See also Witness Statement of Minister Deng Alor Kuol, at p. 19, ¶117; Witness Statement of James Lual Deng, at p. 11, ¶63.

¹⁹⁷⁹ See Witness Statement of Minister Deng Alor Kuol, at p. 11, ¶62 (“From the end of March 2004 to 26 May 2004, Minister Paul Mayom and I joined Ambassador Dirdeiry and Mr. Assalih Solaha in negotiating and drafting the document which became the Abyei Protocol.”).

1200. The Commission's unique access to evidentiary materials was married with the equally unique expertise of the ABC Experts. As discussed above, the five ABC Experts brought a combined 150 years of expertise in African and Sudanese history, ethnography, law and other disciplines to bear.¹⁹⁸⁰ Together, the ABC's evidentiary access and technical expertise give its finding a unique and highly-important value.

1201. In these circumstances, there would be very strong reason for the Tribunal to rely significantly upon the Commission's findings, notwithstanding a conclusion that the ABC Experts exceeded their mandate. Of course, the nature and extent of the Tribunal's reliance could vary, depending on the nature of the ABC Experts' purported excess of mandate. As a consequence, the SPLM/A reserves further comment on the issue pending the GoS's articulation of its putative excess of mandate claim.

IX. REQUEST FOR RELIEF

1202. 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 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.

¹⁹⁸⁰ See above at paras. 10 and 604.

Respectfully submitted this 18th day of December 2008



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