

**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  
REJOINDER**

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## I. SUMMARY OF ARGUMENT

1. The Government's Reply Memorial is a remarkable submission. Without acknowledgment or explanation, the Government has attempted to recharacterize the bulk of its "excess of mandate" claims, while also fundamentally rewriting its factual and historical case. Those actions reveal the implausibility of the Government's previous claims, by hastily substituting new contentions that are even less plausible.

2. With regard to its excess of mandate claims, the Government's Reply Memorial attempts to recharacterize its "mandatory criteria" and "substantive mandate" complaints as "*ultra petita*" and "*infra petita*" objections – while doing nothing to address the continuing jurisdictional and substantive defects in those claims. With regard to its factual claims, the Government abandons its allegations that the Ngok Dinka were located entirely below the Kiir/Bahr el Arab in 1905 – while adducing evidence that acknowledges the existence of Ngok Dinka villages to the north of the Kiir/Bahr el Arab, widely scattered throughout the Bahr, including at the location of present day Abyei town.

3. The Government's concessions are long overdue. At the same time, the Government's new claims are even less tenable than those which it has abandoned. As discussed in this Rejoinder, when the Government's objections to the ABC Report are considered in light of its latest concessions, there can be no conceivable excuse for the Government's continued refusal to give the ABC Report "immediate effect." The Government should at last honor that promise, so as to enable the Ngok Dinka to return to their historic homeland and vote upon their future.

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

4. The GoS Reply Memorial's discussion of the Government's purported "excess of mandate" claims is striking. Remarkably, the Government devotes only very limited attention to addressing its excess of mandate claims – spending less than 32 pages of its 199 page submission on the issue. Even more remarkably, the Government's discussion simultaneously abandons significant elements of its earlier excess of mandate analysis, while also purporting to recharacterize other major elements of its claims.

5. The Government's last minute effort to rewrite its excess of mandate claims is a continuation of its initial tactic of advancing a scatter-shot collection of eleven separate challenges to the ABC Report. Thus, at last count, the Government appears to be advancing twelve different complaints, including four alleged violations of "mandatory criteria," four supposed breaches of "substantive mandate" and four (previously three) purported procedural violations – many of which the Government's Reply Memorial attempts to recategorize in entirely new ways.

6. The Government's tactics are transparently aimed at creating the maximum amount of confusion and delay, to permit the GoS to keep misappropriating the oil and other resources of the Abyei Area for as long as the international community will tolerate it. As to their substance, the Government's latest iteration of its case continues to be entirely misconceived. As detailed in Part II below, all of the complaints on the GoS's most recent laundry list of objections to the ABC Report are spurious.

7. There are at least three independent reasons for rejecting the Government's attacks of the ABC Report: (a) the Government's purported objections are inadmissible because they do not constitute excesses of mandate within the meaning of Article 2 of the Abyei Arbitration Agreement; (b) even if the Government's complaints were admissible, none of those objections has any merit; and (c) in any event, the Government has waived or is estopped from asserting its objections. Any one of these grounds is a complete and independently sufficient basis for rejecting the Government's purported complaints.

1. The Government's Reply Memorial Attempts Improperly to Expand the Grounds on which the ABC Experts' Report May Be Challenged

8. First, the Government continues its effort improperly to expand the grounds on which it may challenge the ABC Report in these proceedings. The sole basis under Article 2 of the Arbitration Agreement for the Government to challenge the ABC Experts' decision is an "excess of mandate." If, **and only if**, an excess of mandate by the ABC Experts is found, then, **and only then**, is it necessary or permissible to proceed to reconsider the definition of the boundaries of the Abyei Area.

9. The Government's Reply Memorial continues studiously to ignore the parties' agreed definition of an "excess of mandate," set forth in Article 2 of the Arbitration Agreement, and instead undertakes a wholesale recharacterization of the Government's purported excess of mandate claims. As discussed in Part II(A) below, these efforts are hopeless: whatever labels the Government chooses to attach to its complaints, the actual objections it raises to the ABC Report do not constitute "excesses of mandate" within the meaning of the Abyei Arbitration Agreement.

10. Article 2(a) of the Arbitration Agreement provides that the **only** basis for challenging the ABC Report in these proceedings is if "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.'**" No other basis for challenging the ABC Report is admissible in these proceedings.

11. Remarkably, the Government's Reply Memorial continues to ignore the parties' agreed definition of an "excess of mandate," not once addressing the text or structure of Article 2(a) of the Arbitration Agreement. That is because Article 2(a) is fatal to the Government's purported claims.

12. Article 2(a) does not permit the ABC Report to be challenged based on alleged violations of "procedural conditions," or for supposed violations of "mandatory criteria," or for the more general grounds set forth in the New York Convention, the ICSID Convention or the Draft ILC Convention on Arbitral Procedure. Instead, Article 2(a) defines an "excess of mandate" by reference to that category of disputes which the parties agreed to submit to the ABC ("**their mandate WHICH IS 'to define (i.e. delimit) and demarcate the area...**"). As demonstrated in the SPLM/A's Reply Memorial, none of the Government's purported objections falls within this definition of an excess of mandate; the only arguable exception is the Government's claim concerning the ABC Experts' treatment of grazing rights (which has utterly no substantive basis, even if it were categorized as an excess of mandate).

13. Apparently recognizing this, the Government's Reply Memorial purports completely to recharacterize its previous "excess of mandate" claims. Thus, the Government abandons

any reference to either the purported “mandatory criteria” or supposed “substantive mandate” claims which were advanced in its Memorial. Instead, and without any acknowledgment or explanation, the Government’s Reply Memorial now purports to recharacterize these categories of claims as either “*ultra petita*” or “*infra petita*” complaints.

14. The Government’s effort to rewrite its excess of mandate claims is hopeless. The Government’s original characterizations of its claims were accurate and its attempted relabelling of the claims does nothing to alter their substance.

15. The Government’s “mandatory criteria” claims did not (and do not) involve allegations that the ABC Experts acted *ultra petita* of the parties’ agreements, and instead involve alleged breaches of supposed mandatory legal rules external to the parties’ agreements. Whatever label is attached to them, the Government’s *ex aequo et bono*, unreasoned decision, unspecified legal principles and “secret effort to allocate oil revenues” claims are not within this Tribunal’s jurisdiction; simply put, none of those objections involves claims that the ABC Experts decided disputes that were outside the scope of their mandate.

16. Similarly, the Government’s “substantive mandate” claims did not (and do not) involve allegations that the ABC Experts acted *infra petita* by failing to decide disputes presented to them, and instead involved substantive disagreements with how those disputes were resolved. Whatever label is attached to them, the Government’s effort to relitigate the ABC Experts’ substantive interpretation of Article 1.1.2’s definition of the Abyei Area simply does not involve an excess of mandate.

17. As discussed in the SPLM/A Reply Memorial, this Tribunal’s mandate under Article 2(c) parallels that of the ABC Experts, being to “*define (i.e., delimit) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.*” Thus, if the ABC Experts’ misinterpretation of this definition of the Abyei Area was an excess of substantive mandate – as the Government suggests – ***then the same would be true of an alleged misinterpretation of the definition of the Abyei Area by this Tribunal.*** That is, if the ABC Experts exceeded their mandate by adopting the “wrong” definition of the Abyei Area, then this Tribunal would be subject to exactly the same attack, with only the identity of the party making the challenge to be determined.

18. The foregoing result is absurd. It would produce a situation where the parties’ dispute over the definition of the Abyei Area could never be resolved finally by any adjudicatory body, because an erroneous decision – which one or the other party would inevitably claim – would always be an excess of mandate.

19. Rather than responding to the foregoing argument, the Government’s Reply Memorial embraces the argument’s (wholly implausible) consequences with open arms. According to the Government, substantially the same formula “applied to the mandate of the ABC Experts ***and ... in these proceedings pursuant to Article 2(c) of the Arbitration Agreement.***” (GoS Reply Memorial, at paragraph 87.) Given this equivalence, the Government says in very direct terms that on its analysis, any misinterpretation of the definition of the Abyei Area by this Tribunal would also constitute an excess of its mandate:

“The ABC Experts failed to adhere to this mandate [set out in Articles 1.1.2 of the Abyei Protocol and Article 2(c) of the Arbitration Agreement]. ... For present purposes, ***it is necessary to underline the importance of complying with the precise***

*mandate agreed by the Parties* in order not to jeopardise the overall peace process and the political agreements reached pursuant, *inter alia*, to the 2005 Comprehensive Peace Agreement, its related instruments, **and the arbitration agreement in this case.**” (GoS Reply Memorial, at paragraph 89.)

20. The Government’s position does not merely reflect a threat of non-compliance with the Tribunal’s ultimate decision. More importantly, it also confirms the absurdity of the Government’s position: given the Government’s approach to an excess of mandate, there would be an inevitable and inescapable cycle of excesses of mandate, no matter what the Tribunal (or any other decision-maker) decided. Any error in interpreting the definition of the Abyei Area – according to one party or the other – would be an excess of mandate. That is absurd: it is not what the parties could have intended and it cannot be what the law contemplates.

21. Finally, for the reasons detailed in the SPLM/A Reply Memorial, none of the Government’s purported complaints about “procedural violations” constitutes an excess of mandate under Article 2 of the Arbitration Agreement. Pursuant to Article 2(a), an “excess of mandate” must be defined by reference to that category of disputes that the parties submitted for decision to the ABC (“**their mandate WHICH IS ‘to define (i.e. delimit) and demarcate the area...**”). Article 2(a) did **not** define this Tribunal’s authority by reference to the ABC Experts having “exceeded their mandate **which is** set forth in the Rules of Procedure.” Similarly, well-settled international and national authority holds that procedural objections do not constitute an excess of mandate or jurisdictional objection.

2. Even if they Were Admissible, the Government’s Purported Excess of Mandate Claims Are Frivolous

22. Second, even if the Government’s objections to the ABC Report were admissible in these proceedings (which they are not), none of those objections has any merit. That is true both because the Government cannot begin to satisfy the onerous standards required to demonstrate an excess of mandate and because the Government continues fundamentally to mischaracterize the ABC Report and ABC proceedings.

23. The Government’s Reply Memorial acknowledges the highly unusual character of a finding of “excess of mandate,” expressly conceding the applicability of the legal standards set forth in the SPLM/A Memorial (and Reply Memorial). In particular, the Government concedes that, under generally applicable principles of international and national law, a finding of an excess of mandate will be found only in circumstances involving “**manifest,**” “**flagrant,**” or “**glaring**” excesses by the decision-maker and that such a conclusion is “**exceptional**” and “**astonishing.**”

24. Despite these concessions, portions of the Government’s Reply Memorial also advance the confused argument that the parties’ agreement to arbitrate, or their adoption of the PCA Rules, alters these well-settled standards for challenging an adjudicative decision. As discussed in Part II(B) below, the Government’s claims are misconceived.

25. It is both a well-settled general principle of law, and vitally important to the rule of law, that adjudicative decisions, particularly those involving boundary determinations, be accorded a high degree of presumptive validity. As an extensive body of international and national authorities hold, such decisions are presumptively valid, subject to challenge only on



very narrowly defined grounds and under onerous requirements of legal proof. These standards are fully applicable to the ABC Report.

26. The claim in the Government's Reply Memorial that the parties' agreement to arbitrate, or the PCA Rules, alters these legal standards and requirements of proof is entirely misconceived. The parties' agreement to arbitrate selected a forum and a set of procedures for resolving their dispute; that arbitration agreement did not alter existing principles of law applicable to the parties' dispute, which is specifically confirmed by the parties' choice of law agreement in Article 3 of the Arbitration Agreement.

27. Similarly, the PCA Rules do not alter the parties' legal rights under Article 3, or under generally applicable principles of law. Rather, the PCA Rules do nothing but address the *evidentiary* burden of proof with regard to *facts*, without purporting to alter the *legal* burden applicable to the parties' *claims and defenses* under applicable general principles of law. The Government's contrary arguments, suggesting that both parties bear "the same" or "equal" burdens of proof, are confused and manifestly wrong.

28. Even less serious are the Government's remarkable claims that generally applicable principles of finality should not apply to the ABC Report because the "international community" has supposedly not demanded compliance by the Government. The Government's argument misconceives the role of the adjudicative process, where principles of finality do not depend on diplomatic or political coalitions, but on legal rules. The Government's argument also ignores the factual record, which shows that a range of representatives from the international community have called upon the GoS to honor its commitments, including by the Special Representative for Sudan of the UN Secretary-General:

*"the special representative calls on all parties to abide by the decision."*

29. To similar effect is the Government's claim that the ABC Experts' boundary determination should receive reduced finality because

*"[the] composition of the ABC ... was quite unusual compared with that of arbitral tribunals ... especially since it was not composed of lawyers but primarily of historians and political scientists."* (GoS Reply Memorial, at paragraph 130.)

30. That remarkably insular argument ignores the terms of the parties' agreement regarding the ABC, which provided for the parties to obtain the nomination of "*five impartial experts knowledgeable in history, geography and any other relevant expertise*," whose complementary expertises suited them perfectly to the parties' dispute, rather than a body of ICSID or arbitration lawyers. It also ignores the complete lack of any objection by the Government to the composition of the Commission throughout the ABC proceedings – until, that is, the ABC Report adopted a result that displeased the Government.

31. At bottom, the Government's argument rests on an ill-disguised innuendo that the African historical and ethnographic authorities, who served as ABC Experts, were not really the sort of people who should have been entrusted with a complex boundary determination. That position is unacceptably parochial and archaic. Moreover, it ignores the parties' agreement on the membership of the ABC and on the Commission's specifically tailored procedures – confirmed by months of subsequent collaborative participation in the ABC proceedings.

32. In any event, whatever legal standards are applied, it is clear that there is no basis for any of the Government's shifting laundry list of complaints about the ABC Report. Nothing in the Government's Reply Memorial advances those objections and, on the contrary, the Government's latest submission evinces even greater obfuscation and lack of seriousness.

a. Alleged Procedural Violations: There is no basis for any of the three (or, now, four) procedural complaints raised by the Government (even if those complaints were admissible in these proceedings, which they are not). Remarkably, while abandoning its previous analogies to an ICSID or commercial arbitral tribunal, the Government's Reply Memorial continues to ignore the terms of the parties' procedural agreements and the specialized nature of the ABC and the ABC proceedings. That failure is an independently sufficient ground for rejecting the Government's complaints. In addition, and again remarkably, the Government also continues completely to ignore what actually occurred during the ABC proceedings, including the verbatim statements made by its own representatives. Once more, this failure is an independently sufficient ground for rejecting the Government's complaints.

b. Alleged Breaches of "Substantive Mandate/Infra Petita:" There is no basis for any of the Government's three claims of excesses of "substantive mandate" (now rewritten and characterized as *infra petita* claims). Again remarkably, the Government ignores the fact that its "substantive mandate" claims are inadmissible disagreements with the ABC Experts' substantive interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol. Even if it were wrong (which it is not), the ABC Experts' supposed mis-interpretation of Article 1.1.2 would be only a substantive error, and would not constitute an excess of mandate. Equally, the GoS Reply Memorial's efforts to explain the Government's interpretation of the definition of the Abyei Area are wholly unconvincing – failing to address either the plain language of Article 1.1.2 or the clear and undisputed purposes of the parties' agreements.

c. Alleged Violations of "Mandatory Criteria/Ultra Petita:" Likewise, there is no basis for the Government's four "mandatory criteria" claims (now rewritten and characterized as "*ultra petita*" claims). Nothing in the Government's Reply Memorial does anything to shore up the gaping, and fatal, legal holes in these claims, much less attempt to address what the ABC Experts really said – as opposed to the Government's artificial and false characterizations of the ABC Report.

33. Putting the Government's efforts to sow confusion aside, the simple truth remains that the ABC Experts did exactly what they were expected to do, unanimously rendering a well reasoned and erudite decision at the end of a successful and collaborative dispute resolution process. In these circumstances, the Government's cynical refusal to honor its commitments is particularly egregious – both for the parties and for the rule of law more generally.

3. The Government Excluded or Waived Any Rights to Claim that the ABC Experts Exceeded Their Mandate

34. Third, the Government has in any event waived its objections to the validity of the ABC Experts' decision. The GoS did so both in its agreements relating to the ABC proceedings in the Comprehensive Peace Agreement, which provide that the ABC Report would be "*final and binding*" and entitled to "*immediate effect*," and again by its conduct throughout those proceedings.

35. The passing suggestion in the Government’s Reply Memorial that the SPLM/A is itself “estopped” from raising these claims of waiver and estoppel, by virtue of having entered into the Abyei Arbitration Agreement, is specious: the parties’ agreement to arbitrate in no way estopped the SPLM/A from relying on its existing legal rights. To the contrary, the arbitration agreement merely specified the forum and procedures for resolving the parties’ dispute, while the choice of law provision in Article 3 of the Arbitration Agreement preserved the parties’ existing legal rights.

36. It is beyond serious debate that those existing legal rights include rights arising under principles of waiver and estoppel, which are recognized under all developed legal systems. The Government cites no authority, because none exists, suggesting that an agreement to arbitrate somehow “estops” a party from relying on these principles. On the contrary, such a result would penalize recourse to arbitration, while ignoring the parties’ obvious intentions.

*B. The Government’s Fundamentally Revised Factual Case Confirms the ABC Experts’ Decision and Supports the SPLM/A’s Definition of the Abyei Area*

37. Only if this Tribunal were to conclude that the ABC Experts exceeded their mandate is it presented, under Article 2(c) of the Arbitration Agreement, with the task of “defin[ing] (i.e., delimit[ing]) 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.” 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.

38. If, however, the Tribunal does consider the issue presented in Article 2(c), 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, extending north to latitude 10°35’N (west from the current Darfur Kordofan boundary and east to 29°32’12). These include permanent villages located above the 10’22 such as: Dhony Dhoul, Thur [Arabic: Turda], Bakar, and Nyadak Ayuung Achaak (**Map 62**). As discussed in Part III below, nothing in the Government’s Reply Memorial provides any grounds for denying this conclusion; on the contrary, the Government’s wholesale revision of its factual case confirms the lack of substance of its position.

1. The Government’s New Factual Case Confirms that 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

39. The Government’s treatment of the historical and factual evidence in its Reply Memorial is just as remarkable as the treatment of its purported “excess of mandate” claims. That is true for several reasons.

40. First, with virtually no acknowledgement, the GoS Reply Memorial and attached evidence fundamentally rewrite the Government’s factual and historical case. Among other things:

a. The Government initially relied on a random assortment of irrelevant authorities to claim that the Ngok Dinka were never located north of the Kiir/Bahr el Arab and that “[i]t had always been stated that the Baggaras lived north of the Dinkas, on the Bahr el Arab” (Palme, Junker, Schweinfurth, Stanford’s

Compendium). (GoS Memorial, at paragraph 350.) In contrast, as discussed in Part III(A) below, the Government’s Reply Memorial expressly concedes that the Ngok Dinka migrated to the area between the Ngol/Ragaba ez Zarga and Muglad in the 18<sup>th</sup> century, but then proceeds to invent a new and entirely false story that the entire Ngok Dinka people subsequently moved south to the Kiir/Bahr el Arab at some later unidentified and unrecorded later date.

b. The Government initially claimed that, “[p]rior to 1905, *the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab*” (GoS Memorial, at paragraph 332 (emphasis added)). In contrast, the Government’s Reply Memorial and accompanying evidence now concede that, prior to 1905, the Ngok Dinka were located *north* of the Kiir/Bahr el Arab, extending up to at least the Ngol/Ragaba ez Zarga, with the Ngok Dinka Paramount Chief (Arop Biong, referred to as Sultan Rob) living and holding court at Burakol to the *north* of the Kiir/Bahr el Arab in 1905 (GoS Reply Memorial, at para. 275). In place of its prior untenable claims, the Government’s Reply Memorial now invents the equally unsustainable story that the Ngok Dinka were located “predominantly” below the Kiir/Bahr el Arab –which is contradicted by the historical record just as comprehensively as the Government’s earlier claims.

c. The Government initially claimed that the Kiir/Bahr el Arab was a “*physical barrier*” between the Ngok Dinka (and other Dinka tribes) and the Baggara (GoS Memorial, at para. 290). In contrast, the Government’s Reply Memorial abandons that absurd proposition and instead invents the new argument that, “[a]s a matter of general repute [sic], *the Bahr el Arab was well known prior to the [1905] transfer as the dividing line between Arab tribes to the north and Negroid tribes*, including the Dinka, to the south.” (GoS Reply Memorial, at paragraph 522(i).) That new claim of supposed “general repute” is nothing but a disguise for vacuity: there is no factual basis for the Government’s claim, either generally or in the context of the Ngok Dinka specifically, and it is irrelevant.

d. The Government initially claimed that “[i]n the wet season [Sultan Rob and the Ngok Dinka] went *south* to the River Lol, not *north*” (GoS Memorial, at paragraph 359). In contrast, the Government’s Reply Memorial now repeatedly acknowledges that the Ngok Dinka, like other tribes in the area, went *south* in the *dry* season, not the wet season. Despite that, the Government neither acknowledges its (complete) reversal of position nor the significant impact that this reversal has for identifying the wet season locations of the Ngok Dinka –which were necessarily and substantially to the north of their dry season locations.

e. The Government initially claimed that there was a “*process of extension*” following 1905, in which the Ngok Dinka expanded to the north, (GoS Memorial, at paragraphs 366 to 367). In contrast, the Government now acknowledges that the locations of the Ngok Dinka and Misseriya “*did indeed not change to any degree*” following 1905. (GoS Reply Memorial, at paragraph 308.)

41. The Government’s wholesale rewriting of its factual and historical case is of substantial import. On the Government’s own evidence, the Ngok Dinka did *NOT* live only (or even primarily) to the south of the Kiir/Bahr el Arab, as the GoS previously insisted. Instead, even on the Government’s evidence, in 1905, the Ngok Dinka were located in the

Bahr region to the north of the Kiir/Bahr el Arab, with their Paramount Chief also residing north of the Kiir/Bahr el Arab, very near the present day location of Abyei town.

42. That concession alone renders wholly implausible the Government's basic claim that the definition of the Abyei Area confines the Ngok Dinka to a narrow, 14-mile wide strip of swampland to the south of the Kiir/Bahr el Arab. In particular, the Government's concessions that the Ngok Dinka and their Paramount Chief were located to the *north* of the Kiir/Bahr el Arab in 1905 make it inconceivable that the parties' definition of the Abyei Area could have been intended to split the Ngok Dinka's territory in two – thereby excluding not only substantial portions of the Ngok Dinka's historic territory from the Abyei Area, but also excluding both Abyei town and the historic seats of the Ngok Dinka Paramount Chief.

43. Second, the Government's Reply Memorial is also remarkable because of the evidence that it chooses *not* to address. Among other things:

a. The Government devotes very little attention to the early historical cartographic evidence (instead claiming falsely that "*19<sup>th</sup> century maps are likely to be misleading*") (GoS Reply Memorial, at paragraph 228). That is because, as demonstrated in the SPLM/A Reply Memorial, the historical cartographic evidence (consisting of more than 25 different maps produced between 1860 and 1936) consistently shows the Ngok Dinka territory as extending throughout the Bahr region, centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga; conversely, the same maps consistently place the Misseriya substantially to the north, centered on the Muglad and Babanusa regions (SPLM/A Reply Memorial, at paragraphs 1197, 1273).

b. The Government continues to refuse to address the basic environmental and geographic characteristics of the Abyei Area or the manner in which Ngok Dinka and Misseriya culture are adapted to different regions. That is because, as demonstrated in the SPLM/A Reply Memorial, this essentially immutable physical evidence confirms very clearly that the agro-pastoral Ngok Dinka reside in the damp Bahr region, while the nomadic cattle-herding Misseriya are based in the more arid region to the north of the *goz*.

c. The Government devotes virtually no attention to the detailed descriptions of its own witness, Professor Ian Cunnison, whose evidence was heavily relied upon in the Government's first Memorial. That is because, as demonstrated in the SPLM/A Reply Memorial, Professor Cunnison's evidence directly contradicts the Government's case, demonstrating beyond any serious doubt that the Ngok Dinka inhabited the Bahr region, extending north from the Kiir/Bahr el Arab throughout the Bahr into the *goz*.

44. The failure to address this evidence – particularly Professor Cunnison's detailed descriptions of the locations of the Ngok Dinka – speaks much more loudly than the Government's rhetoric and unsubstantiated criticism Professor Daly's expert historical evidence. Not surprisingly, the evidence ignored by the Government's Reply Memorial precisely corroborates the pre-1905 documentary record, locating the Ngok Dinka north of the Kiir/Bahr el Arab, throughout the Bahr region and in the southern parts of the *goz*.

45. Third, the Government's Reply Memorial is remarkable because of the extent to which it attempts to rewrite the documentary record, ignoring the evidence that does not suit

its pre-conceived story-line and distorting the remainder to create an entirely artificial and misleading impression. Among other things:

- a. The Government's Reply Memorial claims that, while the Ngok Dinka migrated to the area between Muglad and the Ngol/Ragaba ez Zarga in the 18<sup>th</sup> century, they later moved again, ending up "***on the southern banks of the Kir/ Bahr el Arab.***" (GoS Reply Memorial, at paragraph 229.) As discussed in Part III(A) below, this newly invented account – which would place the Ngok Dinka Paramount Chief *alone* on the north side of the Kiir/Bahr el Arab, separated from the body of the Ngok Dinka people – is flatly contradicted by the documentary record and flouts common sense.
- b. The Government's Reply Memorial claims that the Ngok Dinka "suffered severely" during the Mahdiyya and were driven south of the Kiir/Bahr el Arab. As discussed in Part III(B) below, this claim is wholly contrived, pieced together by means of egregious mis-citation and omission; in fact, the evidence supports precisely the conclusion reached by Professor Daly, that the Misseriya suffered disproportionately during the Mahdiyya, while the Ngok Dinka were left largely unscathed.
- c. The Government's Reply Memorial claims that the pre-1905 documentary record shows that the Ngok Dinka "were located ***on and around the Bahr el Arab/Kiir, predominantly to the south,***" and no further north than 9°32'N. (GoS Reply Memorial, at paragraph 281.) While substantially rewriting its previous (untenable) claims, the Government's new position still fundamentally misstates and distorts the documentary record. As discussed in Part III(C) below, that record makes it very clear that permanent Ngok Dinka villages were located throughout the Bahr region.

46. In the same vein, while the Government disputes the value of all witness testimony, it simultaneously submits some two dozen hastily contrived witness statements. Putting aside the procedural irregularity of the Government's belated submissions, its last-minute witness statements are aimed at nothing more than devaluing the credibility of oral evidence generally. In fact, careful attention to the details of the parties' respective witness evidence demonstrates that the Ngok Dinka witnesses have provided frank, unvarnished testimony as to their historical knowledge, while the Government's witnesses have provided little more than lawyers' briefs disguised as evidence. That is corroborated by the Community Mapping Project, which provides greater detail and specificity regarding the Ngok Dinka use of the Abyei Area.

47. Having now abandoned its central historical case, the Government also seeks refuge in the argument that, while the Ngok Dinka were observed in a large number of locations well to the north of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, they were not observed everywhere in the region encompassed by the ABC Experts' definition of the Abyei Area. In particular, the Government seizes on a handful of Condominium trip reports, which fail to identify Ngok Dinka in various locations to the north of the Kiir/Bahr el Arab, as permitting a negative inference that the Ngok Dinka were confined to only limited parts in the south of the Abyei Area. That argument is baseless.

48. The materials cited by the Government involve only limited routes through particular parts of the Abyei Area, typically undertaken for specific purposes (e.g., map-making and

topographic recording). The absence of references in these sorts of materials to Ngok Dinka being observed in particular locations, at particular times, does not support an inference that the Ngok were not in fact present there, or present there at other times – much less that they were not present elsewhere in the Bahr region. Contrary to the Government’s elliptical suggestion that the SPLM/A is advancing an “*argumentum ab ignorantia*,” this properly reflects the necessarily limited character of the Condominium records and of any negative inferences which may be drawn from those records.

49. Further, the evidence cited by the Government is limited entirely to dry season observations – which, as the Government’s Reply Memorial now concedes, do not reflect the full northern extent of the Ngok Dinka habitation during the remainder of the year. When the seasonal cattle herding patterns of the Ngok Dinka and Misseriya are taken into account, it is clear that at the very least the Government’s own evidence necessarily places the Ngok Dinka well to the north of the Ngol/Ragaba ez Zarga during the wet season.

50. More generally, and as discussed below, the Government’s attempted negative inferences produce the untenable result that much of the Bahr region would be entirely uninhabited during all but the dry season – given the undisputed location of the Misseriya in Muglad and Babanusa during the wet season. Given the exceptionally fertile character of the region, and its historic role as a bridge between north and south, this state of affairs would be entirely implausible. It would be even more implausible because the fertile territory of the Bahr region is sandwiched between arid, waterless regions in several directions.

51. In sum, as a fair reading of (a) the pre-1905 and post-1905 documentary records, (b) the cartographic evidence, (c) the environmental and cultural evidence (including the MENAS Expert Report), (d) the testimony of Professor Cunnison and Mr. Tibbs, (e) the Ngok Dinka witness evidence, and finally (f) the Community Mapping Project, shows permanent Ngok Dinka villages were located throughout the Bahr region extending north to the *goz* and latitude 10°35’N, both in 1905 and for decades thereafter. The Government’s Reply Memorial does not contradict, but in fact confirms, this conclusion.

2. The Boundary Between Kordofan and Bahr el Ghazal Was Indefinite and Indeterminate in 1905

52. The Government’s case concerning the putative provincial boundary between Kordofan and Bahr el Ghazal provinces is just as flawed as its discussion of the historic territories of the Ngok Dinka and Misseriya. As discussed in Part III(E) below, the Government’s position is impossible to reconcile with the historical record and expert evidence, which make it clear that the putative provincial boundary between Kordofan and Bahr el Ghazal in 1905 was indeterminate and indefinite.

53. First, after abandoning its claim that the Kiir/Bahr el Arab was a “physical barrier,” the Government now claims that, as a matter of “general repute,” the Kiir/Bahr el Arab was regarded as the “dividing line” between the negroid southerners and the Muslim north. (GoS Reply Memorial, at paragraphs 400 to 405.) As discussed below, these claims are plainly false.

54. Second, although the Government acknowledges the grave uncertainties surrounding the identity and location of the “Bahr el Arab” and other rivers of the Bahr region, in its Reply Memorial it nonetheless insists that there was a definite, permanent Kordofan/Bahr el Ghazal boundary by 1905. The Government’s position is unsustainable.

55. The Government's Reply Memorial acknowledges that Wilkinson made an essentially isolated "error" in 1902, confusing the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga, but goes on to make the untenable claim that "this error was **recognized and rectified by 1905.**" (GoS Reply Memorial, at paragraph 387.) The historical record flatly contradicts the Government's claims regarding the Kordofan/Bahr el Ghazal boundary.

56. In fact, as the ABC Experts correctly found, the Anglo-Egyptian confusion over the "Bahr el Arab" was not confined to Wilkinson and it was not "rectified by 1905." Rather, the evidence leaves no question that a large number of Condominium officials (including Mahon, Percival, Wilkinson, Boulnois, Lloyd, and O'Connell) all confused the Bahr el Arab and the Ngol/Ragaba ez Zarga. Equally, the evidence makes it clear that the confusion over the "Bahr el Arab" continued until at least 1907.

57. Given that confusion, it is impossible to accept the Government's claims regarding the putative Kordofan/Bahr el Ghazal boundary at the time of the 1905 transfer of the Ngok Dinka. In fact, prior to 1905, there was simply no definite or determinate provincial boundary between Kordofan and Bahr el Ghazal: the "Bahr el Arab" could have referred to any of the Kiir/Bahr el Arab, the Ngol/Ragaba ez Zarga, the entire Bahr river system or to something else. Indeed, that continued to be the case for a number of years following 1905.

3. The Condominium Officials Transferred the Ngok Dinka People, and Not a Specific Area, to Kordofan in 1905

58. The Government's Reply Memorial errs just as seriously in its characterizations of the 1905 transfer of the Ngok Dinka. The Government claims that "the present dispute concerns **the transfer of a specific area** at a specific time," and not a transfer of Ngok Dinka peoples. (GoS Reply Memorial, at paragraph 88.)

59. In fact, the documentary record makes it unmistakably clear that the 1905 transfer was a transfer of the Ngok Dinka (and Twic Dinka) tribes. That is exactly what the 1905 transfer decision and other instruments record, it is precisely what the Condominium's purposes required and it is precisely what the Government has previously acknowledged.

60. Thus, Condominium officials decided in 1905 to transfer the Ngok Dinka to the administration of Kordofan, in order to ensure their safety. The Condominium transfer decision, recorded in Sudan Intelligence Report No. 128, provides:

"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.***"

61. As its plain language and obvious purpose shows, the thing that was transferred by the Condominium officials in 1905 was the Ngok Dinka tribes; that transfer necessarily entailed the transfer of the Ngok Dinka territory, although the Anglo-Egyptian administrators did not know what this comprised. Conversely, the 1905 transfer was not – as the Government contends – the transfer of a specific area, together with whatever tribes happened to be located on it. Rather, it was the Ngok Dinka people, together with whatever territory they occupied.



4. The Government's Interpretation of the Parties' Agreed Definition of the Abyei Area is Manifestly Wrong

62. The Government's interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol is also unsustainable. Preliminarily, as noted above, disagreements about the interpretation of Article 1.1.2 are not grounds for an excess of mandate claim. Rather, they are matters of substance, which are not grounds for challenging the ABC Report. In any event, the ABC Experts' interpretation of the definition of the Abyei Area was clearly correct, and the Government's interpretation is clearly wrong.

63. The Government's Reply Memorial repeatedly asserts that the definition of the Abyei Area meant "the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905" (GoS Memorial, at paragraph 19) and in particular that "***the area transferred cannot have already been in Kordofan prior to the transfer.***" (GoS Reply Memorial, at paragraph 112.) This interpretation contradicts the ordinary, English language meaning of Article 1.1.2, as well as basic rules of English grammar, and would produce an arbitrary and anomalous result.

64. The plain language of Article 1.1.2 refers to the area of the nine Ngok Dinka Chiefdoms at the time that they were transferred to Kordofan in 1905. As the ABC Experts correctly concluded, that definition includes all of the territory of the nine Ngok Dinka chiefdoms as they stood at the time of the 1905 transfer and does not contemplate dividing the Ngok Dinka territory, or the nine Ngok Dinka Chiefdoms, in half based upon the putative existence of a colonial administrative boundary.

65. The Government claims that this interpretation ignores the preposition "to" in the language of Article 1.1.2, which "conveys the idea of movement in a particular direction." (GoS Reply Memorial, at paragraph 106.) That argument is misconceived: the decisive point is that Article 1.1.2 refers to the nine Ngok Dinka chiefdoms that were transferred "to" Kordofan, together with whatever territory they occupied, rather than to the transfer of a specific pre-existing area.

66. Equally clearly, the Government's interpretation ignores the parties' purposes in agreeing to the Abyei Protocol and would produce implausible results that the parties never could have intended. Not surprisingly, the Government's Reply Memorial does not make even a token effort to address the parties' purposes in entering into the Abyei Protocol and defining the Abyei Area.

67. That is because the principal purpose of the definition of the Abyei Area is to define the area and persons entitled to vote democratically in the Abyei Referendum under the Comprehensive Peace Agreement – which was designed specifically to ensure that the Ngok Dinka would have the opportunity to cast votes on their political future. In these circumstances, the suggestion that the Abyei Area is to be defined without reference to the actual territory of the Ngok Dinka in 1905, or is to be arbitrarily divided in half by reference to a putative colonial provincial boundary, is unsustainable.

68. The Government's interpretation of the definition of the Abyei Area would also produce the anomalous results of: (a) excluding Abyei town and the historic seat of the Ngok Dinka Paramount Chiefs (variously termed Burakol or Sultan Rob's new village) from the Abyei Area; (b) excluding entirely several of the Ngok Dinka chiefdoms from the Abyei Area; and (c) confining the Ngok Dinka to a narrow 14 mile wide strip of land along the

southern bank of the Kiir/Bahr el Arab. None of these various consequences is remotely plausible.

69. The Government’s interpretation of the Abyei Area also contradicts that of the ABC Experts – who articulated their interpretation, without objection from the Government, on a number of occasions during the ABC proceedings. Similarly, the Government’s interpretation is rejected by Lieutenant General Lazaro Sumbeiywo (IGAD mediator) and Mr. Jeffrey Millington (Chargé d’Affairs at the U.S. Embassy in Khartoum, and the U.S. Department of State representative to IGAD), both of whom participated in the negotiations and drafting of the Abyei Protocol.

70. Finally, Article 1.1.2 is best interpreted as referring to the territory of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905 because this is how the relevant Sudan Government transfer documents addressed the issue of what was transferred in 1905. As noted above, the Condominium administration’s decision in Sudan Intelligence Report No. 128 was to transfer “Sultan Rob” to Kordofan, not to transfer some specific territory to Kordofan. Indeed, the Condominium administrators did not know what specific territory was subject to transfer in 1905, and would not do so for some years. In these circumstances, it is clear that what was transferred was the Ngok Dinka and their territory, and not some piece of territory that contained some Ngok Dinka.

71. In sum, there is no basis for challenging, much less rejecting, the ABC Experts’ interpretation of the definition of the Abyei Area. As the ABC Report correctly concluded, the Abyei Area consists of the historic area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905, and not to some artificially truncated slice of that area. Indeed, the Government’s interpretation would manufacture a colonial boundary – which never existed – that would arbitrarily divide the Ngok Dinka people and Chiefdoms in a manner that was never intended and that would serve no legitimate purpose.

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72. The ABC proceedings were a remarkable dispute resolution process, in which the parties collaboratively designed and implemented a *sui generis* and highly constructive means of resolving their dispute over the Abyei Area. That process produced an equally remarkable decision, unanimously rendered by five pre-eminent experts in Sudanese and African affairs, including three experts from the African continent, after an extensive fact-finding process. The resulting ABC Report was carefully-reasoned and dealt skilfully with complex and difficult issues.

73. The parties to the ABC proceedings repeatedly affirmed that the ABC Experts’ decision would be “final and binding” and entitled to “immediate effect.” The Government’s refusal to honor that decision is a cynical attempt to relitigate the Abyei dispute in a new forum, to delay the Abyei Referendum and to continue to misappropriate the resources of the Ngok Dinka and their territory. This brings discredit on the GoS and continuing suffering on the Ngok Dinka people. It is vital to the people of the Abyei Area, as well as the rule of law, that the Government be directed forthwith to honor its promise to implement the ABC Report and permit the Abyei Referendum to go forward.

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

74. The Government's Reply Memorial fails entirely to advance the Government's claims that the ABC Experts exceeded their mandate. Rather, the Reply Memorial is an effort by the Government to avoid and obfuscate the relevant issues, which evinces a disregard for both the parties' agreements and the rule of law. It is of vital importance – both to the parties in this case and to the international legal system more generally – that these litigation tactics not be permitted to succeed.

75. 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." More specifically, Article 2(a) of the Arbitration Agreement provides that the only basis for challenging the ABC Report is presented by the question "[w]hether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.'"<sup>1</sup>

76. No other ground for disregarding the ABC Report is authorized by the Arbitration Agreement. On the contrary, 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."<sup>2</sup> If, *and only if*, an excess of mandate is found, then, *and only then*, is it necessary or permissible to proceed to reconsider the definition of the boundaries of the Abyei Area.

77. The discussion of the Government's purported "excess of mandate" claims in its Reply Memorial is remarkable. The Government's Reply Memorial devotes only very limited attention to its excess of mandate claims (spending less than 32 pages of its 199-page submission on the issue). Even more remarkably, the Government's discussion manages simultaneously to abandon significant elements of its earlier excess of mandate analysis, while also hastily attempting to rewrite or recharacterize other elements of its analysis.

78. The Government's last-minute efforts to rewrite its claims are a continuation of its previous tactic of advancing a scatter-shot collection of eleven challenges to the ABC Report. Once more, the Government has sought to create the maximum amount of confusion – in the hope that either the wheels of justice will be slowed or that some random, eccentric result will be reached.

79. The Government's tactics are misconceived. As detailed in this Part II, all of the complaints on the Government's laundry list of objections to the ABC Report are spurious. Indeed, the Government's Reply Memorial confirms the hopelessness of its excess of mandate claims – both by the concessions it makes and by the frivolous character of the arguments it throws up.

80. There are at least three independently sufficient reasons for rejecting the Government's attacks on the ABC Report: (a) the Government's purported objections are inadmissible because they do not constitute excesses of mandate within the meaning of the Abyei Arbitration Agreement; (b) even if the Government's purported objections were admissible, none of those objections has any merit; and (c) in any event, the Government has

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<sup>1</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial**.

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

waived or is estopped from asserting its purported objections. Any one of these grounds is an independently sufficient basis for rejecting the Government's purported complaints.

81. First, the Government continues improperly to attempt to expand the grounds on which the ABC Report may be challenged in these proceedings. The Government's Reply Memorial studiously ignores the parties' agreed definition of an "excess of mandate," while undertaking a wholesale rewriting and recharacterization of the Government's purported excess of mandate claims. These efforts are hopeless: whatever labels the Government wishes to hide behind, the objections it raises to the ABC Report do not constitute "excesses of mandate" within the meaning of the Arbitration Agreement.

82. Article 2(a) of the Arbitration Agreement provides that the *only* basis for challenging the ABC Report in these proceedings is if "the ABC experts had, on the basis of the agreement of the Parties as per the CPA, *exceeded their mandate which is 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.'*"<sup>3</sup> No other basis for challenging the ABC Report is admissible in these proceedings.

83. Article 2(a) does not permit the ABC Report to be challenged based on violations of "procedural conditions," or for supposed violations of "mandatory criteria," or for the more general grounds set forth in the New York Convention, the ICSID Convention or the Draft ILC Convention on Arbitral Procedure/ILC Model Rules. Instead, Article 2(a) provides that an "excess of mandate" is defined by reference to that category of disputes which the parties submitted to the ABC ("*their mandate WHICH IS...*"). As demonstrated in the SPLM/A Reply Memorial, none of the Government's purported objections (with only one arguable exception concerning grazing rights) falls within this definition of an excess of mandate.

84. The Government's Reply Memorial continues to ignore completely the parties' agreed definition of an "excess of mandate." It never addresses the text of Article 2(a) of the Arbitration Agreement and, again, scarcely bothers to mention Article 2(b). At the same time, the Government completely abandons any reference to either the purported "mandatory criteria" claims or the supposed "substantive mandate" claims advanced in its Memorial; instead, and without any explanation, the Government now attempts to recharacterize these claims as either "*ultra petita*" or "*infra petita*" claims.

85. The Government's last-minute effort to rewrite its excess of mandate claims is spurious. The Government's original characterizations of its claims were accurate and its attempted relabelling of the claims does nothing to alter their substance. Whatever they are called, the Government's *ex aequo et bono*, unreasoned decision, unspecified legal principles and "secret effort to allocate oil revenues" claims are not within this Tribunal's jurisdiction. Equally, whatever its label, the Government's effort to relitigate the ABC Experts' substantive interpretation of Article 1.1.2's definition of the Abyei Area simply does not involve an excess of mandate.

86. Second, even if the Government's objections to the ABC Report were admissible (which they are not), none of those objections has any merit. That is true both because the Government cannot begin to satisfy the onerous standards required to demonstrate an excess of mandate and because the Government continues fundamentally to mischaracterize the ABC Report and ABC proceedings.

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

87. The Government’s Reply Memorial continues to acknowledge the highly exceptional character of a finding of “excess of mandate,” expressly conceding the applicability of the legal standards set forth in the SPLM/A Memorial. In particular, the Government concedes that a finding of an excess of mandate will be found only in circumstances involving “*manifest*,” “*flagrant*,” or “*glaring*” excesses by the decision-maker.<sup>4</sup>

88. Despite these concessions, portions of the Government’s Reply Memorial also apparently advance the confused – and entirely unsupported – argument that the parties’ agreement to arbitrate somehow alters these well-settled principles of finality and presumptive validity of adjudicative decisions. As discussed in Part II(B) below, these suggestions are confused and wholly without merit. Rather, it is both well-settled and vitally important that adjudicative decisions, particularly those involving boundary determinations, be accorded a high degree of presumptive validity, subject only to very narrowly defined exceptions. These standards are fully applicable to the ABC Report.

89. In any event, whatever legal standards are applied, it is clear that there is no basis for any of the Government’s shifting laundry list of complaints about the ABC Report. Nothing in the Government’s Reply Memorial does anything to advance these claims, and on the contrary, the Government itself appears to abandon various of its previous allegations. Specifically:

a. There is no basis for any of the three (or four) procedural complaints raised by the Government (even if those complaints were admissible in these proceedings, which they are not). Remarkably, while abandoning its previous analogies to an ICSID or commercial arbitral tribunal, the Government’s Reply Memorial continues completely to ignore the terms of the parties’ procedural agreements and the specialized nature of the ABC and the ABC proceedings. That failure is an independently sufficient ground for rejecting the Government’s complaints. In addition, and again remarkably, the Government also continues completely to ignore what actually occurred during the ABC proceedings, including the verbatim statements made by its own representatives. Once more, this failure is an independently sufficient ground for rejecting the Government’s complaints.

b. There is no basis for any of the Government’s three claims of excesses of “substantive mandate” (now rewritten and characterized as *infra petita* claims). Again remarkably, the Government ignores the fact that its “substantive mandate” claims are inadmissible disagreements with the ABC Experts’ substantive interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol. Even if it were wrong (which it is not), the ABC Experts’ substantive interpretation of Article 1.1.2 would be only a substantive error, and would not constitute an excess of mandate. Equally, the GoS Reply Memorial’s efforts to explain the Government’s interpretation of the definition of the Abyei Area are wholly unconvincing – failing to address either the plain language of Article 1.1.2 or the clear and undisputed purposes of the parties’ agreements.

c. Likewise, there is no basis for the Government’s four “mandatory criteria” claims (now rewritten and characterized as “*ultra petita*” claims). Nothing in the Government’s Reply Memorial does anything to shore up the gaping, and fatal, legal holes in these claims, much less attempt to address what the ABC Experts really said

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<sup>4</sup> GoS Reply Memorial, at paras. 127-129 (citing SPLM/A Memorial, at paras. 551, 699).

– as opposed to the Government’s artificial and false characterizations of the ABC Report.

90. At bottom, the GoS Reply Memorial adds nothing but confusion and equivocation to the Government’s purported excess of mandate claims. Thus, the Government continues to ignore or distort the legal principles applicable to an excess of mandate claim, the terms of the parties’ agreements regarding the ABC process and the actual conduct of the ABC proceedings.

91. Putting the Government’s efforts to sow confusion aside, the simple truth remains that the ABC Experts did exactly what they were expected to do, rendering a well reasoned and erudite decision at the end of a remarkable and successful collaborative dispute resolution process. In these circumstances, the Government’s cynical refusal to honor its commitments is particularly egregious – both for the parties and for the rule of law more generally.

92. Third, the Government has in any event waived its objections to the validity of the ABC Experts’ decision. The GoS did so both in its agreements relating to the ABC proceedings in the Comprehensive Peace Agreement and then in its conduct during those proceedings. The Government’s passing suggestion that the SPLM/A is itself “estopped” from raising these claims of waiver and estoppel, by virtue of having entered into the Abyei Arbitration Agreement, is specious: the parties’ agreement to arbitrate in no way estopped them from relying on their existing legal rights.

A. *The Government Attempts Improperly to Expand the Grounds on which the ABC Experts’ Report May Be Challenged*

93. As discussed in the SPLM/A Memorial and Reply Memorial, this Tribunal’s authority under Articles 2(a) and 2(b) of the Arbitration Agreement is limited to a simple and straightforward issue.<sup>5</sup> Article 2(a) of the Arbitration Agreement provides that the only basis for challenging the ABC Report in these proceedings is subsumed by the question “[w]hether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, ***exceeded their mandate which is ‘to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.’***”<sup>6</sup>

94. It is fundamental – and indisputable – that under Article 2 of the Arbitration Agreement, the sole basis for this Tribunal to disregard the ABC Report is narrowly defined as an excess of the ABC Experts mandate. No other ground for alleging nullity of, or refusing to comply with, the ABC Report is permitted by the Arbitration Agreement.

95. Despite the plain terms of Article 2 of the Arbitration Agreement, the Government’s Memorial advanced a scatter-shot laundry list of complaints about the ABC Report. The GoS’s collection of objections included three purported violations of “procedural conditions,” four supposed “substantive” excesses of mandate and four alleged breaches of “mandatory criteria.”<sup>7</sup> The Government’s Memorial attempted to support these complaints by reference

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<sup>5</sup> SPLM/A Memorial, at paras. 18-21, 544-554, 665-673; SPLM/A Reply Memorial, at paras. 10-16, 99-101, 147-196.

<sup>6</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial** (emphasis added).

<sup>7</sup> See GoS Memorial, at paras. 192-276.

to an equally eclectic collection of analogies and legal authorities, selectively chosen from ICSID, New York Convention and similar contexts.<sup>8</sup>

96. The Government's Reply Memorial does nothing to attempt to focus or clarify this laundry list of complaints. On the contrary, ignoring basic principles of procedural regularity, the Government's Reply Memorial adds yet another complaint to its previous laundry list (based on supposed communications between the ABC Experts and SPLM/A which occurred two years after the close of the ABC proceedings<sup>9</sup>).

97. As discussed below (and in the SPLM/A Reply Memorial), there is no substance to any of the Government's various complaints.<sup>10</sup> Those complaints are irreconcilable with the plain language of the Abyei Protocol, the Abyei Annex and the parties' other agreements regarding the ABC, as well as with the conduct of the ABC proceedings. In reality, the ABC Experts conducted the ABC proceedings in exactly the manner expected and addressed exactly the issues presented to them. The Government's true complaint is with the substance of the ABC Report and not with the ABC Experts' procedural actions or jurisdictional decisions.

98. Even apart from this, and however they are labelled, the Government's purported objections ignore the parties' agreed definition of an "excess of mandate" in the Abyei Arbitration Agreement. The language of Article 2(a) makes perfectly clear what constitutes an "excess of mandate." As the Government's silence on the subject makes equally clear, none of the GoS's complaints about the ABC Report falls within the parties' agreed definition of excess of mandate.

99. The inadmissibility of the Government's purported complaints is confirmed by the conspicuous – and conspicuously unsuccessful – efforts in the GoS Reply Memorial to recharacterize these complaints. In particular, the Government's Reply Memorial unceremoniously abandons its previous efforts to analogize the ABC Experts to an ICSID (or ICC) arbitral tribunal and to analogize this Tribunal to an ICSID annulment committee. Similarly, the Government attempts to transform its previous "mandatory criteria" and "substantive mandate" claims into *ultra petita* and *infra petita* claims. In each case, the Government's efforts are nothing more than semantic relabelling that do nothing to change the substance of its allegations.

100. However they are characterized, virtually all of the Government's laundry list of eleven (or now twelve) complaints are inadmissible in these proceedings. With the arguable exception of the Government's complaint about grazing rights, none of the Government's complaints could be characterized – even if they were well-founded, which they are not – as an excess of mandate.

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

101. The Government's Reply Memorial claims that the SPLM/A Memorial does not "tak[e] the trouble to define the notion of 'excess of mandate' as envisaged in Article 2 of the Arbitration Agreement."<sup>11</sup> The Government also complains that the "first time" that the

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<sup>8</sup> See GoS Memorial, at paras. 151-176, 254-275.

<sup>9</sup> See GoS Reply Memorial, at paras. 194, 199.

<sup>10</sup> See below at paras. 260-329; SPLM/A Reply Memorial, at paras. 229-484.

<sup>11</sup> GoS Reply Memorial, at para. 136.

SPLM/A's Memorial substantively addresses Article 2(a) of the Arbitration Agreement in paragraph 544, again suggesting that the SPLM/A did not devote attention to the provision.<sup>12</sup>

102. The GoS complaints are completely misplaced. In truth, it is the Government that fails to address the definition of an "excess of mandate" in Article 2 of the Arbitration Agreement, while the SPLM/A devotes careful attention to the issue.

103. The SPLM/A Memorial (at paragraphs 18 to 26, 544 to 554 and 665 to 673) and SPLM/A Reply Memorial (at paragraphs 9 to 21, 152 to 159 and 160 to 228) address the definition of an "excess of mandate" in Article 2 of the Arbitration Agreement in detail. The Government's claim that the SPLM/A does not "tak[e] the trouble to define the notion of 'excess of mandate' as envisaged in Article 2 of the Arbitration Agreement,"<sup>13</sup> is simply and plainly wrong. Equally, the SPLM/A's decision to structure its Memorial by outlining the relevant factual and legal background before addressing the legal issues before the Tribunal is utterly without substantive import; indeed, the first of the legal issues addressed by the SPLM/A Memorial and Reply Memorial is the Government's inadmissible attempts to bring claims that are not excesses of mandate.

104. In truth, it is the Government's submissions that completely ignore the language of Article 2 of the Arbitration Agreement defining an excess of mandate (as well as the relevant legal authority addressing the issue). Neither the Government's Memorial nor Reply Memorial addresses in any way the text of Articles 2(a) and 2(b), or, in particular, the specific definition in the Arbitration Agreement of the concept of an "excess of mandate." The reasons for the Government's failure to address this essential issue is obvious: a review of the text of Article 2 of the Arbitration Agreement makes it perfectly clear that the Government's laundry list of objections to the ABC Report is entirely inadmissible (with one arguable exception).

105. As noted above, Article 2(a) of the Arbitration Agreement provides that the sole issue presented to this Tribunal is "[w]hether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.'"<sup>14</sup>

106. Article 2(a) does not refer to violations of "mandatory criteria," to violations of "procedural conditions," or more generally to concepts of nullity or invalidity of arbitral awards. Likewise, Article 2(a) does not incorporate the (well known) lists of grounds of invalidity or nullity included in the New York Convention, the ICSID Convention or the Draft ILC Convention on Arbitral Procedure/ILC Model Rules.

107. Instead, Article 2(a) identifies only a single ground upon which this Tribunal may invalidate the ABC Report – whether the ABC Experts "*exceeded their mandate*."<sup>15</sup> An "excess of mandate" is a specific basis for claiming the nullity or invalidity of an adjudicative decision. 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. That is demonstrated by the parties' use of the words

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<sup>12</sup> GoS Reply Memorial, at para. 119.

<sup>13</sup> GoS Reply Memorial, at para. 136.

<sup>14</sup> Abye Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial**.

<sup>15</sup> SPLM/A Memorial, at paras. 18-21, 544-554, 665-673; SPLM/A Reply Memorial, at paras. 10-16, 99-101, 147-196.



“*excess of mandate*,” which refer to situations where the ABC Experts might have gone beyond or outside (“*exceeded*”) the scope of the issues submitted to them.

108. Other aspects of the language in Article 2(a) confirm the foregoing interpretation. In particular, as discussed in the SPLM/A’s previous submissions,<sup>16</sup> Article 2(a) defines an “excess of mandate” by reference to the category of disputes that the ABC Experts were charged with resolving under the parties’ agreements, namely “[w]hether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, *exceeded their mandate WHICH IS ‘to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.’*”<sup>17</sup>

109. As provided in Article 2(a), an “excess of mandate” is to be defined by reference to that category of disputes which was submitted by the parties to the ABC (“*their mandate WHICH IS...*”). In contrast, Article 2(a) did not define this Tribunal’s authority by reference to the ABC Experts having “exceeded their mandate *which is* set forth in the Rules of Procedure” or having “exceeded their mandate *which is* to apply the arbitration procedures commonly used in investment arbitrations.” Rather, Article 2(a) defined the concept of “excess of mandate” by reference to the ABC Experts’ substantive task, which was to “define ... and demarcate” the Abyei Area. While Article 2(a) does refer to the Terms of Reference and Rules of Procedure, it does so only insofar as those agreements “*stated*” and “*reiterated*” the ABC Experts’ mandate as defined in the Abyei Protocol.<sup>18</sup> It is therefore clear that the only issue falling within the language of Article 2(a) is whether the ABC Experts decided matters falling outside the scope of (“exceeding”) that substantive task of defining and demarcating the Abyei Area.

110. Nowhere in its 450+ pages of submissions does the Government “take the trouble” to address substantively the language of Article 2 of the Abyei Arbitration Agreement.<sup>19</sup> There is not a word in either the Government’s Memorial or Reply Memorial that discusses the language of Article 2(a) or Article 2(b), or that addresses the parties’ decision not to adopt broader grounds for invalidity or nullity (such as under the New York Convention, the ICSID Convention or the Draft ILC Convention on Arbitral Procedure/ILC Model Rules).

## 2. The Government’s Efforts to Recharacterize Its Purported Excess of Mandate Claims Are Baseless

111. Rather than addressing the definition of an “excess of mandate” in Article 2 of the Arbitration Agreement, the Government’s initial Memorial adopted a different tactic. Ignoring the parties’ agreement, the Government attempted to construct a wholly artificial definition of “excess of mandate” from inapposite international arbitration authorities. This exercise was both unnecessary (because Article 2(a) is clear) and illegitimate (because the Government’s contrived interpretation of Article 2(a) contradicts both the language of the parties’ agreements and the very legal regimes upon which the Government purports to rely).

<sup>16</sup> SPLM/A Memorial, at paras. 665-666; SPLM/A Reply Memorial, at paras. 167-171.

<sup>17</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial** (emphasis added).

<sup>18</sup> See Abyei Arbitration Agreement, Art. 2(a) (“Whether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, exceeded their mandate which is “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905” *as stated* in the Abyei Protocol, *and reiterated* in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.”), **Appendix A to SPLM/A Memorial** (emphasis added); SPLM/A Reply Memorial, at para. 170, footnote 75.

<sup>19</sup> The Government merely mentions Article 2(a) in passing, and nowhere mentions Article 2(b). See GoS Reply Memorial, at paras. 2, 72, 73, 118.

112. Thus, the Government’s Memorial adopted the peculiar reasoning that: “[u]nder *general principles of law and practice*, a serious departure from a fundamental rule of procedure *also constitutes a ground for annulment* of an award *and, as such, a ground for finding an excess of mandate*.”<sup>20</sup> Similarly, the Government relied on supposed “*mandatory criteria*” (regarding inter alia *ex aequo et bono* and unreasoned decisions), which it purported to construct from “*general principles of law and practice*.”<sup>21</sup>

113. The GoS Memorial also argued that this Tribunal was empowered to act “*in a manner similar to that of an annulment panel*”<sup>22</sup> under “Article 53” (sic, presumably Article 52) of the ICSID Convention.<sup>23</sup> To the same effect, the Government’s Reply Memorial asserts that the ABC Report “had the main characteristics of an arbitral award ... and *can therefore be challenged on the same grounds*.”<sup>24</sup> Consistent with that approach, the GoS Memorial embarked on a lengthy exposition of different bases for annulment under Article 52 of the ICSID Convention,<sup>25</sup> for non-recognition under Article V of the New York Convention,<sup>26</sup> for annulment and non-recognition under the UNCITRAL Model Law<sup>27</sup> and sundry provisions of selected institutional arbitration rules.<sup>28</sup>

114. As demonstrated in the SPLM/A’s previous submissions, there is no basis for treating this Tribunal as “*an annulment panel*” under the ICSID Convention or for suggesting that the ABC Report can be “*challenged on the same grounds*” as an arbitral award.<sup>29</sup> This Tribunal was not constituted as an annulment panel under the ICSID Convention or the ICSID Rules, nor an annulment or recognition court under the New York Convention, nor a national court considering an ICC or UNCITRAL arbitral award. This Tribunal was instead granted a very specifically defined authority under Articles 2(a) and 2(b) of the Abyei Arbitration Agreement.

115. It fundamentally misconceives this Tribunal’s authority to suggest that it may disregard the ABC Report “on the same grounds” as an international investment or commercial arbitration award. The parties did not agree – in Article 2 of the Arbitration Agreement or otherwise – to grant this Tribunal either general appellate authority or the review powers of a national recognition or annulment court. On the contrary, the parties specifically agreed that the ABC Report could only be challenged on defined “excess of mandate” grounds and – as detailed in the SPLM/A Reply Memorial – this Tribunal manifestly has no authority to entertain claims other than the single “excess of mandate” ground specified in Article 2 of the Arbitration Agreement.

- a) The Government’s Effort to Recharacterize Its Supposed “Mandatory Criteria” Claims as *Ultra Petita* Claims Is Baseless

116. The Government’s Memorial alleged four supposed violations of so-called “*mandatory criteria*” by the ABC Experts. These violations were allegedly: (a) “[f]ailure to

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<sup>20</sup> GoS Memorial, at para. 177 (emphasis added).

<sup>21</sup> GoS Memorial, at paras. 151-165, 189, 191, 225-262.

<sup>22</sup> GoS Memorial, at para. 131.

<sup>23</sup> GoS Memorial, at para. 131.

<sup>24</sup> GoS Reply Memorial, at para. 129 (emphasis added).

<sup>25</sup> See GoS Memorial, at paras. 143-145, 148-149, 158-164, 172-173, 183.

<sup>26</sup> See GoS Memorial, at para. 182.

<sup>27</sup> See GoS Memorial, at paras. 184-185.

<sup>28</sup> See GoS Memorial, at paras. 156 (UNCITRAL Arbitration Rules; PCA Rules), 171 (UNCITRAL Arbitration Rules; PCA Rules), 175 (LCIA Rules).

<sup>29</sup> See SPLM/A Memorial, at paras. 667, 671-672; SPLM/A Reply Memorial, at paras. 114-117, 156-159.

state reasons capable of supporting the decision;”<sup>30</sup> (b) reaching a decision “on the [b]asis of an [e]quitable [d]ivision or ... *ex [a]equo et [b]ono*;”<sup>31</sup> (c) “[a]pplying unspecified ‘legal principles in determining land rights;”<sup>32</sup> and (d) “[a]ttempting to allocate oil resources.”<sup>33</sup>

117. The SPLM/A Reply Memorial demonstrated that these purported violations of “mandatory criteria” were not admissible as alleged excesses of mandate under Article 2(a) of the Arbitration Agreement.<sup>34</sup> As the SPLM/A Reply Memorial explained, the Government’s complaints did not involve claims that the ABC Experts decided issues that had not been submitted to them, or even that the ABC Experts had not complied with other aspects of the parties’ agreements. Rather, as the name “mandatory criteria” confirmed, the Government claimed that the ABC Experts had allegedly violated mandatorily-applicable rules of law, supposedly applicable to the ABC proceedings.<sup>35</sup>

118. The SPLM/A Reply Memorial demonstrated that – even if the Government’s claims were substantively well-founded, which they were not – they did not constitute excesses of mandate. Rather, even if well-founded, those claims involved purported violations of mandatory procedural or formal rules, external to the parties’ agreements, which could not be categorized as excesses of mandate.<sup>36</sup>

119. No doubt sensitive to this fatal flaw in its argument, the GoS Reply Memorial abandons any reference to supposed “*mandatory criteria*” (as confirmed by both a reading of the Reply Memorial’s text and an electronic word-search of the document). Having devoted 40 or so paragraphs to constructing purported “mandatory criteria” in its Memorial, the Government’s Reply Memorial abandons that characterization – without explanation – and, instead, purports to argue that these various grounds can be regarded as excesses of mandate on “*ultra petita*” grounds. Thus, under the heading, “The ABC Experts Decided *Ultra Petita*,”<sup>37</sup> the Government’s Reply Memorial purports to advance claims based on an *ex aequo et bono* decision,<sup>38</sup> an unreasoned decision,<sup>39</sup> a decision relying on unspecified legal principles,<sup>40</sup> and an attempt to allocate oil revenues.<sup>41</sup>

120. The Government’s (completely unexplained) effort to recategorize its “mandatory criteria” claims as “*ultra petita*” claims is untenable. In fact, there is no conceivable basis for characterizing any of the Government’s claims as instances of “*ultra petita*” actions by the ABC Experts.

121. This conclusion is suggested by the fact that the Government did not initially attempt to characterize these complaints as instances of *ultra petita* actions in its Memorial (instead characterizing them as violations of “mandatory criteria”). In any event, as detailed in the SPLM/A Reply Memorial, there is nothing in the parties’ agreements (including the Abyei Protocol, Abyei Annex and other agreements regarding the ABC) forbidding *ex aequo et*

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<sup>30</sup> GoS Memorial, at p. 56, Heading (ii).

<sup>31</sup> GoS Memorial, at p. 60, Heading (iii); at p. 88, Heading (ii).

<sup>32</sup> GoS Memorial, at p. 89, Heading (iii).

<sup>33</sup> GoS Memorial, at p. 90, Heading (iv).

<sup>34</sup> SPLM/A Reply Memorial, at paras. 201-222, 676-679.

<sup>35</sup> GoS Reply Memorial, at paras. 254-275; SPLM/A Reply Memorial, at paras. 201-222, 676-703.

<sup>36</sup> SPLM/A Reply Memorial, at paras. 201-222, 704-743, 814-833, 834-942, 845-856.

<sup>37</sup> GoS Reply Memorial, at p. 45, Heading (i).

<sup>38</sup> See GoS Reply Memorial, at paras. 149-152, 154.

<sup>39</sup> See GoS Reply Memorial, at paras. 152-153.

<sup>40</sup> See GoS Reply Memorial, at paras. 157-161.

<sup>41</sup> See GoS Reply Memorial, at paras. 155-156.

*bono* decisions,<sup>42</sup> requiring a reasoned decision,<sup>43</sup> forbidding application of “unspecified legal principles,”<sup>44</sup> or permitting inquiry into the ABC Experts’ subjective motivations.<sup>45</sup> As such, there is no conceivable way to characterize alleged violations of such requirements as “*ultra petita*” of some agreement between the parties; in reality, the Government’s original reliance on alleged “mandatory” rules was at least an accurate characterization of its claims – albeit one that confirmed their hopelessness.

122. First, with regard to GoS’s complaints regarding a supposedly unreasoned decision, the Government’s Memorial and Reply Memorial do not seriously argue that the parties’ agreements required the ABC Experts to make a reasoned decision. Certainly, nothing in the Abyei Protocol, the Abyei Annex, the Terms of Reference or the Rules of Procedure provided that ‘the ABC Experts’ decision shall be reasoned’ or that ‘the ABC Report shall include a statement of the reasons of the experts.’

123. It is notable that the parties’ agreements with regard to any requirement of reasoning for the ABC and the ABC Report stand in direct contrast to the provisions of the Abyei Arbitration Agreement in these proceedings. The Arbitration Agreement in this proceeding provides expressly that “[t]he Tribunal shall ***comprehensively state the reasons upon which the award is based.***”<sup>46</sup> When the Government and the SPLM/A intended to require a reasoned decision, they knew perfectly well how to achieve that end.

124. By contrast, the mandate of the ABC Experts, including as recited in Article 2(a) of the Abyei Arbitration Agreement, was simply “to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905.”<sup>47</sup> Nothing in any of the parties’ agreements relating to the ABC proceedings required that the ABC Experts explain their reasoning for adopting a particular definition or delimitation of the Abyei Area.

125. As discussed in the SPLM/A Reply Memorial,<sup>48</sup> the Government refers occasionally to the parties’ agreement that the ABC Experts’ decision “shall be based on scientific analysis and research.”<sup>49</sup> Considered in its full context, in Article 4 of the Abyei Annex, this provision reads:

“The Experts in the Commission shall consult the British Archives and other relevant sources on the Sudan wherever they may be available, ***with a view to arriving at a decision that shall be based on scientific analysis and research.***”<sup>50</sup>

126. The text of Article 4 does not prescribe or even address the nature or form of the ABC Report, much less require that the ABC Experts detail their reasoning. To the contrary, Article 4 merely explains the general objective of the ABC Experts’ independent investigations – namely, “***with a view to arriving*** at a decision that is ***based on*** scientific analysis and research.” Indeed, the text of Article 4 requires only that the ABC Experts have the view of “arriving at ***a decision***” on the basis of their scientific investigation – not that the

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<sup>42</sup> See SPLM/A Reply Memorial, at paras. 814-833.

<sup>43</sup> See SPLM/A Reply Memorial, at paras. 707-730.

<sup>44</sup> See SPLM/A Reply Memorial, at paras. 834-842.

<sup>45</sup> See SPLM/A Reply Memorial, at paras. 843-844.

<sup>46</sup> Abyei Arbitration Agreement, Art. 9(2), **Appendix A to SPLM/A Memorial** (emphasis added).

<sup>47</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial**.

<sup>48</sup> SPLM/A Reply Memorial, at paras. 203, 711.

<sup>49</sup> GoS Memorial, at paras. 151, 254.

<sup>50</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial** (emphasis added).

ABC Experts produce a reasoned award, a particular type or length of report, or anything of the sort.

127. Equally, the parties' agreement that the ABC Experts would produce a "report" does not require or imply that the report would contain the Experts' reasoning. Rather, the "report" needed only to contain the ABC Experts' resolution of the specific issue submitted to them, being "to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."<sup>51</sup> Indeed, the Government omits to mention that the only requirement with regard to the form and explanation of the ABC Experts' decision was contained in the Terms of Reference, which provided that "the ABC shall *demarcate the area, specified above on map...*"<sup>52</sup> Again, although addressing what precisely the ABC Experts' work-product should contain, the parties did not require any statement of reasons.

128. Second, with regard to the GoS complaints about a supposed *ex aequo et bono* decision, nothing in the parties' agreements regarding the ABC proceedings forbade the ABC Experts from making either an *ex aequo et bono* decision or (conversely) from relying on "unspecified legal principles" in reaching their decision. In particular, the parties' agreements contained no choice of law or governing law provision,<sup>53</sup> instead providing only that the ABC Experts' decision was to be "based on scientific analysis and research."<sup>54</sup> It is also of significance that the parties chose a body consisting primarily of experts in regional African history, politics, ethnography and culture to resolve their dispute, rather than a traditional arbitral tribunal consisting of legal experts.<sup>55</sup>

129. The parties' agreement that the ABC Experts' archival research was to be undertaken "with a view to arriving at a decision that shall be based on scientific analysis and research"<sup>56</sup> encouraged a decision based on "scientific analysis and research." It did not mandatorily require such a decision (being phrased precatorily and aspirationally ("with *a view to arriving at*")). Rather, that provision left the ABC Experts free, if they were unable to reach a decision on such a basis, to pursue other forms of reasoning. Moreover, in neither case did the parties' agreements require the ABC Experts to decide in accordance with legal principles or forbid an *ex aequo et bono* decision; to the contrary, the requirement for "scientific analysis and research" would in no way require the application of legal principles or forbid an *ex aequo et bono* decision.

130. Third, with regard to the GoS complaints about supposed reliance on unspecified legal principles, nothing in the parties' agreements regarding the ABC proceedings forbade the ABC Experts from relying on "unspecified legal principles." There was nothing in the parties' agreements that forbade the ABC Experts from considering legal principles – indeed, the logical predicate for the GoS's *ex aequo et bono* argument is that the ABC Experts were required to consider legal principles. Insofar as the ABC Experts concluded that it was relevant to consider issues of land rights or land ownership, the status of boundaries, or other

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<sup>51</sup> Abyei Protocol, Art. 1.1.2, **Appendix C to SPLM/A Memorial**; Abyei Annex, Art. 1, **Appendix D to SPLM/A Memorial**.

<sup>52</sup> ABC ToR, Art. 1.2, **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>53</sup> See also GoS Memorial, at para. 150 ("the relevant instruments setting out the Experts' mandate did not provide for an applicable law.").

<sup>54</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**; see also ABC ToR, Art. 3.4, **Appendix E to SPLM/A Memorial**.

<sup>55</sup> Indeed, the Government (ironically) acknowledges exactly this point elsewhere, when it complains that there was only one lawyer among the ABC Experts (to whose composition it agreed). See GoS Memorial, at para. 269 ("if a legal decision had been required, rather than a factual one, then this would have been reflected in the composition of the ABC itself").

<sup>56</sup> Abyei Annex, Art. 4, **Appendix D to SPLM/A Memorial**.

legal matters, they were entirely free to do so. And, if the ABC Experts did rely on legal principles, “there was nothing” in the parties’ agreements that prescribed how those principles should be referred to in the ABC Report.

131. Fourth, nothing in the parties’ agreements provides for any inquiry into the subjective motivations of the ABC Experts. Indeed, the notion of such an inquiry is antithetical to the adjudicative process and independence of the decision-makers and has, for those reasons, been firmly rejected on those few occasions in which it has been suggested in other contexts (e.g., international arbitral awards).<sup>57</sup>

132. Thus, there is no basis in the parties’ agreements for any of the Government’s four complaints about *ex aequo et bono* decisions, unreasoned decisions, reliance on unspecified legal principles or unstated motivations. Rather, as the Government’s own previous label (now abandoned) of “**mandatory** criteria” makes perfectly clear, the GoS’ complaints were based upon purported rules of **mandatory** law, derived from authorities external to the parties’ agreement.<sup>58</sup> Given this, there is no conceivable basis for treating the Government’s complaints as claims of *ultra petita* – exceeding the parties’ agreement. Instead, as its original characterization illustrated very clearly, the Government’s claims have no basis in the parties’ agreements and are grounded entirely in external principles of purported “mandatory” law.

133. Finally, it is unclear whether the Government maintains its claims for violations of supposed “mandatory criteria.” If so, then, as discussed in the SPLM/A Reply Memorial, there was no basis for these supposed “mandatory criteria” in the legal authorities previously cited by the Government’s Memorial.<sup>59</sup> More fundamentally, however, these purported violations of supposed rules of mandatory law simply may not be categorized as grounds for an excess of mandate under Article 2(a) of the Arbitration Agreement – no matter how the Government may seek to relabel them. Under either its old guise (“mandatory criteria”) or its new one (“*ultra petita*”) the Government’s claims are not admissible as alleged excesses of mandate.

b) The Government’s Effort to Recharacterize Its Supposed “Substantive Mandate” Claims as *Infra Petita* Claims Is Baseless

134. The Government’s Memorial also asserted that the ABC Experts exceeded their “substantive mandate,” which the GoS defined as “the scope of the consent given by the Parties to the [ABC Experts] to resolve the dispute” submitted to them.<sup>60</sup> In particular, the Government’s Memorial alleged that the ABC Experts exceeded their substantive mandate by: (a) “[r]efus[ing] to decide the question asked;”<sup>61</sup> (b) “[a]nswering a different question than that asked;”<sup>62</sup> (c) “[i]gnoring the stipulated date of 1905;”<sup>63</sup> and (d) “[a]llocating grazing rights within and beyond the Abyei Area.”<sup>64</sup>

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<sup>57</sup> SPLM/A Reply Memorial, at para. 54(c), 212-213, 843-844.

<sup>58</sup> SPLM/A Reply Memorial, at paras. 201-222, 678.

<sup>59</sup> SPLM/A Reply Memorial, at paras. 208-210, 213, 217, 678, 680-703.

<sup>60</sup> GoS Memorial, at paras. 227-228.

<sup>61</sup> GoS Memorial, at para. 230, Heading (i).

<sup>62</sup> GoS Memorial, at para. 235, Heading (ii).

<sup>63</sup> GoS Memorial, at para. 242, Heading (iii).

<sup>64</sup> GoS Memorial, at para. 249, Heading (iv).

135. As discussed in detail in the SPLM/A's Reply Memorial, the first three of these claims of alleged excesses of substantive mandate are nothing of the sort.<sup>65</sup> Rather, they are disagreements by the Government with the ABC Experts' decision on the merits of the parties' dispute: the Government's complaints do not concern the ABC Experts allegedly deciding disputes outside of their mandate, but rather involve the ABC Experts interpreting the Abyei Protocol's definition of the Abyei Area ("area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905") in a way contrary to the Government's position.<sup>66</sup> That disagreement with the merits of the ABC Experts' substantive decision is not the basis for an excess of mandate claim.

136. In contrast to the Government's Memorial, the GoS Reply Memorial now abandons any reference to supposed violations of the ABC Experts' "substantive mandate" (again, as confirmed by an electronic word-search of the document). Instead, the Government's Reply Memorial attempts to relabel these complaints as "*infra petita*" claims: "The ABC Experts Decided *Infra Petita*."<sup>67</sup>

137. Applying this new characterization, the Government's Reply Memorial argues that:

"the ABC Experts grossly erred in the interpretation of their mandate which they apparently stopped reading after the expression: 'to define and demarcate the area of the nine Ngok Dinka chiefdoms...,' without paying attention to the end of the definition of their mandate: '... transferred to Kordofan in 1905.'<sup>68</sup> ... In spite of the clear terms of their mandate, the ABC Experts did not consider either the actual territorial transfer or its date in their Report." ... "This is more than enough to conclude that the ABC Experts have not answered the question which had been asked to the ABC, thus deciding *infra petita* in contradiction to their clear mandate."<sup>69</sup>

138. Like its attempt to recharacterize its "mandatory criteria" complaints, the Government's effort to recharacterize its "substantive mandate" claims as claims of *infra petita* is hopeless. Whatever label the Government attaches to its claims, the inescapable truth is that its complaints concern the ABC Experts' substantive interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol. As discussed in detail in the SPLM/A Reply Memorial,<sup>70</sup> and also addressed below,<sup>71</sup> substantive disagreements of this nature are simply not grounds for an excess of mandate claim.

139. Needless to say, it does not make the slightest difference how the Government chooses to label its claims. The fact remains that the Government's complaint rests on its view that the ABC Experts "grossly erred" in interpreting the definition of the Abyei Area and that this is a substantive disagreement, rather than grounds for an excess of mandate claim.

140. Nor does it advance the Government's case to suggest that the ABC Experts decided *infra petita* by supposedly ignoring part of the definition of the Abyei Area (the ABC Experts

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<sup>65</sup> SPLM/A Reply Memorial, at paras. 223-225, 485-612.

<sup>66</sup> See SPLM/A Reply Memorial, at paras. 485-612.

<sup>67</sup> GoS Reply Memorial, at p. 55, heading (ii).

<sup>68</sup> GoS Reply Memorial, at para. 169.

<sup>69</sup> GoS Reply Memorial, at para. 176.

<sup>70</sup> SPLM/A Reply Memorial, at paras. 223-225, 485-612.

<sup>71</sup> See below at paras. 275-291.

supposedly “stopped reading”<sup>72</sup>); the Government’s claim remains a substantive disagreement with how the ABC Experts interpreted the phrase “area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.” Indeed, any substantive disagreement with an adjudicatory body’s decision could be characterized as *infra petita* if the Government’s peculiar logic was adopted: a disappointed party would only need claim that the tribunal had “stopped reading” the portion of the relevant treaty or contract on which it relied, thereby supposedly acting *infra petita*. Needless to say, that is neither the meaning of *infra petita* nor a sensible interpretation of the law.

3. The Purported Violations of “Procedural Conditions” Alleged by the Government Do Not Fall within the Definition of an Excess of Mandate

141. The Government’s Memorial alleged three purported violations of “procedural conditions” by the ABC Experts which supposedly constituted excesses of mandate.<sup>73</sup> These three alleged procedural violations were: (a) the interview of several witnesses in Khartoum;<sup>74</sup> (b) an email exchange with a third party (Mr. Millington);<sup>75</sup> and (c) the ABC Experts’ purported failure to act through the Commission.<sup>76</sup> The Government’s Reply Memorial does not recharacterize these claims, instead referring to them as allegations that “the ABC Experts Committed Gross Violations of the Applicable Procedural Rules.”<sup>77</sup>

142. The Government’s Reply Memorial claims that the breach of a procedural rule “is widely accepted in practice and in the teachings of international lawyers as being a ground for excess of mandate since, clearly, rules of procedure are part of the mandate. Therefore, there can be no doubt that, in the present case, the ABC Experts violated their mandate also in this respect.”<sup>78</sup> Despite its sweeping claims (“this is widely accepted in practice and in the teachings of international lawyers”), the Government provides no authority for the proposition that breach of a procedural rule can constitute an excess of mandate.

143. In fact, the Government’s unsupported claim that a procedural violation constitutes an excess of mandate is wrong. For the reasons detailed in the SPLM/A’s Reply Memorial, the Government’s procedural complaints do not constitute the basis for an excess of mandate under Article 2 of the Abyei Arbitration Agreement.<sup>79</sup> Article 2(a) defines an “excess of mandate” by reference to the category of disputes that the ABC Experts were charged with resolving under the parties’ agreements, namely “[w]hether or not the ABC experts had, on the basis of the agreement of the Parties as per the CPA, *exceeded their mandate WHICH IS ‘to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.’*”<sup>80</sup>

144. Pursuant to Article 2(a), an “excess of mandate” must be defined by reference to that category of disputes that the parties submitted for decision to the ABC (“*their mandate WHICH IS...*” the definition of a particular area). Article 2(a) did *not* define this Tribunal’s authority by reference to the ABC Experts having “exceeded their mandate *which is* set forth

<sup>72</sup> GoS Reply Memorial, at para. 169.

<sup>73</sup> See GoS Memorial, at paras. 177-186, 196-226.

<sup>74</sup> See GoS Memorial, at paras. 196-208.

<sup>75</sup> See GoS Memorial, at paras. 209-226.

<sup>76</sup> See GoS Memorial, at paras. 219-226.

<sup>77</sup> GoS Reply Memorial, p. 68, heading (iii).

<sup>78</sup> GoS Reply Memorial, at para. 187.

<sup>79</sup> SPLM/A Reply Memorial, at paras. 160-200. See also above at paras. 111-115.

<sup>80</sup> Abyei Arbitration Agreement, Art. 2(a), **Appendix A to SPLM/A Memorial** (emphasis added).



in the Rules of Procedure.” Rather, Article 2(a) defined the concept of “excess of mandate” by reference to the ABC Experts’ substantive task, which was to “define ... and demarcate” the Abyei Area.

145. Similarly, as also discussed in the SPLM/A’s previous submissions, the parties’ agreements concerning the ABC make clear precisely what “mandate” was understood to mean.<sup>81</sup> Article 1 of the Terms of Reference is entitled “**Mandate**” and provides that “[t]he ABC shall demarcate the area, specified above [as the Abyei Area] on map and on land.”<sup>82</sup> In contrast, the “**Functioning of the ABC**” is separately addressed in Articles 3 and 4 of the Terms of Reference, while the ABC’s “**Program of work**” similarly appears under separate headings. As with the terms of their other agreements, the parties did not include procedural matters within an “excess of *mandate*,” which instead referred to the scope of the substantive issues submitted to the ABC Experts’ decision.

146. Consistent with this, international authority consistently holds that a dispute regarding “jurisdiction” or excess of mandate does not extend to procedural complaints. As the Permanent Court of International Justice has held:

“According to the terms of Article X of the Paris Agreement No. II, the Parties agree to submit to the Court ‘questions of jurisdiction or merits.’ *In view of the fact that its jurisdiction is limited by the clear terms of this provision, the Court has no power to control the way in which the Mixed Arbitral Tribunal has exercised its functions as regards procedure.*”<sup>83</sup>

Other authorities, detailed in the SPLM/A Reply Memorial, are to the same effect.<sup>84</sup>

147. The Government’s Reply Memorial ignores all of this, and instead plucks a single sentence out of a 1931 journal article (by Castberg) regarding an “excess of power.”<sup>85</sup> According to the Government, quoting Castberg, “an arbitral tribunal can also commit an excess of power when applying rules of procedure different from the one that has been prescribed to it.”<sup>86</sup>

148. This isolated quotation does nothing to advance the Government’s effort to transform procedural complaints into excess of mandate claims under Article 2 of the Arbitration Agreement. Most fundamentally, the quotation does nothing to alter the plain language and obvious intentions of Articles 2(a) and 2(b). Castberg’s views about what should constitute an “excess of powers” in the abstract does nothing to change the meaning of the specific reference to “excess of mandate” in Article 2 of the Abyei Arbitration Agreement.

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<sup>81</sup> SPLM/A Memorial, at paras. 677-681; SPLM/A Reply Memorial, at paras. 168-171.

<sup>82</sup> ABC ToR, Art. 1.2, **Appendix E to SPLM/A Memorial**.

<sup>83</sup> *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pàzmány University v. Czechoslovakia)* Ser. A/B 61, 208, 222 (P.C.I.J. 1933), **Exhibit-LE 24/6** (emphasis added).

<sup>84</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, [1972] I.C.J. Rep. 46, 51, 69 *et seq.* (I.C.J.) (“[t]he Court’s task in the present proceedings is to give a ruling as to whether the Council has jurisdiction in the case. This is an objective question of law, *the answer to which cannot depend on what occurred before the Council.*”), **Exhibit-LE 24/7** (emphasis added); *Separate Opinion of Judge Dillard in Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, [1972] I.C.J. Rep. 46, 99 (I.C.J.) (“[the procedural irregularity] *does not go to the jurisdictional issue itself since this issue is clearly focussed on the reach of the Council’s competence to deal with the subject-matter of the disagreement.*”), **Exhibit-LE 24/7** (emphasis added).

<sup>85</sup> GoS Reply Memorial, at para. 186.

<sup>86</sup> GoS Reply Memorial, at para. 186.

149. Additionally, it is a sign of the Government's desperation to rest its case on the view of one author from 1931 (prior to adoption of any modern arbitration instrument, including the New York Convention, the ICSID Convention, the ILC Draft Convention on Arbitral Procedural/ILC Model Rules or any contemporary national arbitration legislation) about the generic topic of an "excess of power." As discussed in the SPLM/A's Reply Memorial, each of the foregoing instruments treats an excess of mandate differently and separately from complaints about procedural violations (compare New York Convention, Article V(1)(c) with Articles V(1)(b) and V(1)(d); UNCITRAL Model Law, Article 34(2)(a)(iii) with Articles 34(2)(a)(iv) and 36(1)(a)(iv); ICSID Convention, Article 52(1)(b) with Article 52(1)(d)).<sup>87</sup>

150. The Government also fails to mention that the passage it quotes from Castberg was written in the context of his exceptionally narrow view of the standard for an excess of powers claim. According to Castberg, "*we do not accept the doctrine that all excess of power on the part of an international tribunal renders the award invalid.*"<sup>88</sup> Further, Castberg explained that his excess of powers standard is only met in the most exceptional cases where there is a "*usurpation of power*"<sup>89</sup> that is "*flagrant.*"<sup>90</sup> According to Castberg this requirement is, however, almost never fulfilled:

*"[I]t is very rare in arbitral practice that one can ascertain an excess of power, in the sense of an usurpation of power. In all the cases examined above where an excess of power has been alleged, from our point of view, there has only been a very limited number where there had really been such excess. And among those few cases of an excess of power, there is in reality only a single one that could be characterized as an usurpation of power, in the sense that the arbitral award could also be considered as invalid according to modern rules of international justice."*<sup>91</sup>

151. In substance, Castberg's concept of an excess of powers in the procedural sense was limited to cases involving the most flagrant kind of "usurpation of powers" that virtually never occur – and that certainly do not even remotely apply in the present case. Thus, the one instance that Castberg refers to as a case of an excess of power is the infamous *North Eastern* boundary dispute (already cited in the SPLM/A Memorial),<sup>92</sup> which all authors and

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<sup>87</sup> SPLM/A Reply Memorial, at paras. 166, 186-196.

<sup>88</sup> Castberg, *L'excès de pouvoir dans la justice internationale*, 35 Recueil des Cours 449 (1931), **Exhibit-LE 39/1**.

<sup>89</sup> 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**.

<sup>90</sup> 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**; see also SPLM/A Memorial, at paras. 766, 768.

<sup>91</sup> Castberg, *L'excès de pouvoir dans la justice internationale*, 35 Recueil des Cours 444 (1931), **Exhibit-LE 39/1**.

<sup>92</sup> See SPLM/A Memorial, at para. 689 (citing to *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**).

commentators agree constituted an egregious excess of powers.<sup>93</sup> In addition, in none of the cases referred to in Castberg’s article was it claimed by one of the parties (let alone claimed successfully) that breach of a procedural rule constituted an excess of powers. His view that an egregious “usurpation of powers” could form the basis for an excess of power claim was thus not a statement of existing authority, but must be regarded as his personal view about how the law should develop.<sup>94</sup> Castberg’s analysis therefore does nothing to advance, and in fact contradicts, the Government’s case.

152. Finally, the term “excess of powers” is broader than an “excess of mandate,” even apart from Article 2(a)’s specific definition of the term. One early author’s interpretation of that term (“excess of powers”) to include some gross procedural violations has no relevance to the parties’ definition of the term “excess of mandate” in Article 2(a) of the Arbitration Agreement.

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<sup>93</sup> See SPLM/A Memorial, at para. 689 (citing to 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**); See also Castberg, *L’excès de pouvoir dans la justice internationale*, 35 *Recueil des Cours* 444 (1931) (“In that case, it appears that the arbitral judge had exceeded its power. The arbitrator established a boundary which, in his opinion, ‘he found suitable’, and he did not even pretend to found his decision on the provisions conventionally agreed by the parties and prescribed to him as a ground for his judgment.”), **Exhibit-LE 39/1**.

<sup>94</sup> Castberg refers to five cases in support of his analysis, all of which form part of the discussion of excess of power in other leading commentary. The only case referred to by Castberg where an alleged “procedural error” arose was in the *Aves Island* award. Castberg criticizes the Queen of Spain for exercising her arbitral power according to the constitutional rules prescribed in her own jurisdiction and not in accordance with the will of the parties. However, this is Castberg’s own observation and was not a view shared by the parties themselves, or, generally, by other leading commentators.

Thus, another leading author writing some 15 years later, while sharing the observation that this case represents an example of excess of jurisdiction (on quite separate grounds from Castberg, namely that “in determining the wholly distinct question [from that submitted by the parties] of whether a servitude existed [as opposed to determining sovereignty], it would seem that the arbitrator committed an excess of jurisdiction”) nevertheless notes that “no charge of excess of jurisdiction was made by the parties, who apparently found in the award a satisfactory solution of the dispute between them ...” See K. Carlston, *The Process of International Arbitration* 90 (1946, reprinted 1972), **Exhibit-LE 39/2**. Similarly, contemporary leading authors concur with Carlston and his view of the scope of excess committed by the Queen of Spain, and do not share or even refer to Castberg’s opinion. See, e.g., K. Kaikobad, *Interpretation and Revision of International Boundary Decisions* 71 (2007) (“In the *Aves Island* arbitration, the arbitrator, the Queen of Spain, was empowered by the 1857 Convention to decide the question of *sovereignty* over *Aves Island* ... The Queen, however, returned an award in which she attributed the *proprietary* interest in the island ... Although the award was clearly an *excès de pouvoir*, the two parties accepted the award.”), **Exhibit-LE 4/7** (emphasis in original). Perhaps most strikingly, however, the Government actually cites to the dicta of Judge Weeramantry who expressly acknowledges the point made by both Carlston and Kaikobad in relation to the *Aves Island* award but does not mention the argument asserted by Castberg. See GoS Reply Memorial, at para. 147 (quoting “Arbitral Award of 31 July 1989, Dissenting Opinion of Judge Weeramantry, I.C.J. Reports, 1991, p. 153.”); see *Dissenting Opinion of Judge Weeramantry in Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, [1991] I.C.J. Rep. 130, 153 (I.C.J.), **Exhibit-LE 11/11**.

In addition, the other author to which the Government cites in the same paragraph (also referred to by Judge Weeramantry), in discussing the *Aves Island* award, nowhere suggests that the procedural irregularity (although noted by the author) constituted an excess of powers. See GoS Memorial, at para. 147 (citing to “A. de La Pradelle et N. Politis, II *Recueil des arbitrages internationaux* (1923) pp. 404, 416-417, 421 (SCM Annex 17)”); See A. de Lapradelle & N. Politis, *Recueil des Arbitrages Internationaux* II 404, 416-417, 421 (1923) (the full text of the Chapter of which only a small portion is exhibited by the GoS), **Exhibit-LE 39/3**. To the best of our knowledge, there is not a single author who shares Castberg’s view (whether arising out of the *Aves Island* award or otherwise) that a procedural error can constitute an excess of power, even less so the much narrower excess of mandate. Moreover, the Government has not provided any such authority.

153. In sum, this Tribunal does not possess a general appellate review authority, or the power of an ICSID annulment panel or a national recognition court. It possesses only the power to consider an “excess of mandate” as defined in Articles 2(a) and 2(b) of the Arbitration Agreement.

154. With one arguable exception, none of the Government’s (now) 12 purported complaints about the ABC Report constitutes an “excess of mandate” within the meaning of Article 2(a) of the Abyei Arbitration Agreement. Notwithstanding the Government’s last-minute (and unacknowledged) efforts to relabel these claims, not one of these objections is admissible in these proceedings. As such, none of these objections is within the Tribunal’s jurisdiction or grounds for disregarding the ABC Report.

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

155. Even if one assumed (contrary to fact) that the Government’s 12 complaints about the ABC Experts were admissible in these proceedings, all of those complaints are demonstrably without merit. That is because the Government’s claims ignore the terms of the parties’ agreement regarding the ABC and the ABC proceedings, as well as the well-settled general principles of law regarding the presumptive finality and validity of adjudicative decisions, particularly concerning boundary determinations.

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

156. Preliminarily, the Government’s Reply Memorial again acknowledges that the ABC proceedings were adjudicative in nature. Thus, as with the Government’s initial Memorial,<sup>95</sup> the Government asserts:

“in the present case, the decision which was to be given by the ABC (or the ABC Experts) had the main characteristics of an arbitral award ....”<sup>96</sup>

157. The Government’s position thus again correctly acknowledges the essentially adjudicatory character of the ABC and the proceedings before the ABC. That character is explained in greater detail in the SPLM/A’s Memorial (at paragraphs 562 to 591).<sup>97</sup>

158. Given this characterization of the ABC proceedings, there can be no dispute as to the application of the various general principles of presumptive finality and extremely limited review of the ABC Experts’ decision (as discussed in the SPLM/A’s previous submissions<sup>98</sup>). These general principles of law apply to all adjudicative decisions rendered pursuant to consensual international dispute resolution mechanisms, and clearly govern analysis of the ABC proceedings and the ABC Report.

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<sup>95</sup> GoS Memorial, at paras. 130, 132. See also SPLM/A Reply Memorial, at paras. 118-121.

<sup>96</sup> GoS Reply Memorial, at para. 129.

<sup>97</sup> See also SPLM/A Reply Memorial, at paras. 118-121.

<sup>98</sup> See SPLM/A Memorial, at paras. 700-745; SPLM/A Reply Memorial, at paras. 129-136.

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

159. While correctly acknowledging the adjudicatory character of the ABC, the Government’s Reply Memorial continues to adopt a distorted and parochial view of the ABC and its proceedings. That view ignores the terms of the parties’ agreements and the specialized character of the ABC Experts, adopting a parochial disregard for the parties’ agreed dispute resolution mechanism and chosen decision-makers.

160. The Government’s Memorial claimed that “the entire mechanism by which the ABC and the Experts were entrusted with their task *closely resembled that found in international arbitral practice*.”<sup>99</sup> As a consequence, the Government relied extensively on what it characterized as the “general law and practice” relating to international investment and commercial arbitrations.<sup>100</sup>

161. As discussed in the SPLM/A Memorial, the Government’s analysis ignores the fact that the “Abyei Boundaries Commission” was a *boundary commission* and was *not an arbitral tribunal* (whether investment or commercial) or an international court.<sup>101</sup> This is evident from a number of essential features of the ABC and the procedures before it – all of which the Government completely omits from its analysis, including in its Reply Memorial:

- a. instead of being a tribunal of arbitrators, the Abyei Boundaries Commission was a commission of party and community representatives and experts: that is evident in the name of the ABC (“*Commission*”),<sup>102</sup> as well as in the various specific features discussed below;
- b. the number and composition of the ABC (15 members, including *10 party-appointed and overtly partisan and partial members*), which differed markedly from international investment and commercial arbitral practice (with three or five member tribunals composed entirely of impartial members);<sup>103</sup>
- c. the nature and qualifications of the ABC Experts, who were *experts in Sudanese and regional history, geography, politics, public affairs, ethnography and culture*,<sup>104</sup> and who were not “arbitration” or “investment arbitration” practitioners;
- d. the investigatory procedures that the ABC Experts were affirmatively expected to use, including provisions for the ABC Experts to conduct independently such scientific and other research as they considered relevant (“*The experts shall consult the British archives and other relevant sources on the Sudan wherever they*

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<sup>99</sup> GoS Memorial, at para. 132 (emphasis added). The Government (revealingly and) incorrectly refers to the ABC’s Rules of Procedure as the “*Arbitration Rules*” – a label in fact never used by the parties or in any of the ABC instruments; See GoS Memorial, at para. 211 (“This was a clear failure of due process and a patent breach of Arbitration Rule 14”) at p. 75, Heading (iii) (“Failure to act through the Commission (Arbitration Rule 14)”), and at pp. 94-95.

<sup>100</sup> GoS Memorial, at paras. 129-191.

<sup>101</sup> SPLM/A Reply Memorial, at paras. 122-128.

<sup>102</sup> Abyei Annex, Art. 1 (“there shall be established by the Parties Abyei Boundaries *Commission*”), **Appendix D to SPLM/A Memorial** (emphasis added); ABC ToR, Preamble (“to draw the Terms of Reference of the Abyei Boundaries *Commission*”), **Appendix E to SPLM/A Memorial** (emphasis added).

<sup>103</sup> See Abyei Annex, Art. 2, **Appendix D to SPLM/A Memorial**.

<sup>104</sup> See SPLM/A Memorial, at paras. 596-601, 604. The biographies of the five ABC Experts appear at **Exhibits- FE 13/7** (Johnson), **13/21** (Muriuki), **13/22** (Berhanu), **14/12** (Gutto), **19/29** (Petterson).

*may be available. ...*<sup>105</sup>), which differed markedly from arbitral practice where wholly *ex parte* independent investigations by arbitral tribunals are generally not the practice;<sup>106</sup>

e. the provision for open public meetings involving all interested residents at a number of locations throughout the Abyei Area at which the ABC gave laymen's explanations of its purpose and functions,<sup>107</sup> which contrasts with the confidential and structured procedural character of arbitral (and judicial) proceedings;

f. the express guarantee that “[a]s occasions warrant, *Commission members should have free access to members of the public* other than those in the official delegations at the locations to be visited,”<sup>108</sup> which contrasts with the limitations on contacts between commercial and investment arbitrators and potential witnesses; and

g. the emphasis on “*the spirit of goodwill*”<sup>109</sup> and “*partnership*,”<sup>110</sup> and “*informal yet businesslike*”<sup>111</sup> proceedings, without incorporation of (any of the numerous available) institutional arbitration rules,<sup>112</sup> and the procedural formalities those rules entail.

162. Although these aspects of the ABC proceedings have previously been identified, the Government's persistent refusal to mention or acknowledge *ANY* of the various features of the ABC proceedings requires underscoring. It is essential to note – as the Government consistently fails to do – that the ABC was *not* an arbitral tribunal and was *not* expected or required to follow either a specific set of arbitration rules or some constructed set of rules derived from “general” arbitral practice.

163. The ABC was an adjudicative body, but it was not, as the GoS Memorial would have it, a body that “closely resembled” an ICSID or ICC arbitral tribunal; equally, the ABC was not required or expected to apply or follow the ICSID, ICC or UNCITRAL Arbitration Rules.<sup>113</sup> On the contrary, the ABC was a specialized, *sui generis* boundary commission of experts that, despite its adjudicative nature and role, differed in a substantial number of vital respects from an investment or commercial arbitral tribunal.

164. The only time that the Government acknowledges the specialized and distinctive character of the ABC is in a passing effort to denigrate it. Thus, the Government's Reply Memorial makes the extraordinary statement that:

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<sup>105</sup> ABC ToR, Art. 3.4, **Appendix E to SPLM/A Memorial**; *see also* Abyei Annex, Art. 4 (“In determining their findings, the Experts in the Commission shall consult the British Archives and other relevant sources on Sudan wherever they may be available...”), **Appendix D to SPLM/A Memorial**.

<sup>106</sup> *See* SPLM/A Reply Memorial, at para. 124(d).

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

<sup>108</sup> ABC RoP, Art. 7, **Appendix F to SPLM/A Memorial** (emphasis added).

<sup>109</sup> ABC RoP, Art. 2, **Appendix F to SPLM/A Memorial**.

<sup>110</sup> ABC ToR, Preamble, **Appendix E to SPLM/A Memorial**.

<sup>111</sup> ABC RoP, Art. 2, **Appendix F to SPLM/A Memorial**.

<sup>112</sup> The parties could have agreed to incorporate any number of sets of institutional arbitrations rules (e.g., PCA, UNCITRAL, LCIA), but chose not to.

<sup>113</sup> *See* GoS Memorial, at para. 132.

“[the] composition of the ABC ... was *quite unusual compared with that of arbitral tribunals* ... especially since it was not composed of lawyers but primarily of historians and political scientists.”<sup>114</sup>

Based on this surprisingly insular statement, the Government goes on to suggest that finding an excess of mandate here “could be ... less astonishing” than with a “body composed of lawyers experienced in arbitrating boundary disputes.”<sup>115</sup>

165. This line of argument is unacceptably parochial. It is of course true that – unlike the arbitral tribunals with which the Government’s counsel are accustomed – the ABC Experts did not include a majority of European or American arbitration specialists. The fact that this is, in the Government’s view, “unusual,” provides no grounds to suggest that it is “less astonishing” that the ABC Experts could have exceeded their mandate.

166. Rather, the ABC Experts included Africans and historical or ethnographic experts because this is what the parties agreed upon. As discussed in the SPLM/A Memorial and Reply Memorial, the parties specifically agreed that three of the ABC Experts would be chosen by IGAD (an East African inter-governmental body) and that the ABC Experts would have expertise in Sudanese and regional history, geography, politics, public affairs, ethnography and culture.<sup>116</sup>

167. Thus, Article 2.2 of the Abyei Annex provided for the parties to obtain the nomination of “*five impartial experts knowledgeable in history, geography and any other relevant expertise*,”<sup>117</sup> (whose extensive and impressive expertise and credentials is detailed in the SPLM/A’s previous submissions<sup>118</sup>). Unsurprisingly, neither the SPLM/A nor the Government objected to any of these appointees or to their expertise or impartiality. In the words of Ambassador Dirdeiry:

“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 the Sudanese community will never be prejudiced or favour anybody.*”<sup>119</sup>

168. At bottom, the Government’s Reply Memorial rests on ill-disguised innuendo that the African experts who served as ABC Experts were not really the sort of people who should have been entrusted with a complex boundary determination and that it is therefore really not

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<sup>114</sup> GoS Reply Memorial, at para. 130 (emphasis added).

<sup>115</sup> GoS Reply Memorial, at para. 130.

<sup>116</sup> See SPLM/A Memorial, at paras. 594-605; SPLM/A Reply Memorial, at paras. 124, 236.

<sup>117</sup> Abyei Annex, Art. 2.2, **Appendix D to SPLM/A Memorial**.

<sup>118</sup> SPLM/A Memorial, at paras. 594-601; SPLM/A Reply Memorial, at paras. 116, 715.

<sup>119</sup> ABC Report, Part II, App. 4, at p. 97, **Exhibit-FE 15/1** (emphasis added).

so “astonishing” that they would make serious mistakes or exceed their mandate. That innuendo is narrow-minded and unacceptable. Moreover, it ignores fundamentally the parties’ specific and desired agreement on the membership of the ABC – confirmed by months of subsequent collaborative participation in the ABC proceedings. It is therefore profoundly ironic and wrong for the Government now to claim that the specialized dispute resolution mechanism which it participated in creating, implementing and operating was really some kind of unreliable, second-class justice. In fact, the ABC consisted of precisely the sorts of individuals, with precisely the expertise, that the parties desired. Equally, the ABC functioned under challenging logistical circumstances, together with the parties, to produce a careful and highly professional decision. Accepting the Government’s invitation to denigrate the ABC Experts and the parties’ chosen dispute resolution mechanism would ignore the fundamentally important principle of party autonomy, while simultaneously perpetuating the innuendo that a regional African dispute resolution mechanism cannot be trusted as reliable.

169. To compound that innuendo, the Government also suggests that Professor Shadrack B.O. Gutto “does not appear to have been admitted to practice law before any bar or to have any arbitration experience, whether as counsel and advocate or arbitrator.”<sup>120</sup> The Government once more betrays a striking insularity, apparently suggesting that the SPLM/A, Government and IGAD were all incapable of selecting an adequate decision-making body, because Professor Gutto is not a member of a bar.

170. Again, the Government’s criticisms proceed from the completely untenable basis that the ABC Experts were expected or intended to be practicing lawyers and international arbitration specialists. The simple answer is that the parties specifically did *NOT* agree to resolve their dispute by international arbitration before practicing lawyers, but instead specifically agreed to refer their dispute to a Commission of “*Experts*” in substantive disciplines relevant to Sudan (“*five impartial experts knowledgeable in history, geography and any other relevant expertise*”<sup>121</sup>).

171. Nor did the Government raise any objection to the composition of the ABC Experts, or Professor Gutto’s bar credentials, at any time during the ABC proceedings. On the contrary, as noted above, the Government did exactly the opposite – expressing approval of the ABC Experts’ credentials and experience.

172. In sum, there is no reason at all to suggest that the ABC Experts were less able to fulfill their mandate than “international arbitration experts” would have been. The ABC Experts had a complementary mix of public service, academic experience and legal expertise and it is simply parochial nonsense for the Government to suggest that their decision is somehow less reliable or more unpredictable than decisions by European or American arbitrators.

173. Finally, it bears repetition that the ABC was not only *not* some sort of second-class justice. In addition, the ABC was a remarkably successful and impressive dispute resolution mechanism in which both parties participated, without objection to produce an efficient, collaborative and fair procedure that left both parties well satisfied throughout. It was only when the Government later decided to reject the ABC Report – motivated by its desire to

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<sup>120</sup> GoS Reply Memorial, at para. 130, note 106.

<sup>121</sup> Abyei Annex, Art. 2.2, **Appendix D to SPLM/A Memorial.**



misappropriate the Abyei Area’s resources – that it raised its current critiques of the ABC Experts and proceedings.

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

174. Like the Government’s Memorial, its Reply Memorial ignores the well-settled body of general principles of law that apply to the decisions of consensually constituted adjudicatory bodies such as the ABC. In particular, the Government’s analysis entirely lacks recognition of any authority that addresses the final and binding character of an adjudicative decision.

a) Generally Applicable Principles of Finality and Validity of Adjudicatory Decisions

175. As already noted, the Government’s analysis rests on the claim that “in the present case, the decision which was to be given by the ABC (or the ABC Experts) had the *main characteristics of an arbitral award* . . . .”<sup>122</sup> Consistent with this, the Government repeatedly cites the grounds for annulment of an ICSID arbitral award (in Article 52 of the ICSID Convention),<sup>123</sup> the grounds for annulment or non-recognition of a commercial arbitral award (in the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration 1985 (“UNCITRAL Model Law”))<sup>124</sup> and miscellaneous authority regarding grounds for challenging arbitral awards.<sup>125</sup>

176. Despite basing its entire analysis on an analogy between the ABC Experts’ decision and an arbitral award, the Government nowhere refers to the more important general principles of law providing that *adjudicatory decisions are presumptively final and binding and that only in rare, exceptional cases will such decisions be invalidated*. Thus, neither the Government’s Memorial nor Reply Memorial ever refers to Article III of the New York Convention prescribing the obligation to recognize arbitral awards, to Article 53 of the ICSID Convention prescribing the binding character of ICSID awards, or to Articles 34(1) and 35 of the UNCITRAL Model Law prescribing the obligation to recognize and enforce arbitral awards.<sup>126</sup>

177. Likewise, the Government’s Memorial and Reply Memorial do not mention the extensive body of authority and commentary emphasizing the presumptive finality of adjudicative decisions, particularly in the context of boundary determinations. That authority is set out in detail in the SPLM/A’s Memorial (at paragraphs 700 to 745) and demonstrates that it is fundamental to all developed international and national legal systems, and to the rule of law itself, that:

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<sup>122</sup> GoS Reply Memorial, at para. 129 (emphasis added).

<sup>123</sup> See GoS Memorial, at paras. 131, 148-149, 158-159, 162-164, 172-173, 183.

<sup>124</sup> See GoS Memorial, at paras. 156, 171, 182, 184, 185.

<sup>125</sup> See GoS Memorial, at paras. 136-144, 147-150, 169.

<sup>126</sup> See New York Convention, Art. III, **Exhibit-LE 5/1**; ICSID Convention, Art. 53, **Exhibit-LE 23/3**; UNCITRAL Model Law, Arts. 34(1), 35, **Exhibit-LE 23/20**.

- a. adjudicatory decisions made pursuant to international dispute resolution agreements are presumptively final and binding, subject to invalidation only in rare and exceptional cases;<sup>127</sup> and
- b. the presumptive finality and validity of international adjudicatory decisions is particularly powerful where boundary determinations are at issue.<sup>128</sup>

178. Thus, as discussed in the SPLM/A's Memorial, a very substantial body of international judicial, arbitral and other authorities are emphatic in requiring the finality of adjudicative determinations.<sup>129</sup> The decision in *Orinoco Steamship Company Case (United States v. Venezuela)* is illustrative, where the tribunal declared that:

“[i]t is assuredly 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.**”<sup>130</sup>

179. These principles of presumptive finality and validity are vitally important to the international legal system. In the *Final Award in the Trail Smelter Case*, the tribunal declared:

“That 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.**”<sup>131</sup>

180. Academic authority also affirms the principle that adjudicative decisions are presumptively entitled to final and binding effect. In the words of one leading commentator, “[t]he importance of the *res judicata* rule to domestic legal systems and to the international community **[cannot] be exaggerated.**” The same author goes on to emphasize: “Suffice it to say that **legal systems, municipal and international, would be in considerable chaos if this rule did not exist.**”<sup>132</sup> Moreover, as also discussed in the SPLM/A's Memorial, these principles of presumptive finality are applicable with particular force in the context of boundary determinations.<sup>133</sup> Thus, the tribunal in the *Laguna del Desierto* case declared that it 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.**”<sup>134</sup>

181. To the same effect is the judgment in *Temple of Preah Vihear Case*, where the Court said:

<sup>127</sup> See SPLM/A Memorial, at paras. 700-715.

<sup>128</sup> See SPLM/A Memorial, at paras. 716-725.

<sup>129</sup> See authorities cited in SPLM/A Memorial, at para. 710, note 1172.

<sup>130</sup> *Arbitral Award of 25 October 1910, Orinoco Steamship Co. Case (“United States v. Venezuela”)*, XI U.N.R.I.A.A. 227, 238 (2006), **Exhibit-LE 8/3** (emphasis added).

<sup>131</sup> *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).

<sup>132</sup> K. Kaikobad, *Interpretation and Revision of International Boundary Decisions* 330 (2007), **Exhibit-LE 4/7** (emphasis added).

<sup>133</sup> See SPLM/A Memorial, at paras. 716-725.

<sup>134</sup> *The Laguna del Desierto Award*, 113 I.L.R. 1, 43 *et seq.* (1999), **Exhibit-LE 3/12**.

“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.”<sup>135</sup>

182. To the same effect, a leading authority 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.<sup>136</sup> Elsewhere, the same author observes that the principle of the finality of boundary determinations 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.”<sup>137</sup> Another authority writes similarly:

“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.*”<sup>138</sup>

183. Given the fundamental importance of these principles of presumptive finality and validity of adjudicative decisions, particularly in the context of boundary determinations, it is particularly striking that the Government’s analysis ignores them. That mode of analysis disregards one of the foundational tenets of legal analysis relevant to the ABC Report.

b) There Is No Basis for the Government’s Claim that Generally Applicable Principles of Finality Do Not Apply to the ABC Report

184. The Government’s Reply Memorial acknowledges in passing that “border settlements do enjoy a particular regime of stability and permanence,”<sup>139</sup> but then goes on to argue that general principles of finality and *res judicata* do not apply to the ABC Report. That attempt is entirely untenable and consists in little more than an effort to deny the importance and applicability of vitally important principles of international and national law. It is essential, both to these parties and the rule of law more generally, that the Government’s excuses be rejected.

185. Thus:

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<sup>135</sup> *Temple of Preah Vihear Case*, [1962] I.C.J. Rep. 6, 34 (I.C.J.), **Exhibit-LE 10/4** (emphasis added).

<sup>136</sup> See K. Kaikobad, *Interpretation and Revision of International Boundary Decisions* 143 (2007), **Exhibit-LE 4/7**.

<sup>137</sup> 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).

<sup>138</sup> 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), **Exhibit-LE 9/8** (emphasis added).

<sup>139</sup> GoS Reply Memorial, at para. 122.

a. The Government's Reply Memorial argues that principles of finality and *res judicata* do not apply to the ABC Report because "this question is disputed between the Parties."<sup>140</sup> That statement is not only incoherent, but would necessarily apply in every case: obviously, it is only if the effect of a judgment, award or boundary determination is "disputed between the Parties" that principles of finality and *res judicata* become relevant. The Government's argument as to why the ABC Report is not presumptively final and valid thus disregards, and would overturn, one of the most fundamental tenets of international and national legal systems and the rule of law.

b. The Government's Reply Memorial also argues that the ABC Report was to "determine where the boundary was in 1905,"<sup>141</sup> implying that this somehow makes generally applicable principles of finality and *res judicata* inapplicable. That implication is again incoherent and wrong. The Government cites no authority suggesting that determinations regarding past states of affairs or boundaries do not benefit fully from general principles of finality and *res judicata*. Nor would any such distinction make any sense: the same policies of legal stability and repose that apply in other contexts apply with equal force to determinations based on past events (as is in fact true in most cases).

c. The Government's Reply Memorial goes on to argue that general principles of *res judicata* and finality do not apply because "this Tribunal has been assigned, by the common will of the Parties, the task of determining whether the ABC Report is tainted with an excess of mandate."<sup>142</sup> Again, that argument makes no sense.

The fact that the parties have referred their dispute over the ABC Report to arbitration before this Tribunal in no way nullifies or alters the long-standing and fundamental general principles of law affirming the finality and validity of adjudicative decisions. Rather, the parties' agreement to arbitrate their dispute concerning the ABC Report before this Tribunal does nothing more than specify the forum and procedures for resolving that dispute: it does not alter the substantive rules of law applicable to that dispute (which are instead prescribed by Article 3 of the Abyei Arbitration Agreement).<sup>143</sup> Indeed, in this regard, there is no material difference between the parties' agreement to refer their disputes over the ABC Report to this Tribunal and the agreement of parties to an ICSID arbitration agreement to refer excess of mandate disputes to an ICSID annulment panel pursuant to their acceptance of the ICSID Convention and ICSID Rules; in neither case can it seriously be suggested that, by agreeing to arbitrate a dispute, the parties altered or invalidated generally applicable principles of finality and *res judicata*.

186. Next, the Government advances the extraordinary argument that generally applicable principles of finality and *res judicata* do not apply to the ABC Report because, allegedly, "the international community did not endorse the ABC Experts' Report."<sup>144</sup> In addition to being factually wrong, this is an egregiously a-legal and entirely baseless argument.

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<sup>140</sup> GoS Reply Memorial, at para. 122, second subparagraph.

<sup>141</sup> GoS Reply Memorial, at para. 122, first subparagraph.

<sup>142</sup> GoS Reply Memorial, at para. 122, third subparagraph.

<sup>143</sup> Abyei Arbitration Agreement, Art. 3, **Appendix A to SPLM/A Memorial**. Article 3 provides, inter alia, that the Tribunal shall apply such "general principles of law and practices as the Tribunal may determine to be relevant."

<sup>144</sup> GoS Reply Memorial, at para. 131.

187. Generally applicable principles of finality and *res judicata* do not depend on the vociferousness of the political approval of the international community: they are rules of law, whose fundamental purpose is precisely to resolve disputes without the need for further appeals to the international community. Given the Government's argument, it is appropriate to recall again the decision in the *Final Award in the Trail Smelter Case*:

“That 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.***”<sup>145</sup>

188. At bottom, the Government's suggestion that the finality and *res judicata* effect of an adjudicative decision depends on the extent of the “endorsement” of the international community ignores the rule of law. It is little more than an appeal to naked self-help and political leverage, as prevailing over legal rules and adjudicatory decisions. Those views have been unacceptable since at least the Hague Conventions of 1899 and 1907, and they have no place in contemporary international relations.<sup>146</sup> As the ICJ put it in analogous circumstances:

“[T]he Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law .... The purpose of recourse to the Court is the peaceful settlement of such disputes; the Court's judgment is a legal pronouncement, and it cannot concern itself with the

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<sup>145</sup> *Final Awards of 16 April 1938 and 11 March 1941*, (“*Trail Smelter Case*”), III U.N.R.I.A.A. 1905, 1950 (2006), **Exhibit-LE 8/4** (emphasis added).

<sup>146</sup> See, e.g., *Separate Opinion of Judge Schwebel in Case Concerning Questions Of Interpretation And Application Of The 1971 Montreal Convention Arising From The Aerial Incident At Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, [1998] I.C.J. 155, 172 (I.C.J.) (“For some 45 years, the world rightly criticized stalemate in the Security Council. With the end of the Cold War, the Security Council has taken great strides towards performing as it was empowered to perform. That in turn has given rise to the complaint by some Members of the United Nations that they lack influence over the Council's decision-making. However understandable that complaint may be, ***it cannot furnish the Court with the legal authority to supervene the resolutions of the Security Council. The argument that it does is a purely political argument***; the complaints that give rise to it should be addressed to and by the United Nations in its consideration of the reform of the Security Council. It is not an argument that can be heard in a court of law.”), **Exhibit-LE 39/4** (emphasis added); *Separate Opinion of Judge Spender in Advisory Opinion on Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, [1962] I.C.J. Rep. 151, 184 (I.C.J.) (“Once the Court has determined the interpretation it must accord to a provision of the Charter on which it is called upon to express its opinion, its function is discharged. Any political consequences which may flow from its decision is not a matter for its concern.”), **Exhibit-LE 39/5**; *Haya de la Torre Case (Columbia v. Peru)*, [1951] I.C.J. 71, 79 (I.C.J.) (“[T]hese courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice.”), **Exhibit-LE 39/6**; W. Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* 47 (1992) (“Sensitive to the political elements in the cases it would be processing, the ICSID system also sought to reduce the role of national courts in enforcement even more than in other available systems of private international arbitration by providing for direct enforcement with no possibility of challenging an award in those national courts where enforcement of awards would otherwise have been sought” suggesting that it was important to exclude any possibility for political interference, even through national courts, given the political sensitivity inherent in many ICSID cases), **Exhibit-LE 39/7**.

political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement.”<sup>147</sup>

189. In any event, the Government’s claim that the international community has not “endorsed” and sought implementation of the ABC process and ABC Report is factually wrong. Preliminarily, it is telling that the Government has not cited a single instance of a member of the international community saying the ABC Report should *not* be implemented. As noted below, no foreign government or inter-governmental organization or non-governmental organization, has even once suggested that the ABC Report is in any way flawed or not entitled to implementation in accordance with the parties’ agreements.<sup>148</sup> In reality, while usually couched in diplomatic terms, the international community has called repeatedly for implementation of the Comprehensive Peace Agreement – including the ABC Report.

190. Initially, it bears emphasis that the Comprehensive Peace Agreement, including specifically the Abyei Protocol and Abyei Annex, was the product of involvement by what the Government terms the “international community.” As discussed in the SPLM/A’s Memorial, the CPA was the product of discussions involving IGAD, the U.S., the United Kingdom, and the United Nations.<sup>149</sup> All of these members of the international community took active efforts in seeking and attempting to implement an agreement that would end the forty years of civil war in Sudan.

191. Moreover, while not mentioned by the Government, immediately after the release of the ABC Report, the Special Representative for Sudan of the UN Secretary-General, Jan Pronk, issued a press statement “welcom[ing] the Abyei Boundary (sic) Commission’s (ABC) presentation of its final report to the Presidency of the Government of National Unity... laud[ing] the members of the commission for their work in preparing the report...[and] commend[ing] the Parties for their wisdom in establishing the ABC and confirming that the report of its experts is ‘final and binding.’”<sup>150</sup> The press release concluded.

***“THE SPECIAL REPRESENTATIVE CALLS ON ALL PARTIES TO ABIDE BY THE DECISION.”***<sup>151</sup>

While it is true that the Government ignored this request, by the most directly-responsible representative of the “international community,” it cannot seriously claim that the international community did not request that it abide by the ABC Report.

192. Following on from this, the UN Security Council has repeatedly drawn attention to the need for full and prompt implementation of the CPA, including the Abyei Protocol. In a 6 October 2006 Resolution, the Security Council “[c]all[ed] upon the parties to the Comprehensive Peace Agreement... to respect their commitments and **implement fully all**

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<sup>147</sup> *Case concerning Border and Transborder Armed Actions Case (Nicaragua v. Honduras)*, [1988] I.C.J. Rep. 69, 91 (I.C.J.), **Exhibit-LE 2/5**, cited with approval in the *Separate Opinion of Judge Kooijmans in the Case Concerning Questions Of Interpretation And Application Of The 1971 Montreal Convention Arising From The Aerial Incident At Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, [1998] I.C.J. 144, 145 (I.C.J.), **Exhibit-LE 39/4**.

<sup>148</sup> See below at para. 191-204.

<sup>149</sup> See SPLM/A Memorial, at paras. 473-494.

<sup>150</sup> UNMIS Press Release, “The Secretary-General’s Special Representative for Sudan Welcomes the Presentation of the Abyei Boundary Commission’s Report,” dated 15 July 2005, **Exhibit-LE 39/8**.

<sup>151</sup> UNMIS Press Release, “The Secretary-General’s Special Representative for Sudan Welcomes the Presentation of the Abyei Boundary Commission’s Report,” dated 15 July 2005, **Exhibit-LE 39/8** (emphasis added).

*aspects of the Agreements without delay.*”<sup>152</sup> As detailed in the SPLM/A Memorial, the Government’s commitments under the CPA specifically included its promise to honor and immediately implement the ABC Report.<sup>153</sup>

193. Similarly, in April 2007, the Security Council “[c]all[ed] upon the parties to the [CPA] to accelerate urgently progress on implementing all their commitments, in particular ... *to resolve the Abyei problem and urgently establish an administration there*; and to take the *necessary steps to hold national elections according to the agreed time frame.*”<sup>154</sup> Again, the Government’s commitments included specifically its promises regarding the ABC process and its promises immediately to implement that ABC Report and establish an interim administration in accordance with the Report.

194. In October 2007, the Security Council again “[s]tress[ed] the importance of full and expeditious implementation of all elements of the [CPA], ... [and] call[ed] for all the parties to respect their commitments to these agreements without delay.”<sup>155</sup> Specifically with regard to Abyei, the Security Council “[c]all[ed] for parties to take steps to reduce tensions in the Abyei region, including ... *by implementing an Interim Administration and agreeing upon boundaries.*”<sup>156</sup> Once more, the Security Council’s call for immediate implementation of “all elements” of the CPA plainly included the Abyei Protocol and other agreements regarding the ABC process.

195. In addition, as recently as in April 2008, just two months before the parties agreed to the Abyei Road Map,<sup>157</sup> the United Nations Secretary-General’s Report on Sudan noted that “[t]he failure of the Presidency to resolve the Abyei issue, including the appointment of a local administration, continued to mar overall implementation of the Comprehensive Peace

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<sup>152</sup> UN Security Council Resolution 1714 (2006), dated 6 October 2006, at para. 3, **Exhibit-LE 39/9** (emphasis added).

<sup>153</sup> SPLM/A Memorial, at paras. 503, 531, 534.

<sup>154</sup> UN Security Council Resolution 1755 (2007), dated 30 April 2007, at para. 3, **Exhibit-LE 39/10** (emphasis added).

<sup>155</sup> UN Security Council Resolution 1784 (2007), dated 31 October 2007, at para. 3, **Exhibit-LE 39/11** (emphasis added).

<sup>156</sup> UN Security Council Resolution 1784 (2007), dated 31 October 2007, at para. 7, **Exhibit-LE 39/11** (emphasis added).

<sup>157</sup> *The Road Map for Return of IDPs and Implementation of Abyei Protocol* (National Congress Party/Sudanese People’s Liberation Movement) 2008, **Appendix G to SPLM/A Memorial**.

Agreement.”<sup>158</sup> Of course, what the parties’ agreements provided for the “Presidency”<sup>159</sup> to do with regard to the “Abyei issue” was to immediately implement the ABC Report.

196. The most specific statements by the international community with regard to the ABC Report itself were made in the CPA Monitor Monthly Reports, produced by the United Nations Mission in Sudan (“UNMIS”). UNMIS was established following the Security Council’s adoption of Resolution 1590, and is tasked with supporting the Government and the SPLM/A in the implementation of the CPA.<sup>160</sup> As such, UNMIS is an organ of the international community that is directly engaged with the ABC process and the ABC Reports.

197. As part of its mandate, UNMIS produced monthly reports on the implementation of the CPA, to “monitor developments towards reaching the benchmarks of the CPA.”<sup>161</sup> In the first UNMIS CPA Monitor report in December 2005, UNMIS stated that the ABC submitted its Report to the Presidency on 14 July 2005, and noted critically that “[t]he *Presidency has yet to act on the ABC’s report.*”<sup>162</sup> The following monthly reports all draw further attention to the issue of Abyei and note the Government’s non-implementation of the ABC Report,

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<sup>158</sup> Report of the Secretary-General on the Sudan to the United Nations Security Council, dated 22 April 2008, S/2008/267, at para. 12, **Exhibit-LE 39/12** (emphasis added). Indeed, ever since the Road Map was entered into, the GoS has continued its past approach of non-adherence to its commitments under the Abyei Protocol, and has failed to implement some of those aspects of the Roadmap it was required to implement contemporaneously with this arbitration. These include the provision on funding to the Abyei Area Administration (as required by Art. 3.6 of the Roadmap) and the division of oil revenue as per the interim boundaries (as required by Art. 3.9 of the Roadmap). See Speech of the Chairman to the Assessment and Evaluation Commission (AEC), dated 25 August 2008, available at <http://aec-sudan.org/speeches/SpeechEng.pdf>, where the Chairman stated “[w]ith regard to Abyei, full implementation of the Road Map is critical. *Deadlines have slipped and the sense of urgency needs to be maintained given the volatility of the area and the plight of the displaced...* I urge the government to work with them to ensure that support is timely and well targeted. Critical to success will be the triggering of the interim wealth sharing arrangements provided for in the Road Map, including the allocation of 50% of GoNU and 25% of GoSS receipts from oil fields in the areas under arbitration to a fund for development of the areas along the border. Again, *I urge the parties to ensure that arrangements for this fund are put in place without delay.*” (emphasis added). See also Speech of the Chairman of the AEC to the DDR Roundtable Meeting, dated 15 February 2009, available at <http://aec-sudan.org/Speeches/2162009.htm> (“[t]he Mid Term Evaluation noted the extent to which the Three Areas, including *Abyei, have been deprived of funds for recovery and development*, and the fact that only 5% of the total funding estimated as being required for them from 2005 to 2007 had been forthcoming. Notwithstanding strong expressions of interest and support from the government and from donors *this picture remains substantially unchanged*”) (emphasis added).

The GoS’s failure to implement matters provided for in the Road Map has been perpetuated despite the importance of adherence to the parties’ agreement for stability in the region. This was noted repeatedly in the recent Assessment and Evaluation Commission Mid-Term Evaluation Report submitted to the GoS in July 2008, available at [http://aec-sudan.org/mte/mte\\_english.pdf](http://aec-sudan.org/mte/mte_english.pdf). This report stated, *inter alia*, that “resolution of the Abyei issue” is “critical for the sustainability of the CPA and unity arrangements” (at p. 1), that “failure to proceed with implementation of the Abyei Protocol...[has] been [a] persistent source[] of tension and [has] led to violence. The recent heavy fighting and destruction in Abyei, and the displacement of its population, was by far the most serious instance of this to date, and probably the greatest challenge that has yet faced the CPA” (at pp. 7 to 8), and that the implementation of the Road Map’s provisions regarding oil wealth sharing should take place immediately (at p. 23).

<sup>159</sup> Note that the reference to the “Presidency” is a reference to the NCP-dominated GoS Presidency, not the Government of National Unity Presidency.

<sup>160</sup> See UN Security Council Resolution 1590 (2005), dated 24 March 2005, at paras. 1, 4, 11, **Exhibit-LE 39/13**. ((Note that the reference to the “Presidency” is a reference to the NCP-dominated GoS Presidency, not the Government of National Unity Presidency). UNMIS superseded the UN Advance Mission in Sudan (UNAMIS), which was set up following the adoption of UN Security Council Resolution 1547 on 11 June 2004. That body was given the task of preparing for a fully-fledged UN peace support mission to be deployed during the interim period following the signing of the CPA. See UN Security Council Resolution 1547 (2004), dated 11 June 2004, at paras. 1, 4, 7, **Exhibit-LE 39/14**.)

<sup>161</sup> The CPA Monitor, Monthly Report on the Implementation of the CPA, dated December 2005, available at p. 1, at [http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor\\_dec05.pdf](http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_dec05.pdf).

<sup>162</sup> The CPA Monitor, Monthly Report on the Implementation of the CPA, dated December 2005, at para. 66, available at [http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor\\_dec05.pdf](http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_dec05.pdf).



lasting until February 2006.<sup>163</sup> Since then, UNMIS has continued to report on developments relating to the ABC Report on a monthly basis.<sup>164</sup>

198. Equally, individual states have also drawn attention to the need for full and prompt implementation of the CPA, including the Abyei Protocol. In 2005, over 100 members of the United States Congress wrote to the U.S. State Department, requesting that policy towards the Government of Sudan be reconsidered in light of, amongst other matters, the GoS's failure to implement the decision of the ABC "as called for in the CPA."<sup>165</sup>

199. The former U.S. special representative to the State Department for Sudan, Mr. Roger Winter, made clear the U.S. view that the ABC Experts had not exceeded their mandate. In testimony to the U.S. House of Representatives Committee on International Relations, Mr. Winter stated in September 2006, "[t]he ABC determined the boundaries but President Bashir has rejected it and also the appointment of an interim local government as provided in the CPA. To buy time as the clock ticks, he refuses to proceed,"<sup>166</sup> and urged that the matter be raised at "the UN Security Council and other appropriate forums."<sup>167</sup> Similar evidence was given to this same committee in January 2007, where Mr. Winter stated:

"The ABC, chaired by an American former Ambassador to the Sudan, did its job. Its findings are final and binding. President Bashir rejected the Commission's findings although the CPA does not provide him with that authority."<sup>168</sup>

200. This testimony was evidently persuasive for the members of the House of Representatives. On 26 September 2006, the House of Representatives passed with a vote of 414 – 3, a resolution (H. Res. 992), calling for the appointment of a Presidential Special Envoy for Sudan, and noting:

"Whereas implementation of the Comprehensive Peace Agreement (CPA) between the Government of Sudan and the Sudan People's Liberation Movement (SPLM) is slow, ***raising serious concerns about the commitment of the Government of Sudan to fulfill its responsibilities;***

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<sup>163</sup> The CPA Monitor, Monthly Report on the Implementation of the CPA, dated January 2006, at para. 87, available at [http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor\\_jan06.pdf](http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_jan06.pdf), The CPA Monitor, Monthly Report on the Implementation of the CPA, dated February 2006, at para. 109, available at [http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor\\_feb06.pdf](http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_feb06.pdf).

<sup>164</sup> See e.g. The CPA Monitor, Monthly Report on the Implementation of the CPA, dated March 2006, at paras. 120 *et seq.*, available at [http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor\\_mar06.pdf](http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_mar06.pdf); The CPA Monitor, Monthly Report on the Implementation of the CPA, dated November 2008, at paras. 126 *et seq.*, available at [http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor\\_nov08.pdf](http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_nov08.pdf).

<sup>165</sup> See "Van Hollen Expresses Concerns About Recent Developments in Darfur, Sudan", 26 October 2005, available at <http://vanhollen.house.gov/HoR/MD08/Newsroom/Press+Release+by+Date/2005/10-26-05+Van+Hollen+Expresses+Concern+About+Recent+Developments+in+Darfur+Sudan.htm>; "Letter to Secretary of State Condoleezza Rice concerning the crisis in the Darfur Region of Sudan", 2 November 2005, available at [http://www.house.gov/apps/list/press/mi12\\_levin/morenews/os110105b.shtml](http://www.house.gov/apps/list/press/mi12_levin/morenews/os110105b.shtml).

<sup>166</sup> Hearing before the Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations, 109<sup>th</sup> Congress, 20 September 2006, p. 75, available at <http://www.internationalrelations.house.gov/archives/109/29972.PDF>

<sup>167</sup> Hearing before the Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations, 109<sup>th</sup> Congress, 20 September 2006, p. 77, available at <http://www.internationalrelations.house.gov/archives/109/29972.PDF>

<sup>168</sup> Hearing before the Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations, 110<sup>th</sup> Congress, 24 January 2007, p. 17, available at <http://foreignaffairs.house.gov/110/32846.pdf>.

Whereas in July 2005, although the Abyei Boundary [sic] Commission, established to define and demarcate the area of the nine Ngok Dinka Chiefdoms, finished its work and submitted its report to President Bashir, *the President has yet to implement the conclusions of the Commission, as called for in the Comprehensive Peace Agreement ...*<sup>169</sup>

201. At about this time, the Darfur Peace and Accountability Act of 2006 was also passed (and came into force on 16 October 2006). This imposed a number of restrictions and prohibitions on the Government of Sudan and its agents, and made the removal of these conditional upon the Government of Sudan, amongst other things “fully implement[ing] the Comprehensive Peace Agreement for Sudan without manipulation of delay, by – (A) *implementing the recommendations of the Abyei Boundaries Commission Report ...*”<sup>170</sup>

202. Further action was initiated in the U.S. during the recent periods of violence in the Abyei region in May 2008,<sup>171</sup> with one member of Congress, Mr. Donald M. Payne, Chairman of the House Subcommittee on Africa and Global Health, introducing a Bill – the “Just and Lasting Peace in Sudan Act of 2008” (H.R. 6416) – into the house. This bill codifies all existing sanctions against the Sudan Government, and, like the Darfur Peace and Accountability Act 2006, “lays out clear conditions...[including] fully implementing the Comprehensive Peace Agreement and the Abyei Boundary Commission’s recommendations – which must be met before the sanctions may be lifted.”<sup>172</sup>

203. Moreover, although again not mentioned by the Government, former representatives of both IGAD and the U.S. (General Sumbweiyi and Mr. Millington) support efforts to give effect to the ABC Report. The concrete actions by IGAD and U.S. representatives in these very proceedings, requiring effect to be given to the ABC Report, amount to more tangible “endorsement” of the ABC Report than any number of general political statements.

204. In contrast to these diverse calls for immediate implementation of the CPA and the ABC Report, the Government has cited not a single foreign governmental or non-governmental source saying the ABC Report should *not* be implemented. As noted above, no foreign government or inter-governmental organization, and no non-governmental organization, has even once suggested that the ABC Report is in any way flawed or not entitled to implementation in accordance with the parties’ agreements.

205. Finally, the Government’s Reply Memorial suggests that the ABC Report is not subject to generally applicable principles of finality and *res judicata* because the GoS supposedly objected to the ABC Experts’ decision.<sup>173</sup> In particular, the Government claims that Ambassador Dirdeiry “immediately made clear” the GoS’s position that “the Experts exceeded their mandate” at the first press conference following the release of the report.<sup>174</sup> The GoS relies on witness evidence, articles from the Arabic publication *Akhbar El Youm*, and a letter purportedly sent by Ambassador Dirdeiry to Senator Danforth.

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<sup>169</sup> Resolution Urging the President to appoint a Presidential Special Envoy for Sudan, H.R. 992, 109th Cong., 2d Sess., at p. 3 (2006), **Exhibit-LE 39/15** (emphasis added).

<sup>170</sup> Darfur Peace and Accountability Act of 2006, §7(a)(6)(A) **Exhibit-LE 39/16** (emphasis added).

<sup>171</sup> “Payne and Capuano Condemn Brutal Attacks in Abyei, Sudan”, 23 May 2008, available at <http://www.gurtong.org/ResourceCenter/documents/Reports/AbyeiCrisis/AbyeiBurning.pdf>.

<sup>172</sup> “Payne Commends International Criminal Court on Genocide Charges”, 15 July 2008, available at [http://www.house.gov/list/press/nj10\\_payne/pr\\_080715.shtml](http://www.house.gov/list/press/nj10_payne/pr_080715.shtml).

<sup>173</sup> See GoS Reply Memorial, at paras. 132-134.

<sup>174</sup> See GoS Reply Memorial, at para. 132.

206. Even if the Government's factual claims were correct (which they are not), this argument does nothing at all to render generally applicable principles of presumptive finality and *res judicata* inapplicable. The Government cites no authority for the proposition that protests against an adjudicatory decision deny it *res judicata* effect. On the contrary, it is only where such protests exist that application of principles of presumptive finality and *res judicata* come into play: if the parties both accept a decision, there is no need to consider its legally binding status. Thus, the Government's claims about its purported objections to the ABC Experts' decision are simply irrelevant to the *res judicata* and binding effects of that decision.

207. In any event, there is no credible evidence that the Government in fact did anything beyond objecting to the ABC Report on whatever politically expedient grounds suited it from time to time. Notably, the Government's Reply Memorial points to no GoS statement or communiqué that sets forth its position, instead referring only to a variety of press reports, which, with the possible exceptions of a single, one-line comment purportedly made by President Bashir, largely report the positions taken by members of the NCP/Misseriya community, and not made in any official capacity as official GoS spokespersons. Had the Government in fact had some articulated and coherent position with regard to the ABC Experts' purported excess of mandate, it would have been expressed in some such formal communication.

208. It is also notable that the GoS Reply Memorial provides no transcript or media account of the press conference at which it supposedly objected to the ABC Report on the day that it was issued. Likewise, the Government conspicuously provides no witness statement from Ambassador Dirdeiry – the person who supposedly made the statements on behalf of the GoS at the press conference. Again, had the Government articulated some principled basis for objecting to the ABC Report, it surely would have provided some record of its statement.

209. Similarly, the media reports of statements actually made by official GoS representatives in the months after the ABC Report show only a diversity of politically expedient claims and efforts at delay. In the days following the release of the ABC Report, the Sudan Tribune did not report any excess of mandate claims by the GoS; instead, it reported that “[a]fter 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.”<sup>175</sup> On 19 July 2005, the Sudan Tribune reported that “[t]he Khartoum government ... was still discussing the report but expressed confidence it would not unravel January's landmark deal.”<sup>176</sup> Similarly, the Sudan Tribune reported that “the report will be *subject to thorough study*” and a few days later that “the Khartoum *government ... was still discussing the report.*”<sup>177</sup>

210. Even the random press articles relied on by the Government's Reply Memorial only record largely persons giving statements not made in any official capacity as GoS spokespersons, and stating variously that “[the ABC] *had suggested a new map with no*

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<sup>175</sup> “President Receives Report of Abyei Panel on Border Demarcation,” Sudan Tribune, dated 15 July 2005, **Exhibit-FE 15/2**. See also, SPLM/A Memorial, at para. 536.

<sup>176</sup> “Pro-Khartoum Arabs See Red over Plans for Disputed Oil District of Abyei,” Sudan Tribune, dated 19 July 2005, **Exhibit-FE 15/3**. See also, SPLM/A Memorial, at para. 536.

<sup>177</sup> “Pro-Khartoum Arabs See Red over Plans for Disputed Oil District of Abyei,” Sudan Tribune, dated 19 July 2005, **Exhibit-FE 15/3**. See also, SPLM/A Memorial, at para. 536.

*relation with the mandate,*<sup>178</sup> that “*the report exceeded the ABC mandate and even admitted the ABC’s Expert failure to carry out the mandate entrusted to it,*”<sup>179</sup> and that the Experts “[failed] to delimit the area of nine Ngok Dinka chiefdoms transferred *as per the date specified in the Protocol, which is the year 1905.*”<sup>180</sup>

211. The alleged letter which Ambassador Dirdeiry supposedly sent to Senator John Danforth on 15 September 2005<sup>181</sup> also does not assist the Government’s case and, on examination, further undermines it. First, the Government has not provided any proof that the letter it cites was ever sent to – or received by – Senator Danforth; indeed, it also has provided no evidence of when the *undated* letter was supposedly written and sent.<sup>182</sup> Second, by 15 September 2005, Senator Danforth no longer served as U.S. Envoy to Sudan (as had been publicly reported) and a letter to him would have served no purpose; notably, the Government also refers to no such communications to IGAD, the SPLM/A, the UN, the U.S. State Department or to other governments, and no copy of this letter was ever received by the SPLM/A.<sup>183</sup> In a similar vein, the letter from Ambassador Dirdeiry, even if one were to accept it at face value, does not evidence any communication by the GoS or the Presidency. Rather, the letter is signed by Ambassador Dirdeiry, in his capacity as a representative to the ABC. It bears emphasis that Ambassador Dirdeiry was not at this time an official representative of either the GoS or the Presidency. Finally, Ambassador Dirdeiry’s purported communication with Senator Danforth merely reflects another after-the-fact effort to contrive grounds for delaying compliance with the ABC Report.

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212. In sum, the ABC Report is subject to well-settled principles of presumptive finality and validity, which apply to all adjudicatory decisions and in particular to boundary determinations. These principles form one of the essential cornerstones of international and national legal systems.

213. The Government’s purported grounds for ignoring these generally applicable principles of finality and *res judicata* are specious. As discussed above, it is completely irrelevant that the Government disputes the ABC Report, that the ABC Experts considered the definition of the Abyei Area by reference to circumstances in 1905, that the parties submitted their disputes regarding the ABC Report to arbitration or that the international community has supposedly not demanded immediate implementation of the ABC Report.

214. The Government cites no authority suggesting that any of these “facts” would prevent or alter the application of general principles of finality and *res judicata* – precisely because there is no such authority. To the contrary, the ABC Report is fully entitled to be treated –

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<sup>178</sup> GoS Reply Memorial, Annex 13, at p. 82 (emphasis added).

<sup>179</sup> GoS Reply Memorial, Annex 13, at p. 83 (emphasis added).

<sup>180</sup> GoS Reply Memorial, Annex 13, at p. 82 (emphasis added).

<sup>181</sup> GoS Reply Memorial, at para. 133.

<sup>182</sup> Furthermore, although the Government offers testimony from three ABC members, Ambassador Dirdeiry has (conspicuously) not provided a statement. It is also noteworthy that the Government has decided to exhibit this letter, but not the letter Mr. Abdul Rasul El-Nour Ismail refers to in his witness statement, namely a letter the GoS purportedly wrote to the Presidency “recommending the rejection of the Experts’ report on the basis of exceeding the mandate.” See Witness Statement of Abdul Rasul El-Nour Ismail, SCM WS5, at p. 7, ¶32. Lastly, it bears emphasis that, if the Government did in fact send this letter to Ambassador Danforth in September 2005 as it claims, it is uncertain what it hoped to achieve. Ambassador Danforth’s role as Special Envoy to Sudan ended in 2004, and he retired in January 2005.

<sup>183</sup> On its face, the letter does not purport to be copied to any other entity, including the SPLM/A.

like other adjudicatory decisions and boundary determinations – as presumptively valid and binding.

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

215. The Government’s Memorial and Reply Memorial also purport to ignore the equally well-settled principles of law that limit the grounds for overcoming the presumptive finality and validity of adjudicatory decisions. In particular, while acknowledging the limitations on the grounds for challenging an adjudicatory decision, the GoS also asks this Tribunal to relitigate, *de novo*, the substantive decisions and procedural judgments of the ABC Experts. That is a fundamentally misconceived approach to this Tribunal’s mandate, which is contradicted by the Government’s own analysis and concessions.

- a) The Government’s Reply Memorial Concedes that Finding An “Excess of Mandate” Is “Astonishing,” “Exceptional” and “Cannot Be Accepted Lightly”

216. Preliminarily, the GoS makes a number of concessions in various of its submissions regarding the extremely limited nature of this Tribunal’s mandate. These include the following acknowledgments, under the general principles of law applicable to adjudicative decisions:

- a. The Government acknowledges that it “is ***rather exceptional for an arbitrator or arbitration tribunal to be found to have exceeded its mandate,***”<sup>184</sup> and that it is “***certainly true*** that an allegation of excess of power ***cannot be accepted lightly.***”<sup>185</sup> Elsewhere, the Government’s Reply Memorial acknowledges that finding an excess of mandate is “***astonishing***” and “***exceptional,***”<sup>186</sup> while arguing that the absence of practicing lawyers from the ABC should make such a result “less astonishing.”<sup>187</sup>
- b. The Government acknowledges that “minor deviations from the Rules of Procedure would [not] amount to an excess of mandate.”<sup>188</sup> Rather, only a “***[s]erious [d]eparture from a [f]undamental [r]ule of [p]rocedure***”<sup>189</sup> would constitute grounds for invalidating the ABC Report. Moreover, a “breach of procedural conditions for a binding decision . . . must be material, that is to say significant both in itself ***and as to the result reached.***”<sup>190</sup>
- c. “This does not mean that an award can be annulled simply because a party disagrees with the reasoning of a tribunal on a point of fact or law, ***even if the Tribunal was in error in its reasoning on a point of fact or law. Annulment is to be distinguished from appeal.***”<sup>191</sup>

<sup>184</sup> GoS Reply Memorial, at para. 127 (emphasis added).

<sup>185</sup> GoS Reply Memorial, at para. 129.

<sup>186</sup> GoS Reply Memorial, at para. 130.

<sup>187</sup> GoS Reply Memorial, at para. 130.

<sup>188</sup> GoS Memorial, at para. 120.

<sup>189</sup> GoS Memorial, at p. 63, Heading (iv), and at paras. 177, 179, 186. That standard is developed in Chapter 4 of the Government’s Memorial, at paras. 177-186.

<sup>190</sup> GoS Memorial, at para. 193 (emphasis added).

<sup>191</sup> GoS Memorial, at para. 160 (emphasis added).

d. “It is not the case that *a mere disagreement, however justified, with the Experts’ appreciation of the facts* is sufficient to indicate an excess of mandate.”<sup>192</sup>

217. The Government’s concessions are well justified. There is a well-settled and extensive body of general principles of law that limit very significantly the circumstances in which adjudicatory decisions may be disregarded. These authorities are detailed in the SPLM/A’s Memorial (at paragraphs 746 to 791), and need not be repeated here. It is nonetheless important to note that the following principles are fundamental to both international and national legal systems:

a. Finding an excess of mandate is an exceptional conclusion, as to which the party refusing to comply with an adjudicative decision bears a heavy burden of proof. This characterization of an excess of mandate and allocation of the burden of proof is well recognized in all developed legal systems: “[*T*]he party impugning the award is at all times under the burden of proving that sufficiently weighty circumstances exist to support its contention that the award is invalid.”<sup>193</sup>

b. Equally well-settled international and national authorities hold that any excess of authority must be “*manifest*,” “*glaring*,” “*flagrant*,” “*substantial*” and unambiguous.<sup>194</sup> An excess of authority only arises in extreme and clear cut cases, not in vague, debatable or complex circumstances.

c. Errors of law, treaty and/or contract interpretation or factual 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.*”<sup>195</sup>

d. Other grounds for challenging adjudicative decisions, whether for procedural irregularities, public policy violations or otherwise, are also subject to equally onerous requirements.<sup>196</sup> Only in very rare and exceptional circumstances, and never on the grounds of substantive disagreement with the merits of the decision, may an adjudicative decision be challenged.<sup>197</sup>

218. These principles embody the vital public policies, and basic requirements of good faith and fairness, that attach to the presumptive finality and validity of adjudicative decisions. In particular, these principles are essential to ensuring that parties do not – as the Government seeks here – attempt to circumvent the finality and *res judicata* effects of adjudicative decisions by attacks on the decision-maker’s substantive, jurisdictional or procedural judgments.

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<sup>192</sup> GoS Memorial, at para. 161 (emphasis added).

<sup>193</sup> *Dissenting Opinion of Judge Weeramantry in Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, [1991] I.C.J. Rep. 53, 152, **Exhibit-LE 11/11**.

<sup>194</sup> See SPLM/A Reply Memorial, at paras. 140(b), 140(c), 622-624; SPLM/A Memorial, at paras. 762-770.

<sup>195</sup> D. Guermanoff, *L’excès de pouvoir de l’arbitre* 63 (1929), **Exhibit-LE 13/9**; see also *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 106, available at [www.un.org](http://www.un.org), **Exhibit-LE 1/1**, referring to J. Bluntschli, *Le droit international codifié*, Sect. 495, at p. 289 (1886), **Exhibit-LE 14/5**; K. Carlston, *The Process of International Arbitration* 190 (1946, reprinted 1972) (“No one would gainsay that merely a mistake or a questionable application of the law would not give rise to nullity.”), **Exhibit-LE 1/3**; see also SPLM/A Memorial, at paras. 771-791; SPLM/A Reply Memorial, at paras. 577-586.

<sup>196</sup> See SPLM/A Reply Memorial, at paras. 197-200, 285-311, 692-702.

<sup>197</sup> See SPLM/A Reply Memorial, at paras. 105, 114, 140, 308-311, 577-586, 599-608, 613-624, 682-691.

219. Indeed, the Government’s Reply Memorial also does not dispute the second and third principles outlined above: “[t]he other two propositions of the SPLM/A – i.e., that the excess of authority must be flagrant and that errors of law are not grounds for excess of mandate – are less debatable.”<sup>198</sup> Again, these concessions are well justified; it is fundamental to developed legal systems that the grounds for finding an excess of mandate be treated as highly exceptional, requiring a “manifest,” “glaring” or “flagrant” excess of the decision-maker’s jurisdiction.

b) The Government’s Burden of Proof Arguments Are Confused and Manifestly Wrong

220. Notwithstanding the foregoing concessions regarding the highly exceptional character of an excess of mandate claim, requiring the existence of a “manifest,” “flagrant” or “glaring” excess, the Government’s Reply Memorial also argues – for the first time – that “[o]n each issue, the Parties bear the same onus of proof.”<sup>199</sup> The Government contends that because “there is a dispute which both Parties have mutually and jointly agreed to refer to arbitration”<sup>200</sup> and because Article 24(1) of the applicable PCA Rules provides that each party bears the burden of proving the facts on which it relies, “a Party arguing that there was an excess of mandate bears [no] different burden of proof than a Party arguing that there was no excess of mandate.”<sup>201</sup>

221. The Government’s arguments regarding the “onus” or “burden” of proof are confused and misleading. Those arguments are either an effort to obscure the indisputable fact that it is the Government who bears the legal burden of proving its claims that the ABC Report is invalid, applying the very rigorous and demanding standards referred to above, or a non-controversial statement that each party bears the evidentiary burden of proving the facts on which it relies. In neither case, however, do the Government’s “onus of proof” arguments in any way alter the fact that it bears a heavy legal burden of demonstrating the exceptional circumstances necessary to establish an excess of mandate.

(1) The PCA Rules Do Not Alter the Government’s Very Onerous Burden of Proving An Excess of Mandate by the ABC Experts

222. The GoS’s Reply Memorial argues that the Government is under the “same”<sup>202</sup> or “no more onerous”<sup>203</sup> burden of proof of an excess of mandate than the SPLM/A. The Government purportedly relies on Article 24(1) of the PCA Rules, which provides that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence.”<sup>204</sup> The Government’s argument misreads the PCA Rules and confuses the concepts of the legal burden of proving a party’s claims and the evidentiary burden of proving particular facts.

223. Article 24(1) of the PCA Rules merely restates the general rule that the *evidentiary* burden of proving particular *facts* lies upon the party which alleges those facts. This is what is provided for by the plain language of Article 24(1) – which refers to “the burden of

<sup>198</sup> GoS Reply Memorial, at para. 128.

<sup>199</sup> GoS Reply Memorial, at para. 70.

<sup>200</sup> GoS Reply Memorial, at para. 74.

<sup>201</sup> GoS Reply Memorial, at para. 73.

<sup>202</sup> GoS Reply Memorial, at paras. 68, 70, 74.

<sup>203</sup> GoS Reply Memorial, at paras. 75, 81.

<sup>204</sup> PCA Rules, Art. 24(1), **Exhibit-LE 29/15**.

proving *the facts* relied on to support its *claim or defence*.”<sup>205</sup> Article 24(1) thus distinguishes clearly between the evidentiary burden of proof of “facts” (which is addressed by Article 24(1)) and the legal burden of proof of “claim[s] or defence[s]” (which is not addressed by Article 24(1) and is instead addressed by underlying rules of substantive law).

224. This is confirmed by reference to the UNCITRAL Arbitration Rules, which contain an identical provision to Article 24(1) of the PCA Rules, also in Article 24(1). The leading commentary on the UNCITRAL Arbitration Rules explains:

“[I]t is clear that the provision [Article 24(1)] is simply a restatement of ‘the general principle that each party has the burden of proving the facts on which he relied in his claim or in his defence,’ else risk an adverse decision. Article 24(1) therefore scarcely represents a modification of pre-existing principles. *Nor does the provision, though limited to the question of burden of proof as to the asserted facts, alter the standard rule that the claimant has the burden of demonstrating the legal obligation on which its claim is based.*”<sup>206</sup>

225. This is explained in greater detail by another author, who comments:

“It is uncertain, however, whether Article 24, despite its wording, really deals with the burden of proof in *the sense of the ‘legal’ burden of proof*, (i.e. who bears the risk that the Arbitral Tribunal considers certain facts to be true or not). Article 24 rather seems to deal with what under English legal terminology, one would call the *‘evidential’ burden of proof*. Article 24 distinguishes between those facts on which the claimant relies or has to rely to support his claim and those facts on which the respondent relies or has to rely to support his defence. *Article 24 does not decide which facts have to be proved by whom, and therefore necessarily refers to the burden-of-proof rules contained in the governing law, including (legal or factual) presumptions and rules providing for the shifting of the burden of proof. Article 24 neither establishes nor defines or excludes any such presumptions or such rules concerning the shifting of burden but necessarily presupposes their existence. The UNCITRAL Rules certainly do not define any standard of proof, which seems to confirm that Article 24 does not and was never intended to allocate the legal burden of proof.*”<sup>207</sup>

226. Thus, it is scarcely debatable that Article 24(1) of the PCA Rules, like Article 24(1) of the UNCITRAL Rules, is a restatement of the general principle on which both parties are agreed – a party must prove the *facts* on which it relies.<sup>208</sup> Importantly, however, Article 24(1) does not purport to address the question of which party bears the *legal burden of proving particular claims and defenses* and, in particular, does not alter general principles of law such as the presumptive finality and validity of adjudicative decisions.

227. While Article 24(1) does not address the legal burden of proving an excess of mandate, the very general principles of law that the Government has repeatedly relied on in

<sup>205</sup> PCA Rules, Art. 24(1), **Exhibit-LE 29/15** (emphasis added).

<sup>206</sup> D. Caron, L. Caplan & M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 568 (2006), **Exhibit-LE 40/1** (emphasis added).

<sup>207</sup> A. Redfern, *The Standards and Burden of Proof in International Arbitration* 10 Arb. Int’l 317, 329 (1994), **Exhibit-LE 40/2** (emphasis added).

<sup>208</sup> See M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* 221 (1995) (“The Rule Actori Incumbit Probatio ... is the broad basic rule of the burden of proof.”), **Exhibit-LE 40/3**.



this proceeding do specifically address the allocation of this burden. As detailed in the SPLM/A Memorial (at paragraphs 753 to 761), general principles of law specifically and unequivocally place the burden of overcoming the presumptive validity of an adjudicative decision on the party denying the validity of that decision.<sup>209</sup>

228. Judge Weeramantry has stated this rule in very clear terms:

*“In the Arbitral Award Made by the King of Spain (I.C.J. Reports 1960, p. 192, at p. 206),<sup>210</sup> this Court acted on the principle that the burden lay upon the party contending that the award is invalid. The ensuing enquiry is undertaken on this basis **and with due deference to the presumption of validity. The burden of displacing that presumption lies on [the party challenging the award], and that burden, having regard to the importance of the finality of arbitral awards, is a heavy one. Moreover, the contention of Guinea-Bissau [the party challenging the award] ... that the burden of proof of validity lies upon the parties seeking to uphold it is not entitled to succeed. ... [T]he party impugning the award is at all times under the burden of proving that sufficiently weighty circumstances exist to support its contention that the award is invalid.**”<sup>211</sup>*

229. Similarly, the ICJ and PCIJ have repeatedly held that the burden of proof lies on the party alleging the nullity of an adjudicative decision or other legal act.<sup>212</sup> 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.”*<sup>213</sup> Likewise, 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.”*<sup>214</sup>

230. The same allocation of the legal burden of proving the invalidity of an arbitral 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) and Article 52 of the ICSID Convention – all of which are central authorities in the Government’s own legal analysis. As discussed in the SPLM/A Memorial, each of these Conventions provides that an award may be denied recognition or annulled only if one of a limited number of specifically-defined exceptions to the presumptive validity of an award applies.<sup>215</sup>

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<sup>209</sup> See SPLM/A Memorial, at paras. 753-761; see also SPLM/A Reply Memorial, at paras. 613-621.

<sup>210</sup> See *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, 206 (I.C.J.) (an allegation that “such [i.e., that the proceedings did not comply with the procedure set out by the parties’ agreement] was not in fact the case **must be established by positive proof.**”), **Exhibit-LE 7/3** (emphasis added).

<sup>211</sup> *Dissenting Opinion of Judge Weeramantry in Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, [1991] I.C.J. Rep. 130, 152 (I.C.J.), **Exhibit-LE 11/11** (emphasis added).

<sup>212</sup> *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 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**”), **Exhibit-LE 11/13** (emphasis added).

<sup>213</sup> *Dissenting Opinion of Judge Read in Case Concerning Nottebohm (Liechtenstein v. Guatemala)*, [1955] I.C.J. Rep. 34, 35 *et seq.* (I.C.J.) (1955), **Exhibit-LE 12/1**.

<sup>214</sup> 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).

<sup>215</sup> See SPLM/A Memorial, at paras. 709-710.

231. It is also indisputable that, under the New York Convention and the ICSID Convention, 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 authority<sup>216</sup> and in equally uniform academic commentary<sup>217</sup> under the Conventions.

232. In the words of one representative 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.**”<sup>218</sup> 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.”<sup>219</sup>

233. 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.

234. As noted above, it bears emphasis that it is the Government that has argued repeatedly and consistently in its Memorial and Reply Memorial that “the entire mechanism by which the ABC and the Experts were entrusted with their task **closely resembled that found in international arbitral practice,**”<sup>220</sup> and that “the decision which was to be given by the ABC (or the ABC Experts) had the **main characteristics of an arbitral award** ...”<sup>221</sup> To the same effect, the Government’s Reply Memorial asserts that the ABC Report “had the main characteristics of an arbitral award ... and **can therefore be challenged on the same grounds.**”<sup>222</sup>

235. Similarly, as also discussed above, it is the Government that has argued that this Tribunal was empowered to act “**in a manner similar to that is ... similar, of an [ICSID] annulment panel.**”<sup>223</sup> As a consequence, the Government has relied extensively on what it

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<sup>216</sup> See authorities cited at SPLM/A Memorial, at para. 754, notes 1255-1257, at para. 756, note 1259, at para. 757, notes 1261-1262, at para. 758, notes 1263-1265.

<sup>217</sup> See authorities cited at SPLM/A Memorial, at para. 756, note 1260, at para. 757, note 1262.

<sup>218</sup> *Judgment of 17 July 2003*, XXIX Y.B. Com. Arb. 819, 825 (Obergericht Zürich) (2004), **Exhibit-LE 12/15**.

<sup>219</sup> 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 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).

<sup>220</sup> GoS Memorial, at para. 132 (emphasis added). The Government (revealingly and) incorrectly refers to the ABC’s Rules of Procedure as the “**Arbitration Rules**” – a label in fact never used by the parties or in any of the ABC instruments; See also GoS Memorial, at para. 211 (“This was a clear failure of due process and a patent breach of Arbitration Rule 14”) at p. 75, Heading (iii) (“Failure to act through the Commission (Arbitration Rule 14)”), and at pp. 94-95.

<sup>221</sup> GoS Reply Memorial, at para. 129.

<sup>222</sup> GoS Reply Memorial, at para. 129.

<sup>223</sup> GoS Memorial, at para. 131.

characterizes as the “general law and practice” relating to international investment and commercial arbitrations.<sup>224</sup>

236. Having relied repeatedly and systematically on analogies to arbitral awards and “general law and practice” relating to arbitral awards, the Government cannot seriously deny the applicability of one of the most fundamental general principles of law governing both arbitral awards and other adjudicative decisions. That general principle of law affirms the presumptive validity and finality of such decisions, subject only to narrowly defined exceptions to be proven by the party resisting the decision.

237. Indeed, the Government’s various concessions that finding an excess of mandate is “exceptional” or “astonishing,” and requires “flagrant” or “glaring” excesses (discussed above<sup>225</sup>) rest on precisely the foregoing general principle of law. It is exactly because of the vital importance of the presumptive validity of adjudicative decisions that invalidating them is “exceptional” and demands proof of “glaring” circumstances. It is also for just the same reason that it is the party who denies the validity of such a decision who bears the legal burden of establishing the exceptional grounds for such invalidity. That is so clear that it is difficult to see how the Government can seriously suggest to the contrary.

238. Moreover, it makes a nonsense of the basic purpose of the legal burden of proving a claim to argue, as the Government does, that both parties bear “the same” burden of proof in relation to the same claim – i.e., whether or not the ABC Experts exceeded their mandate. The very purpose of allocating the legal burden of proving a claim is to resolve disputes when the parties’ arguments are at equipoise.<sup>226</sup> The Government’s suggestion that the burden of proving an excess of mandate is “the same” or “equal” is wholly irreconcilable with the essential function of allocations of the burden of proof, which is to identify the party that will lose in such cases of equipoise.

5. The Abyei Arbitration Agreement Does Not Alter the Government’s Very Onerous Burden of Proving an Excess of Mandate by the ABC Experts

239. Even less seriously, the Government’s Reply Memorial also argues that the Abyei Arbitration Agreement means that “each Party bears the same burden of proof with respect to its contentions on the issues in dispute.”<sup>227</sup> The Government contends on the basis that “there is a dispute which both Parties have mutually and jointly agreed to refer to arbitration.”<sup>228</sup> According to the GoS, “[s]uch a provision is incompatible with the SPLM/A’s argument that the GoS bears an enhanced burden of proof in any way different, or more onerous, from that which applies to the SPLM/A itself.”<sup>229</sup>

240. There is no credible basis for the Government’s claim that the parties’ agreement to refer their dispute regarding the ABC Report to arbitration altered the presumptive validity of adjudicative decisions or the allocation of the legal burden of proving an excess of mandate.

<sup>224</sup> GoS Memorial, at paras. 129-191.

<sup>225</sup> See above at paras. 87, 216-219.

<sup>226</sup> See M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* 30 (1995), **Exhibit-LE 40/3** (“[i]t is also the purpose of the burden of proof to break the impasse in cases where evidence is evenly divided. ***If at the end of the proceeding the trier of fact finds that evidence is evenly divided in favour of the claimant and the respondent, the case will be decided against the party that bears the burden of proof.***”) (emphasis added).

<sup>227</sup> GoS Reply Memorial, at para. 74.

<sup>228</sup> GoS Reply Memorial, at para. 74; see also GoS Reply Memorial, at paras. 68, 71, 72, 73, 80.

<sup>229</sup> GoS Reply Memorial, at para. 75.

That claim is unsupported by any authority and it contradicts at least a century of well established, vitally important law that prescribes the presumptive validity of adjudicative decisions and the legal burden of establishing the exceptional invalidity of such decisions.

241. First, the GoS cites not a single legal authority in support of its argument that the parties' agreement to arbitrate the question of an excess of mandate alters or reverses otherwise applicable presumptions of validity and allocations of burdens of proving invalidity. Put simply, there is no reported decision and no commentary anywhere that suggests that an agreement to arbitrate alters generally applicable presumptions or allocations of legal burdens of proof.

242. The reason that no authority has ever adopted the Government's argument is that the argument is specious. An agreement to arbitrate selects the forum and the procedural mechanism for resolving a dispute; the agreement to arbitrate does not of itself alter the applicable legal or substantive rules governing the parties' dispute. That is elementary and indisputable.

243. Accordingly, and strikingly absent from the Government's discussion, the question of the substantive law applicable by this Tribunal is set forth in Article 3 of the Abyei Arbitration Agreement, which is headed "***Applicable Law.***" Article 3 provides that the Tribunal shall "apply and resolve the disputes before it in accordance with [the CPA] and ***general principles of law and practices*** as the Tribunal may determine to be relevant."<sup>230</sup> It is this provision of Article 3 – which refers to the generally applicable principles of law prescribing the presumptive validity of adjudicative decisions and the allocation of the legal burden of overcoming that presumptive validity – that governs the parties' burden of establishing the invalidity of the ABC Report.

244. Moreover, there is nothing at all in the parties' agreement to arbitrate their disputes that would alter or displace the fundamentally important and well-settled presumptive validity of adjudicative decisions, particularly in the context of boundary determinations. These generally applicable principles serve vitally important public purposes (outlined above and discussed in the SPLM/A Memorial), ensuring repose and legal stability and giving effect to adjudicative processes.<sup>231</sup> The parties' agreement to resolve a dispute over an adjudicative decision by arbitration in no conceivable way changes or diminishes any of these general principles of law or the policies underlying them.

245. On the contrary, the suggestion that an agreement to arbitrate somehow undoes the otherwise applicable presumptive validity of adjudicative decisions would discourage agreements to arbitrate: parties who agreed, peacefully and consensually, to resolve their disputes by arbitration would in effect be penalized for having done so by compromising their rights under existing adjudicative decisions. That is not what an agreement to arbitrate constitutes, nor is it consistent with the policies of encouraging peaceful and consensual resolution of international disputes.

246. Second, the Government's reliance on the parties' agreement to arbitrate their dispute is irreconcilable with its own extensive reliance on the ICSID Convention. As noted above,

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<sup>230</sup> Abyei Arbitration Agreement, Art. 3, **Appendix A to SPLM/A Memorial** (emphasis added).

<sup>231</sup> See above at paras. 174-183; SPLM/A Memorial, at paras. 700-745.

the Government’s Memorial repeatedly argued that this Tribunal was empowered to act “*in a manner similar to that of an [ICSID] annulment panel.*”<sup>232</sup>

247. It is indisputable, however, that a central element of the ICSID Convention and ICSID Rules is the parties’ agreement to a specific form of appellate review of an ICSID arbitral award (specifically, by an annulment panel under Article 52 of the ICSID Convention).<sup>233</sup>

Thus, as one authority remarked on the *Klöckner* annulment decision:

“The committee posited a presumption in favor of the validity of the award under question. In cases in which doubts were raised, “analysis should be resolved *in favorem validitatis sententiae.*” This particular holding, to which the committee returned on a number of occasions in its decision, appears to be mandated by the structure of ICSID review. The alternative, that the award does not enjoy such a presumption, would, in effect, transform the procedure under Article 52 into a *de novo* arbitration. *If the award did not enjoy a presumption of validity and the burden of proof was not on the challenging party, the procedure would be re-arbitration.*”<sup>234</sup>

248. The submission by a party requesting review by an annulment committee in an ICSID arbitration agreement plainly does nothing to effect the presumptive validity of the arbitral award. It simply provides a procedural mechanism and forum for resolving disputes over the validity of the award. As the Government’s own repeated reliance on analogies between this Tribunal and an ICSID annulment committee illustrates, the same principle of presumptive validity of adjudicative decisions applies equally to the ABC Report and this Tribunal.

249. The Government asserts that there is no “applicant” and no “respondent” in these proceedings, and that this too somehow vitiates the normal rule on the burden of proof. That is nonsense. The caption of the arbitration and the order of submissions does nothing at all to alter the vitally important public policies underpinning the generally applicable principles regarding the presumptive validity of adjudicative decisions.

250. This is explained by a leading author on this subject who reasons that the “difficulty in distinguishing between claimant and respondent,” where it arises, “*is not an impediment to the application of the basic rule of the burden of proof.*...”<sup>235</sup> The same author goes on to note that:

“in principle *the allocation of the burden of proof is not dependent on such a distinction between the parties.* Each party who claims a fact is, apart from its formal position, the claimant with respect to that fact and has the burden of proving it.”<sup>236</sup>

251. The same authority notes:

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<sup>232</sup> GoS Memorial, at para. 131.

<sup>233</sup> See ICSID Convention, 52, **Exhibit-LE 14/3**.

<sup>234</sup> M. Reisman, *Systems of Control in International Adjudication and Arbitration* 57 (1992), **Exhibit-LE 23/9** (emphasis added).

<sup>235</sup> M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* 225 (1995), **Exhibit-LE 40/3** (emphasis added).

<sup>236</sup> M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* 226 (1995), **Exhibit-LE 40/3** (emphasis added).

“It has also been argued that simultaneous submission of pleadings in international proceedings leaves no room for the application of the rule of *actori incumbit probatio*. ***It is submitted, however, that this argument is not well-founded. Simultaneous submission of the pleadings is not an obligatory feature of international proceedings. ... [E]ven in cases involving simultaneous submission of pleadings, international tribunals would be able to apply that rule [actori incumbit probatio.]***”<sup>237</sup>

252. Again, the fact that the parties agreed to simultaneous submissions (in order to expedite the arbitral process) in no way alters the applicable general principles of law. The order and timing of written submissions in no way conflict with either Article 3 of the Arbitration Agreement (selecting the applicable law) or the general principles of law outlined above (and not otherwise disputed by the Government).

253. The Government also suggests that the burden of proving an excess of mandate under Article 2(a) and 2(b) of the Arbitration Agreement should parallel the burden of defining the Abyei Area under Article 2(c) of the Agreement.<sup>238</sup> That analysis precisely confirms the Government’s confusion and the analysis set forth above by the SPLM/A.

254. The reason that the Government bears the legal burden of proving the exceptional invalidity of the ABC Report on excess of mandate grounds is because that is what is prescribed by the “general principles of law” referred to in Article 3 of the Arbitration Agreement. As discussed above, this allocation of the legal burden of proof and the presumptive validity of the ABC Report is required by generally applicable principles of law, which even the Government acknowledges.

255. In contrast, were the Tribunal to reach the issue presented by Article 2(c), then the same general principles of law would obviously not be applicable. That is because Article 2(c) presents a different substantive question – namely, definition of the Abyei Area – than do Articles 2(a) and 2(b). The essential point, which the Government seeks to confuse, is that it is not the Arbitration Agreement but instead generally applicable principles of law that define the presumptive validity of the ABC Report and the allocation of legal proof in the parties’ disputes.

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256. In sum, the Government’s claim that the parties both bear the “same” or “equal” burdens of proof of an excess of mandate is nonsense. That claim contradicts the vitally important and well-settled general principles of law prescribing the presumptive validity of arbitral awards and other adjudicative decisions, which even the Government acknowledges.

257. Nothing in the PCA Rules or the Abyei Arbitration Agreement alters these general principles of law or the Government’s legal burden of demonstrating the exceptional invalidity of that Report. Rather, the PCA Rules address the evidentiary burden of proving “facts,” not “claims or defences;” concerning or regarding the legal burden of proving claims or defenses, that is prescribed by the applicable general principles of law (specifically selected by Article 3 of the Arbitration Agreement).

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<sup>237</sup> M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* 227-228 (1995), **Exhibit-LE 40/3** (emphasis added).

<sup>238</sup> GoS Reply Memorial, at para. 81.

258. Equally, nothing in the parties' agreement to arbitrate purports to alter the general principles of law applicable to the ABC Report (and, indeed, Article 3 of the Arbitration Agreement specifically dictates the application of these principles). The agreement to arbitrate merely selects the procedure and forum for resolving the parties' dispute over the ABC Report, without purporting to alter the applicable rules of the governing law.

259. It is absurd for the Government to suggest that, by agreeing to arbitrate their dispute, the parties somehow excluded application of the presumptive validity of adjudicative decisions and the requirement for the award debtor exceptionally to demonstrate the decision's invalidity. That argument devalues the weighty public policies and interests in the presumptive validity and finality of adjudicative decisions and undermines the rule of law, while simultaneously adopting an analysis that would penalize agreements to arbitrate such disputes. Both results are pernicious and implausible.

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

260. The Government's Reply Memorial repeats its original claims of purported procedural violations by the ABC Experts, while also (apparently) adding a fourth purported claim of procedural unfairness. None of the Government's various procedural complaints is admissible in these proceedings and in any event, all of the complaints are manifestly without foundation.

1. The Three Procedural Breaches Initially Alleged by the Government Were Not Excesses of Mandate

261. In its first Memorial, the GoS alleged three purported violations of "procedural conditions" by the ABC Experts which supposedly constitute excesses of mandate.<sup>239</sup> These three alleged procedural violations were: (a) the interview of several witnesses in Khartoum; (b) an email exchange with a third party (Mr. Millington); and (c) the ABC Experts' purported failure to act through the Commission.<sup>240</sup> The Government asserted that, through these alleged violations, "the ABC Experts breached material procedural requirements which were express conditions for the exercise of their mandate."<sup>241</sup>

262. First, as discussed above and in the SPLM/A Reply Memorial at paragraphs 160 to 200, the Government's procedural complaints would not (even if well-founded, which they are not) constitute an excess of mandate under Article 2(a) of the Abyei Arbitration Agreement. That is an independent and complete answer to all of the GoS's procedural complaints.

263. Second, the Government's Reply Memorial does nothing at all to advance the GoS's three original procedural complaints. Those complaints are baseless (often contrived in bad faith) for the reasons stated in paragraphs 312 to 391 of the SPLM/A Reply Memorial (responding to the Governments complaints regarding the "Khartoum meetings"); paragraphs 392 to 420 of the SPLM/A Reply Memorial (responding to the Government's complaints regarding the "Millington email"); and paragraphs 421 to 481 of the SPLM/A Reply

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<sup>239</sup> See GoS Memorial, at paras. 177-186, 196-226.

<sup>240</sup> See GoS Memorial, at paras. 196-226.

<sup>241</sup> GoS Memorial, at para. 196.

Memorial (responding to the Government’s complaints regarding the ABC Experts alleged “failure to act through the Commission”).

264. Only the following matters raised in the GoS Reply Memorial warrant further attention.

a. The Government claims the so-called ‘Millington email’ constituted an excess of mandate because (a) the ABC Experts “were not authorized to consult the US Government,”<sup>242</sup> (b) the “Parties were given no notice of the request or the response”<sup>243</sup> and (c) “the response raised many more questions than it resolved.”<sup>244</sup> As set out in the SPLM/A Reply Memorial, one of the many independent responses to this argument was that the ‘Millington email’ caused no serious prejudice because it had no impact on the ABC Experts’ decision and can therefore not have constituted a breach of a procedural rule (much less an excess of mandate).<sup>245</sup> The Government essentially conceded this point in its Memorial,<sup>246</sup> and does so even more explicitly in its Reply Memorial, when it acknowledges that the response contained in the ‘Millington email’ “*was meaningless*.”<sup>247</sup> In these circumstances, there is no possible basis for claiming (which the Government does not even attempt to do) that the ‘Millington email’ caused any prejudice, much less serious prejudice, and this complaint is therefore baseless.

b. In the context of the Government’s complaints regarding the Khartoum meetings, the Government alleges in its Reply Memorial that “the Government of Sudan and SPLM/A representatives did not participate in the Khartoum meetings ... [and] the Parties ... were ever [sic, presumably never] consulted on these interviews, *which were conducted after the Experts had formally informed the Parties that they would proceed to no more interviews*.”<sup>248</sup> This is a gross misrepresentation of the document to which the Government cites and is entirely specious.

Nowhere in the two page document to which the Government refers (which is a document that was prepared by the ABC Experts on 25 April 2005 after the last of the field visits in the Abyei area) did the Experts say, formally or informally, that “they would proceed to no more interviews”<sup>249</sup> or anything of the sort. To the contrary, the document merely records the ABC Experts’ preliminary assessment that “[s]ince there is no agreement from the oral testimony [received during the Abyei field visits] and that testimony does not conclusively prove either side’s position” and their undertaking to “find as much evidence from contemporary records as we can ....”<sup>250</sup> For the Government to conclude from this document that “the breach of the

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<sup>242</sup> GoS Memorial, at para. 210.

<sup>243</sup> GoS Memorial, at para. 211.

<sup>244</sup> GoS Memorial, at para. 212.

<sup>245</sup> See SPLM/A Reply Memorial, at paras. 408-418.

<sup>246</sup> GoS Memorial, at para. 214.

<sup>247</sup> GoS Reply Memorial, at para. 190 (at the third bullet point).

<sup>248</sup> GoS Reply Memorial, at para. 192 (citing to “Abyei Boundary Commission, Note on Testimony Obtained in Field Visit: 14-20 April 2005, 25 April 2005, (SM Annex 78).”) (emphasis added). The same document also appears as **Exhibit-FE 14/6**.

<sup>249</sup> GoS Reply Memorial, at para. 192.

<sup>250</sup> Abyei Boundary Commission, Note on Testimony Obtained in Field Visit: 14-20 April 2005, 25 April 2005, at p. 2, **Exhibit-FE 14/6**.



procedural elements of the mandate (as well as the fundamental general principle of an adversarial process) is manifest”<sup>251</sup> is utterly hopeless.

c. The Government argues that “[s]ince ... gross procedural violations constitute excess of mandate, they must follow the same rules and, therefore, they can be invoked at any time.”<sup>252</sup> This statement appears to be an attempt by the Government to avoid the requirement that procedural objections be raised at the earliest possible opportunity.<sup>253</sup> That attempt is confused and futile. The Government does not provide even one authority for its proposition that procedural violations can be raised at any time, regardless of past conduct. In any case, as clearly set out in the SPLM/A Memorial and Reply Memorial, both jurisdictional and procedural objections must be raised at the earliest opportunity or they will be waived.<sup>254</sup> The Government’s Reply Memorial does not attempt to respond to that principle, for the simple reason that there is no answer.

265. Finally, the Government’s Reply Memorial is also remarkable in its studied disregard for what was actually provided for by way of procedures for the ABC in the parties’ agreements (again, never addressing the actual terms of the parties’ agreements). The Government instead continues its effort to conjure up abstract procedural rules, instead of addressing the particular provisions regarding the ABC Experts’ investigative and fact-finding role. In the absence of such attention, the Government’s procedural complaints are hopeless.

266. Likewise, the Government’s Reply Memorial also continues its complete disregard for what was actually done in the implementation of the ABC procedures (again, ignoring the verbatim transcripts that detail the Government’s own statements to the ABC as well as other records of the parties’ actions). It is only this approach to the evidentiary record that permits the Government to make such unsupportable and manifestly wrong claims as:

- a. “at no stage, did the ABC Experts try to achieve a consensus decision”<sup>255</sup> (when the evidence shows that at least three such attempts were made<sup>256</sup>); or
- b. that the ABC Experts held “three unscheduled meetings with representatives of the Ngok Dinka”<sup>257</sup> (when the evidence shows that one meeting was with the Twic Dinka, arranged by the Government’s own adviser<sup>258</sup>); or
- c. that the “ABC Experts have shown, on several occasions, a propensity to side with the SPLM/A”<sup>259</sup> (when the evidence shows that the ABC Experts in fact afforded the Government undue procedural advantages (including permission to present a third time to the ABC where the SPLM presented only twice<sup>260</sup>) and Ambassador Dirdeiry

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<sup>251</sup> GoS Reply Memorial, at para. 192.

<sup>252</sup> GoS Reply Memorial, at para. 188.

<sup>253</sup> See SPLM/A Memorial, at para. 844-854; SPLM/A Reply Memorial, at paras. 354-362.

<sup>254</sup> See SPLM/A Memorial, at para. 844-854; SPLM/A Reply Memorial, at paras. 354-362.

<sup>255</sup> GoS Reply Memorial, at para. 196.

<sup>256</sup> See SPLM/A Reply Memorial, at paras. 460-471.

<sup>257</sup> GoS Reply Memorial, at para. 189.

<sup>258</sup> See SPLM/A Reply Memorial, at paras. 367-373.

<sup>259</sup> GoS Reply Memorial, at paras. 189, 194.

<sup>260</sup> SPLM/A Memorial, at para. 513.

repeatedly and effusively acknowledged the fairness and impartiality of the ABC Experts<sup>261</sup>).

267. In truth, the Government's procedural complaints are nothing but after-the-fact contrivances, aimed at creating maximum confusion and delay. That is confirmed by the Government's last minute innuendo that the ABC Experts had a "propensity to side" with the SPLM/A. The reality is that the Government's complaint is with the substance of the ABC Experts' decision and that its Reply Memorial is simply casting about in desperation for any conceivable avenue for sowing further confusion and uncertainty.

2. The Government's New Complaint That the ABC Experts Held "Unilateral Consultations With Representatives of the SPLM/A" is Frivolous and Entirely Without Substance

268. In an extraordinary new argument, the Government now seeks to advance – in one half of a single paragraph – a new procedural complaint that the ABC Experts held "unilateral consultations with representatives of the SPLM/A."<sup>262</sup> According to the Government, by supposedly holding these consultations, the ABC Experts "grossly violated their fundamental rules of procedure binding on them and, consequently, manifestly exceeded their mandate."<sup>263</sup> This new claim is remarkable not only for its lack of seriousness but for the rising tide of desperation it signals on the part of the Government – now scrambling to add yet further complaints to its laundry list of objections.

269. The sole argument on which the Government's extraordinary new claim is based is set forth in the following seven lines of text, which are worth quoting in full:

"More generally, the ABC Experts have shown, on several occasions, a propensity to side with the SPLM/A. In particular, it is interesting to note that '[a]t the invitation of GoS [sic] and following strong criticism by the NCP, the experts of the Abyei Borders Commission made a one-day visit to the South on 15 September [2007] and met at the South Sudan Legislative Assembly's headquarters in Juba with MPs, GoS [sic] officials and civil society representatives to *defend their findings*.' [quoting from *The CPA Monitor*]<sup>264</sup> The ABC Experts started working with the SPLM/A after the release of the Report."<sup>265</sup>

270. From these lines, the Government concludes that the ABC Experts "grossly violated their fundamental rules of procedure binding on them and, consequently, manifestly exceeded their mandate."<sup>266</sup> This line of argument stands out amongst even the Government's already desperate complaints.

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<sup>261</sup> SPLM/A Memorial, at para. 865 (quoting Ambassador Dirdeiry during the Government's Final Presentation to the ABC); SPLM/A Reply Memorial, at paras. 445-447.

<sup>262</sup> GoS Reply Memorial, at para. 199(c).

<sup>263</sup> GoS Reply Memorial, at para. 199.

<sup>264</sup> GoS Reply Memorial, at para. 194 (citing United Nations Mission in Sudan, *The CPA Monitor*, para. 122 (October 2008)), **Exhibit-FE 16/13a** (GoS emphasis).

<sup>265</sup> GoS Reply Memorial, at para. 194 (emphasis added). Parenthetically, the references the Government quotes as being to "GoS" are in fact in the original source references to "GoSS" – a not insignificant typographical error.

<sup>266</sup> GoS Reply Memorial, at para. 199.

271. First, in addition to ignoring both the broad procedural discretion that international tribunals enjoy<sup>267</sup> and the presumptive adequacy of their procedural determinations,<sup>268</sup> the Government makes no attempt – as is apparent from the argument which has been quoted in its entirety above – to identify the procedural rule that the ABC Experts are purported to have “grossly violated.” That is because there is nothing at all in the ABC procedural arrangements that even remotely precluded or even disfavored the ABC Experts’ actions.

272. Second, the Government also fails to explain how any action taken by the ABC Experts *long after* the close of the ABC proceedings could possibly constitute a breach of the rules of procedure of those proceedings (much less an excess of mandate). The suggestion that public discussion of the ABC Report two years after the conclusion of the ABC proceedings somehow violated the procedures for producing that Report is on its face an unsustainable proposition.

273. Third, even if (contrary to fact) a procedural rule did exist which somehow prevented the ABC Experts from meeting with members of the SPLM/A after the conclusion of the ABC proceedings, the Government has failed utterly to show any prejudice it has suffered as a result of the matters of which it complains. Any such actions obviously did not influence the terms of the ABC Report and therefore could not have prejudiced the Government. As set forth in the SPLM/A Memorial, in these circumstances, the Government’s complaint must fail.<sup>269</sup>

274. Fourth, there is in any case no basis for the Government’s objection to the ABC Experts’ public meeting with the South Sudan Legislative Assembly. It bears emphasis that this presentation was made to (and at the invitation of) the Southern Sudan Legislative Assembly (not the SPLM/A), a body composed of representatives of all Southern and Northern political parties, including the SPLM *and* the National Congress Party.<sup>270</sup> Further, the ABC Experts indicated that they were also willing to hold a similar meeting with the Government.<sup>271</sup> All of this was precisely consistent with the ABC Experts’ role in attempting to resolve the parties’ dispute and implement the ABC Report and was in no way prohibited by or inconsistent with the procedures for the ABC proceedings. Again, the Government’s last minute complaint is another after-the-fact contrivance intended only to sow confusion and provoke delay.

*D. Three of the “Substantive” Breaches Alleged by the Government Were Not Excesses of Mandate and Were Instead Manifestly Correct Interpretations of the Parties’ Agreements and the Evidentiary Record*

275. In its Memorial, the Government claimed that the ABC Experts exceeded their “substantive mandate,” defined as “the scope of the consent given by the Parties to the [ABC Experts] to resolve the dispute” submitted to them.<sup>272</sup> In particular, the Government alleged that the ABC Experts committed four separate substantive excesses of mandate based on allegedly: (a) “refus[ing] to decide the question asked;”<sup>273</sup> (b) “answering a different question

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<sup>267</sup> SPLM/A Reply Memorial, at paras. 270-284.

<sup>268</sup> SPLM/A Reply Memorial, at paras. 285-297.

<sup>269</sup> SPLM/A Memorial, at paras. 298-311.

<sup>270</sup> First Witness Statement of Minister Deng Alor Kuol, at p. 27, ¶167.

<sup>271</sup> First Witness Statement of Minister Deng Alor Kuol, at p. 27, ¶167.

<sup>272</sup> GoS Memorial, at paras. 227-228.

<sup>273</sup> GoS Memorial, at para. 230, Heading (i).

than that asked;”<sup>274</sup> (c) “ignoring the stipulated date of 1905;”<sup>275</sup> and (d) “allocating grazing rights within and beyond the Abyei Area.”<sup>276</sup>

276. As discussed above, the Government’s Reply Memorial abandons its previous characterization and now advances the first three of its complaints under the heading “The ABC Experts Decided *Infra Petita*”<sup>277</sup> and the fourth (“allocating grazing rights ...”) under the new heading “*Answers to Questions Not Submitted: the ‘Secondary Rights’ Issue.*”<sup>278</sup> Under the first three headings, the Government claims that the Abyei Area must be defined as “an area that was transferred from the Bahr el Ghazal to Kordofan in 1905”<sup>279</sup> and that “***the area transferred cannot have already been in Kordofan prior to the transfer.***”<sup>280</sup> The Government claims that the ABC Experts (and the SPLM/A) err in not adopting this definition, and in instead defining the Abyei Area as the territory of the nine Ngok Dinka chiefdoms at the time of their transfer to Kordofan in 1905.<sup>281</sup>

277. The Government’s new formulation of its complaints adds nothing to its previously stated position, which is disposed of at paragraphs 485 to 624 of the SPLM/A Reply Memorial. The SPLM/A’s response to the fourth category under this heading (“allocating grazing rights within and beyond the Abyei Area”) is dealt with at paragraphs 625 to 975 of the SPLM/A Reply Memorial.

278. Preliminarily, as discussed above, the Government’s “substantive mandate” or “*infra petita*” claims are not admissible in these proceedings. That is because they do not constitute excesses of mandate, but instead are substantive disagreements with the ABC Experts’ reasoning and factual appreciation of the evidence. It is well-settled that such disagreements are not grounds for finding an excess of mandate.

279. Even if they were admissible in these proceedings, and however they are characterized, the Government’s “substantive mandate” or “*infra petita*” claims would be baseless. Indeed, the Government’s Reply Memorial advances a number of arguments that demonstrate – even more clearly than previously – why its substantive mandate/*infra petita* claims are entirely misconceived.

280. First, the Government makes no effort at all to address the argument – set forth in the SPLM/A Memorial and Reply Memorial – that an alleged error in treaty or contract interpretation is not grounds for an excess of mandate.<sup>282</sup> That is an independently sufficient basis for rejecting the Government’s substantive mandate/*infra petita* claims.

281. It is beyond dispute – and, indeed, the point is expressly acknowledged by the Government – that an error in substantive treaty or contract interpretation by an adjudicative body cannot form the basis for an excess of mandate claim. As the Commentary to the Draft ILC Convention on Arbitral Procedures explains, “***the decision of the arbitrators cannot be***

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<sup>274</sup> GoS Memorial, at para. 235, Heading (ii).

<sup>275</sup> GoS Memorial, at para. 242, Heading (iii).

<sup>276</sup> GoS Memorial, at para. 249, Heading (iv).

<sup>277</sup> GoS Reply Memorial, at paras. 162-185, Heading (ii).

<sup>278</sup> GoS Reply Memorial, at paras. 140-148, Heading (a).

<sup>279</sup> GoS Reply Memorial, at para. 110.

<sup>280</sup> GoS Reply Memorial, at para. 112.

<sup>281</sup> See GoS Reply Memorial, at para. 509-512.

<sup>282</sup> SPLM/A Memorial, at paras. 771-791; SPLM/A Reply Memorial, at paras. 577-586.

*attacked on the ground that it is wrong or unjust. Errors in calculation excepted from this statement.*<sup>283</sup>

282. This prohibition against a claim of nullity based upon error, even if essential error, is also recognized more generally in international law. One leading authority observes “**An excess of power must not be confused with an essential error,**”<sup>284</sup> and then 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.”<sup>285</sup>

283. As discussed in the SPLM/A Memorial, the same rule applies under both the ICSID Convention, the New York Convention and national arbitration legislation.<sup>286</sup> Thus, in the words of the annulment decision in *CMS v. Argentine Republic* (relied on by the GoS),<sup>287</sup> the annulment committee held that an error of law was not recognized as a sufficient basis for nullity. The committee reasoned that although the tribunal had applied the law “**cryptically and defectively,**” it did apply the law, and thus there was “**no manifest excess of powers.**”<sup>288</sup>

284. The Government does not dispute the foregoing rule – and, on the contrary, appears expressly to accept that it is not debatable. Thus, the Government’s Reply Memorial acknowledges that “the other two propositions of the SPLM/A – i.e., that the excess of authority must be flagrant and that **errors of law are not grounds for excess of mandate – are less debatable.**”<sup>289</sup> Similarly, according to the Government:

“This does not mean that an award can be annulled simply because a party disagrees with the reasoning of a tribunal on a point of fact or law, **even if the Tribunal was in error in its reasoning on a point of fact or law.** Annulment is to be distinguished from appeal.”<sup>290</sup>

285. Given these concessions, it is striking that the Government never responds to the SPLM/A’s repeated argument that the ABC Experts’ interpretation of the definition of the Abyei Area – “The territory [i.e., the Abyei Area] is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905”<sup>291</sup> – was a matter of substantive interpretation of the Abyei Protocol which cannot be the basis for an excess of mandate. That argument is a complete and sufficient answer to the Government’s various substantive mandate/*infra petita* claims and it is entirely unopposed by the Government’s submissions.

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<sup>283</sup> *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, available at [www.un.org](http://www.un.org), **Exhibit-LE 1/1**, referring to J. Bluntschli, *Le droit international codifié*, Sect. 495, p. 289 (1886), **Exhibit-LE 14/5**.

<sup>284</sup> D. Guermanoff, *L’excès de pouvoir de l’arbitre* 63 (1929), **Exhibit-LE 13/9**. See also K. Carlston, *The Process of International Arbitration* 190 (1946, reprinted 1972) (“No one would gainsay that merely a mistake or a questionable application of the law would not give rise to nullity.”), **Exhibit-LE 1/3**.

<sup>285</sup> D. Guermanoff, *L’excès de pouvoir de l’arbitre* 63 (1929), **Exhibit-LE 13/9** (emphasis added).

<sup>286</sup> See SPLM/A Memorial, at paras. 771-791.

<sup>287</sup> GoS Memorial, at para. 149.

<sup>288</sup> *Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, CMS Gas Transmission Company v. Argentine Republic* (25 September 2007), (ICSID Case No. ARB/01/8)(Annulment Proceeding), ¶136 (2007), **Exhibit-LE 15/2**.

<sup>289</sup> GoS Reply Memorial, at para. 128.

<sup>290</sup> GoS Memorial, at para. 160 (emphasis added).

<sup>291</sup> Abyei Protocol, Art. 1.1, **Appendix C to SPLM/A Memorial**.

286. Second, the GoS submissions also do not respond to the SPLM/A’s argument that the Government’s substantive mandate/*infra petita* arguments would apply equally to this Tribunal. On the contrary, the Government’s Reply Memorial confirms in express terms that this would be the case – which is manifestly unsustainable.

287. As discussed in the SPLM/A Reply Memorial, this Tribunal’s mandate under Article 2(c) parallels that of the ABC Experts, being to “*define (i.e., delimit)* on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.” Thus, if the ABC Experts’ misinterpretation of this definition of the Abyei Area was an excess of substantive mandate – as the Government suggests – *then the same would be true of an alleged misinterpretation of the definition of the Abyei Area by this Tribunal*. That is, if the ABC Experts exceeded their mandate by adopting the “wrong” definition of the Abyei Area, then this Tribunal would be subject to exactly the same attack, with only the identity of the party making the challenge to be determined.

288. The foregoing result is absurd. It would produce the result that the parties’ dispute over the definition of the Abyei Area could never be finally resolved by any adjudicatory body, because its decision would always be an excess of mandate in the eyes of one party. Consigning the parties’ dispute to self-help might be the Government’s current inclination, but it is completely untenable as a legal matter and entirely contrary to the rule (set forth above) that errors of substance do not constitute an excess of mandate.

289. Rather than responding to the foregoing argument, the Government’s Reply Memorial embraces the argument’s (wholly implausible) consequences with open arms. According to the Government, substantially the same formula “applied to the mandate of the ABC Experts and ... in these proceedings pursuant to Article 2(c) of the Arbitration Agreement.”<sup>292</sup> Given this equivalence, the Government says in very direct terms that any misinterpretation of the definition of the Abyei Area by this Tribunal would also constitute an excess of its mandate:

“The ABC Experts failed to adhere to this mandate [set out in Articles 1.1.2 of the Abyei Protocol and Article 2(c) of the Arbitration Agreement]. ... For present purposes, *it is necessary to underline THE IMPORTANCE OF COMPLYING WITH THE PRECISE MANDATE agreed by the Parties* in order not to jeopardise the overall peace process and the political agreements reached pursuant, *inter alia*, to the 2005 Comprehensive Peace Agreement, its related instruments, **AND THE ARBITRATION AGREEMENT IN THIS CASE.**”<sup>293</sup>

Moreover, according to the Government, “*the mandate of the Experts, as of this Tribunal*, is not to consider areas according to their demographics, but rather to delimit an area that was transferred from the Bahr el Ghazal to Kordofan in 1905”<sup>294</sup> and, even more explicitly, “[d]rawing another new boundary is **NOT WITHIN THE PURVIEW OF THIS TRIBUNAL EITHER.**”<sup>295</sup>

290. The Government’s position does not merely reflect a threat of non-compliance with the Tribunal’s ultimate decision. More substantively, it also expressly confirms the substantive absurdity of the Government’s position: given the Government’s approach to an excess of mandate, there is an inevitable and inescapable cycle of excesses of mandate, no

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<sup>292</sup> GoS Reply Memorial, at para. 87.

<sup>293</sup> GoS Reply Memorial, at para. 89 (emphasis added).

<sup>294</sup> GoS Reply Memorial, at para. 110 (emphasis added).

<sup>295</sup> GoS Reply Memorial, at para. 103.

matter what the Tribunal (or any other decision-maker) decides. Any error in interpreting the definition of the Abyei Area— according to one party or the other – would be an excess of mandate. That is absurd and is not the law.

291. Third, and in any event, the ABC Experts were precisely correct in their interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol. That is true for a number of independent reasons which are demonstrated in both the SPLM/A Reply Memorial and in Part III F below.<sup>296</sup>

*E. The ABC Experts Did Not Allocate Grazing Rights and the GoS Reply Does Nothing to Advance Its Argument*

292. The Government claimed in its Memorial that the ABC Experts exceeded their mandate by “allocating grazing rights beyond and limiting them within the ‘Abyei Area.’”<sup>297</sup> According to the GoS Memorial, the ABC Report did this in two ways: (a) “in seeking to confer on the Ngok grazing rights outside the ‘Abyei Area;” and (b) in seeking to limit within the Abyei Area the exercise of rights conferred by Article 1.1.3 of the Abyei Protocol.”<sup>298</sup>

293. The Government’s attempt to rearticulate its allegations in two pages of its Reply Memorial does nothing to add to what has already been said, and does not alter the fact that the Government has failed to demonstrate that the ABC Experts “confer[red] on the Ngok grazing rights outside the ‘Abyei Area;” sought to “limit within the Abyei Area the exercise of rights conferred by Article 1.1.3 of the Abyei Protocol” or that they exceeded their mandate in any other way.

294. The SPLM/A response to these arguments is articulated in full in paragraphs 625 to 675 of its Reply Memorial and the Tribunal is respectfully directed to those passages for the SPLM/A’s response on this issue.

*F. The Four Violations of “Mandatory Criteria” Alleged by the Government Were Not Excesses of Mandate and Were Instead Entirely Appropriate Aspects of the ABC Experts’ Decision and Reasoning*

295. The Government’s Reply Memorial also repeats the GoS’s four claims that the ABC Experts violated various purported “mandatory criteria,”<sup>299</sup> although, as discussed above, these claims are now labelled by the Government as instances of *ultra petita* decisions by the ABC Experts.<sup>300</sup> These violations were allegedly: (a) “failure to state reasons capable of supporting the decision;”<sup>301</sup> (b) reaching a decision “on the basis of an equitable division or ... *ex aequo et bono*;”<sup>302</sup> (c) “apply[ing] unspecified ‘legal principles in determining land rights;”<sup>303</sup> and (d) “attempt[ing] to allocate oil resources.”<sup>304</sup>

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<sup>296</sup> See SPLM/A Reply Memorial, at paras. 609-612, 1391-1497, 1501-1575.

<sup>297</sup> GoS Memorial, at p. 84, Heading (iv).

<sup>298</sup> GoS Memorial, at para. 249.

<sup>299</sup> GoS Memorial, at paras. 254-275.

<sup>300</sup> See above at paras. 13, 84-85, 89, 99, 116-133.

<sup>301</sup> GoS Memorial, at p. 56, Heading (ii); at p. 85, Heading (i).

<sup>302</sup> GoS Memorial, at p. 60, Heading (iii); at p. 88, Heading (ii).

<sup>303</sup> GoS Memorial, at p. 89, Heading (iii).

<sup>304</sup> GoS Memorial, at p. 90, Heading (iv).

296. As discussed above, each of these claims is inadmissible in these proceedings.<sup>305</sup> Even if these claims were admissible, however, they are frivolous – whatever label the Government chooses to attach to them.

1. The Government’s Complaints About the ABC Experts’ Purported Failure to Give Reasons Remain Frivolous

297. In its first Memorial, the Government alleged that the ABC Experts had violated certain “mandatory criteria,” in particular that “[t]he Experts failed to provide reasons capable of forming the basis of a valid decision.”<sup>306</sup> The Government argues in its Reply Memorial that the “ABC Experts reliance on the 10°35’N and 10°10’N latitudes manifestly reflects a failure to state reasons ...”<sup>307</sup> and “rests on a demonstrable gap in reasoning.”<sup>308</sup> The numerous independently sufficient answers to these complaints, which have not changed in the Government’s Reply Memorial, are discussed at paragraphs 704 to 785 of the SPLM/A Memorial and need not be repeated again here.

2. The Government’s Complaints About the ABC Experts’ Purported “Ex Aequo et Bono” Decision Remain Frivolous

298. In its first Memorial, the Government complained, in three paragraphs, that the ABC Experts rendered a decision *ex aequo et bono* and that this violated so-called “mandatory criteria,” thereby supposedly constituting an excess of the ABC Experts’ mandate.<sup>309</sup> The GoS repeats this same complaint in its Reply Memorial, this time under the guise of the ABC Experts having “grossly misinterpreted the provisions of their mandate.”<sup>310</sup>

299. The SPLM/A response to these complaints is set out in paragraphs 786 to 833 of its Reply Memorial and need not be repeated here. While the Government’s Reply Memorial does nothing to add to its existing complaints, the following observations are useful.

300. First, the Government’s argument continues to proceed from the erroneous premise that the ABC Experts were prohibited by the parties’ agreements from deciding *ex aequo et bono* (which, in any event, they did not).<sup>311</sup> For the reasons set out in full in paragraphs 814 to 833 of the SPLM/A Reply Memorial, this argument is misconceived. There is nothing in the parties’ agreements or in any general principles of law that forbid an *ex aequo et bono* decision and the Government’s Reply Memorial does nothing to alter that fact or even to address the issue.

301. It is notable, however, that the Government makes no effort to explain why it initially relied on purported “mandatory criteria,” external to the parties’ agreements, in its Memorial, and supposedly discovers provisions in the parties’ agreements in its Reply Memorial, allegedly now justifying an *ultra petita* claim. The reality is instead that nothing in the parties’ agreements imposes the prohibition on *ex aequo et bono* decisions constructed by the Government, which is exactly why the GoS Memorial addressed the subject as a question of “mandatory criteria.”

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<sup>305</sup> See above at paras. 116-133.

<sup>306</sup> GoS Memorial, at para. 255.

<sup>307</sup> GoS Reply Memorial, at para. 152.

<sup>308</sup> GoS Reply Memorial, at para. 153.

<sup>309</sup> See GoS Memorial, at paras. 263-265.

<sup>310</sup> GoS Reply Memorial, at paras. 149-156.

<sup>311</sup> See e.g., GoS Reply Memorial, at para. 150.



302. Second, the GoS now argues that in purportedly deciding *ex aequo et bono* (which they did not), the “ABC Experts grossly misinterpreted the provisions of their mandate, not only with respect to the question they were asked to answer, but also with regard to the basis for the decision.”<sup>312</sup> This argument is obviously misconceived because it is nothing more than a disagreement by the Government with the way in which the ABC Experts interpreted their mandate (the “ABC Experts grossly *misinterpreted* ...”).

303. That argument is also unsustainable because, in the Government’s own words: “This does not mean that an award can be annulled *simply because a party disagrees with the reasoning of a tribunal on a point of fact or law, even if the Tribunal was in error in its reasoning on a point of fact or law*. Annulment is to be distinguished from appeal.”<sup>313</sup> In these circumstances, the Government’s complaints are entirely without merit.<sup>314</sup>

3. The Government’s Complaints About the ABC Experts’ Purported “Failure to Rely on Specified Legal Principles” Remain Frivolous

304. The Government argued in passing in its first Memorial that the ABC Experts’ reference to “unspecified ‘legal principles in determining land rights’” constitutes a violation of mandatory criteria.<sup>315</sup> The Government’s complaint focused on Appendix 2 to the ABC Report and on the principles of “equitable division of shared secondary rights.”<sup>316</sup> The SPLM/A’s response to these complaints is set out in paragraphs 834 to 842 of the SPLM/A Reply Memorial and need not be repeated here.

305. There are nonetheless a few matters raised in the Government’s Reply Memorial that warrant additional comment. Preliminarily, the Government has once again sought to recharacterize its claims. The Government’s complaint no longer appears to be that the reference to “unspecified ‘legal principles in determining land rights’” constitutes a violation of mandatory criteria,<sup>317</sup> but rather that the ABC Experts’ failure to base “their decision on any specified ‘legal principles’”<sup>318</sup> is another example of an alleged failure to provide reasons. The Government now claims that “absent any justification for the categorical and ill-founded assertion that, in the present case, law is based on a pure reference to equity, the Report is devoid of any kind of motivation on this crucial point.”<sup>319</sup>

306. The Government’s effort to restate its argument is confused and wrong. The Government appears to concede, at least by implication, that only a *complete failure* to state reasons will ever justify the setting aside of an award.<sup>320</sup> The Government goes to great pains to point out that the ABC Experts’ purported lack of motivation “must be seen not as based on an erroneous or debatable motivation, but as *completely* and *manifestly* lacking in

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<sup>312</sup> GoS Reply Memorial, at para. 149.

<sup>313</sup> GoS Memorial, at para. 160 (emphasis added); *see also* GoS Memorial, at para. 161 (“It is not the case that a mere disagreement, however justified, with the Experts’ appreciation of the facts is sufficient to indicate an excess of mandate.”); GoS Reply Memorial, at para. 128 (“... that the excess of authority must be flagrant and that errors of law are not grounds for excess of mandate – *are less debatable in the abstract.*”) (emphasis added).

<sup>314</sup> This point is set out in detail in the SPLM/A Memorial at paragraphs 771 to 791 and in the SPLM/A Reply Memorial at paragraphs 577 to 586 and need not be repeated here.

<sup>315</sup> GoS Memorial, at paras. 266-269.

<sup>316</sup> GoS Memorial, at paras. 266-269.

<sup>317</sup> *See* GoS Memorial, at paras. 266, Heading (iii).

<sup>318</sup> GoS Reply Memorial, at para. 157, Heading.

<sup>319</sup> GoS Reply Memorial, at para. 160.

<sup>320</sup> GoS Reply Memorial, at para. 160.

motivation.”<sup>321</sup> Furthermore, as the SPLM/A Reply Memorial notes, even an award that is “illogical, nonsensical, inexplicable, arbitrary, untenable, completely incorrect, inequitable, absurd, abstruse, boundlessly unenlightened, unreasonable, in violation of common sense,”<sup>322</sup> may not be set aside. However it is framed, there is no possible basis for the Government’s complaints about the reasoning of the ABC Report.

307. First, as stated in the SPLM/A Reply Memorial, there was no requirement in the parties’ agreements that the ABC Experts provide a reasoned decision.<sup>323</sup> The full discussion on this point appears in paragraphs 707 to 716 of the SPLM/A Reply Memorial and need not be repeated here.

308. Second, and again as discussed in the SPLM/A Reply Memorial, there is no general principle of law, much less a mandatory one, that requires all adjudicatory decisions to contain reasons and the Government has singularly failed to provide authority to the contrary.<sup>324</sup> The Government’s new complaint regarding a purported failure to state reasons in relation to any “legal principles” relied on by the ABC Experts suffers and must fall in the same way as its argument that there were “crucial gaps in the argumentation of the Experts both in their rejection of the GoS case and in the adoption of the 10°10’N line.”<sup>325</sup> Both arguments are hopeless.

309. Third, as set forth in detail in the SPLM/A Memorial (at paragraphs 518 to 531, 643) and Reply Memorial (at paragraphs 745 to 752), the ABC Report was in any event a substantial document in which the ABC Experts diligently considered the parties’ submissions, the oral testimony, the documentary and map evidence and concluded with a well reasoned and logical determination of the issue in dispute. That conclusion alone is enough to dispose of the Government’s new complaint, as it was sufficient to dispose of the Government’s other complaints regarding the ABC Report’s reasoning.<sup>326</sup>

310. Fourth, the Government’s suggestion that the ABC Experts’ reliance on the “legal principle of the equitable division of shared secondary rights” “finds no support whatsoever in the Experts’ Report” is specious.<sup>327</sup> As detailed in the SPLM/A Reply Memorial,<sup>328</sup> the ABC Report stated precisely the principles on which it relied, and identified the legal principles to which they referred in Appendix 2 as applicable in “*former British colonies and protectorates, including Sudan (a Condominium)*”<sup>329</sup> and “*Sudan*” at the “*time of the Condominium*.”<sup>330</sup> Appendix 2 of the ABC Report also cited to a number of secondary sources about Sudanese and British colonial law.<sup>331</sup> The Government’s new objection that the legal “principle” relied on by the ABC Experts “finds no support whatsoever in the Experts’ Report” is therefore demonstrably false.

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<sup>321</sup> GoS Reply Memorial, at para. 160 (emphasis added). This standard is confirmed by the discussion appearing at paragraphs 733 to 741 of the SPLM/A Reply Memorial, explaining that only if an award is “*totally lacking in reasons both as to fact and as to law*” may it be set aside (and even then, only in rare and exceptional circumstances). See *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session*, UN Doc. A/CN.4/92, 110, available at [www.un.org](http://www.un.org), **Exhibit-LE 25/7** (emphasis added).

<sup>322</sup> *Judgment of 14 November 1990*, DFT 116 II 634, 637 (Swiss Federal Tribunal), **Exhibit-LE 31/6**.

<sup>323</sup> SPLM/A Reply Memorial, at paras. 707-715.

<sup>324</sup> SPLM/A Reply Memorial, at para. 716-730.

<sup>325</sup> GoS Memorial, at para. 262.

<sup>326</sup> See SPLM/A Reply Memorial, at para. 754.

<sup>327</sup> GoS Reply Memorial, at para. 158.

<sup>328</sup> See SPLM/A Reply Memorial, at paras. 840-841.

<sup>329</sup> ABC Report, Part II, App. 2, at p. 24, **Exhibit-FE 15/1**.

<sup>330</sup> ABC Report, Part II, App. 2, at p. 25, **Exhibit-FE 15/1**.

<sup>331</sup> See ABC Report, Part II, App. 2, at pp. 24-25, **Exhibit-FE 15/1**.

311. Finally, the Government’s claim that the “legal principle of the equitable division of shared secondary rights” was not really “legal” is also frivolous.<sup>332</sup> As already noted, the ABC Report stated that the principles on which it relied were “a universal **legal characterisation** in the former British colonies and protectorates, including Sudan (a Condominium).”<sup>333</sup> Similarly, the ABC Report cited and relied upon standard legal texts regarding land law, land rights and registration in Sudan and the former British colonies.<sup>334</sup>

312. The Government’s evident disagreement with the substance of the ABC Experts’ analysis does nothing to alter the indisputable fact that the Experts cited and relied upon what they took to be the applicable legal principles. In these circumstances, the Government’s suggestion that the ABC Experts’ “legal principle” was not really “legal” is simply absurd.

4. The Government’s Complaints About the ABC Experts’ Purported Attempt to Allocate Oil Resources Remain Frivolous

313. In its initial Memorial, the Government argued in passing that the ABC Report was in reality motivated by an “unarticulated” desire by the five ABC Experts to allocate Sudan’s oil resources to the Abyei Area.<sup>335</sup> As the SPLM/A Reply Memorial noted, “[e]ven in a submission littered with errors and misquotations, this claim by the GoS distinguishes itself.”<sup>336</sup> The Government’s Reply does nothing to add to those complaints and the SPLM/A therefore respectfully directs the Tribunal to paragraphs 843 to 859 of its Reply Memorial.

314. In reality, it is the Government – not the ABC Experts – that has been motivated by a greed for oil resources. The Government’s opposition to the ABC Report is fuelled entirely by its desire to (mis-)appropriate yet more of the resources of the Ngok Dinka for its own benefit in the North – including to develop further the North’s economic infrastructure and military capabilities. This motivation is widely described by observers to have been in play both before and during the period of the CPA negotiations, as well as afterwards. For example, the International Crisis Group records that:

“Abyei locality in 1995 had boundaries considerably larger than those established by the ABC. The government changed the boundaries in 2000 (creating a fourth locality, Heglig, in Abyei province), and again in 2005 (to including a fifth locality, Sitep). ***In each case, the size of Abyei locality became smaller, as oil areas were carved out.***”<sup>337</sup>

315. The Government’s attitude to oil rich areas (the locations of which were unknown in 2005, as they are today)<sup>338</sup> was also described in the Danforth Report, in the following terms:

“For its part, ***the government regards oil fields as vulnerable, strategic assets, which it seeks to defend preemptively through attacks upon southern insurgents and their alleged civilian supporters.*** The recent reconciliation between John Garang and Riak Machar, and Garang’s statements on impending attacks by the SPLA, are seen by the Sudanese Government as a serious Nuer-

<sup>332</sup> GoS Reply Memorial, at para. 158.

<sup>333</sup> ABC Report, Part II, App. 2, at p. 24, **Exhibit-FE 15/1** (emphasis added).

<sup>334</sup> See ABC Report, Part II, App. 2, at p. 24 notes 7 & 8, **Exhibit-FE 15/1**.

<sup>335</sup> GoS Memorial, at paras. 270-275.

<sup>336</sup> SPLM/A Reply Memorial, at para. 843.

<sup>337</sup> International Crisis Group, “Sudan: Breaking the Abyei Deadlock”, Africa Briefing No. 47, 12 October 2007, at p. 5, **Exhibit-FE 15/11**.

<sup>338</sup> See SPLM/A Reply Memorial, at para. 845.

Dinka threat to the oil fields, justifying a military response including attacks on civilians.”<sup>339</sup>

316. These motivations continued into the negotiation of the CPA and Abyei Protocol. As the International Crisis Group report records: “The government consistently refused to consider a referendum for Abyei, arguing that the Machakos Protocol had already closed that door, and Abyei must remain in the North. Khartoum’s rejection of a referendum on Abyei was driven *primarily by its fear of losing control over the oil resources in the area.*”<sup>340</sup>

317. Finally, the relevance of the GoS’s oil motivations in its refusal to accept and implement the ABC Report is widely acknowledged in the international community.<sup>341</sup> At the U.S. House of Representatives Committee on International Relations September 2006 hearing (discussed above), Representative Smith (D-NJ) gave testimony that: “The Abyei border, despite a border commission decision, *has been delayed by the Government of Sudan in its pursuit of continued control of oil resources in the region.* This not only interferes with the equitable distribution of oil resources to the Government of Southern Sudan, but it also prevents the installation of administration in that area. That means people in the border area are not receiving vital police protection or other services.”<sup>342</sup>

318. Similarly, Mr. Winter stated at the same Congressional Hearing:

*“[The GoS] needed to maintain possession of the oil fields to the maximum extent.* The CPA provides that in the case of Abyei, a location that is entirely an oil field, a very significant oil field which is likely to become a part of a separate south if the south ever seceded, that regarding Abyei, the CPA includes a provision for, first of all, determining its boundaries and then, on the basis of that, implementing a civil administration that is reflective of the two sides. When the Abyei Boundaries Commission issued its report, President Bashir refused to accept it. He still refuses to accept it. The CPA provides for a delimitation of the borders between north and south. This is very important for two reasons: Most of the oil fields span the borders, and in addition, if redeployment of military forces, separation of military forces between north and south, is going to happen, you have to know where the boundaries are. That has not been implemented.”<sup>343</sup>

319. Indeed, representatives of the Government do not particularly seek to conceal this, as evidenced by the comment made by Bona Malwal, Presidential Advisor to President

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<sup>339</sup> Danforth Report, dated 26 April 2002, at p. 23, **Exhibit-FE 9/7**.

<sup>340</sup> International Crisis Group, “Sudan: Breaking the Abyei Deadlock”, Africa Briefing No. 47, 12 October 2007, at pp. 3-4, **Exhibit-FE 15/11**.

<sup>341</sup> It is also clear that the issue of oil was only touched on during the proceedings of the ABC and *only by the Government*. As stated in the SPLM/A Reply Memorial, “The exact location of oil fields in the Abyei region is not information which was readily known in 2005 (or even today), and there is no indication from the extensive documentary record of the proceedings of the ABC that the ABC Experts received and information from the parties or witnesses ... the only time that the issue of oil was even mentioned was *by the Government*, with Ambassador Dirdeiry pointing out in his closing presentation “[the ABC decision] this is very important because so many rights, including oil rights and other rights will be in fact treated according to what we are going to establish.” SPLM/A Reply Memorial, at para. 845. See also Ambassador Dirdeiry, Taped Recording of GoS Final Presentation, dated 16 June 2005, File 2, at p. 1, **Exhibit-FE 19/16**.

<sup>342</sup> Hearing before the Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations, 109<sup>th</sup> Congress, 20 September 2006, p. 14, available at <http://www.internationalrelations.house.gov/archives/109/29972.PDF>.

<sup>343</sup> Hearing before the Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations, 109<sup>th</sup> Congress, 20 September 2006, pp. 31-32, available at <http://www.internationalrelations.house.gov/archives/109/29972.PDF>.

Bashir,<sup>344</sup> who has stated to the Sudan Tribune: “Abyei’s oil is the cause of dispute then it is urgent to have that oil extracted, so that the country as a whole benefits.”<sup>345</sup>

320. Thus, during the three years that it has refused to comply with the ABC Experts’ decision, the GoS has continued to extract oil from Abyei without making the required revenue distributions to the people of this producing region,<sup>346</sup> as required by the Abyei Protocol<sup>347</sup> and by the Abyei Roadmap which established this arbitration process.<sup>348</sup> This continues to this date, with the Government failing to provide the Abyei Area Administration (established six months ago pursuant to the Abyei Roadmap<sup>349</sup>) with any funding.<sup>350</sup> Given this, there is a deep and unfortunate irony to the Government’s cynical criticisms of the ABC Experts for supposedly being motivated by a secret desire to allocate oil resources.

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

321. As discussed in the SPLM/A’s Memorial, the Government has waived its objections to the validity of the ABC Experts’ decision. The GoS did so both in its agreements relating to the ABC proceedings and then in its conduct during those proceedings.<sup>351</sup>

322. First, the Government waived its objections to the ABC Experts’ decision by agreeing both that the ABC Report would be “*final and binding*” and that it would be given “*immediate effect*,” without any possibility for appeal or other challenge. In the overall setting of the CPA, this regime governing the implementation of the ABC Report left neither party with any substantive rights to claim that the ABC Experts exceeded their mandate. The Government was under no obligation to agree to this regime, but, for its own reasons, it chose to do so.

323. Second, as also discussed both in the SPLM/A Memorial and above, it is well-settled that jurisdictional and procedural objections must be raised at the time they occur or they will

<sup>344</sup> SPLM/A Reply Memorial, at para. 371.

<sup>345</sup> “*Bona Malwal criticises SPLM maladroitness over Abyei row*,” Sudan Tribune, 13 December 2007, p. 1, **Exhibit-FE 19/24**.

<sup>346</sup> Human Rights Watch, *Abandoning Abyei. Destruction and Displacement* May 2008, at p. 12, **Exhibit-FE 16/7**.

<sup>347</sup> Abyei Protocol, Arts. 1.2.3 and 3.1, **Appendix C to SPLM/A Memorial**.

<sup>348</sup> *The Road Map for Return of IDPs and Implementation of Abyei Protocol* (National Congress Party/ Sudanese People’s Liberation Movement) 2008, Art 3.10, **Appendix G to SPLM/A Memorial**.

<sup>349</sup> *The Road Map for Return of IDPs and Implementation of Abyei Protocol* (National Congress Party/ Sudanese People’s Liberation Movement) 2008, Art. 3.6, **Appendix G to SPLM/A Memorial**.

<sup>350</sup> “Sudan flashpoint oil town starved of funding – officials”, Reuters, dated 22 February, available at <http://www.alertnet.org/thenews/newsdesk/LV320365.htm>, (“Southern leaders on Saturday said the Khartoum government had not sent money to support a new Abyei authority which is supposed to re-build the central town after it was burned to the ground in the May fighting. “It is a deliberate intention to create despair in the people of Abyei,” said south Sudan's Minister for Presidential Affairs Luka Biong. “That feeling (of despair) is developing and it is very alarming.” Biong told Reuters a 280 million Sudanese pound (\$126 million) fund to establish the administration and rebuild the town had been passed by Sudan's national parliament and agreed by Sudan’s President Omar Hassan al-Bashir. But the transfer of the cash had been blocked by Khartoum's ministry of finance, he said... Neither of the two main ethnic communities, the Ngok Dinka and the Arab Misseriya, have received a promised share of the region's oil revenues either, he added.”). *See also* “S Sudan calls for full implementation of peace deal”, dated 22 February 2008, available at [http://news.xinhuanet.com/english/2009-02/22/content\\_10870876.htm](http://news.xinhuanet.com/english/2009-02/22/content_10870876.htm), (“The Abyei area has remained in limbo since [the ABC Report was released], neither electing its own local administration nor receiving the share of oil revenues due under the deal. Southern officials have estimated they should have received 1 billion U.S. dollars over the past four years from Abyei alone but have not received a cent.”)

<sup>351</sup> *See* SPLM/A Memorial, at paras. 792-868. It bears emphasis that during the proceedings of the ABC, the GoS did not raise any of the 12 complaints that it now makes in this arbitration.

be waived.<sup>352</sup> Basic and generally applicable rules of procedural fairness forbid a party from holding back objections, and instead require parties to assert claims of an excess of mandate at the earliest opportunity. In this case, the GoS raised no jurisdictional (or other) objection at any time during the ABC's work – in which it actively participated. Instead, as described in the SPLM/A Memorial, the GoS repeatedly and explicitly affirmed that the Commission's decision would be final and binding.<sup>353</sup>

324. The Government's Reply Memorial responds to these arguments only in passing, with the obvious hope that they will not be considered in any detail. That hope is understandable, but short-sighted.

325. The Government contends that the SPLM/A's exclusion and waiver arguments are "frivolous and inadmissible," on the grounds that the SPLM/A "is estopped from raising objections to this Tribunal's unambiguously agreed mandate."<sup>354</sup> According to the Government, by agreeing to arbitrate the Government's excess of mandate claims in the Abyei Arbitration Agreement, the SPLM/A "fully and freely accepted" that the Tribunal could decide such excess of mandate claims.

326. The Government's arguments are confused and do nothing to "estop" the SPLM/A from raising claims of exclusion, waiver or estoppel against the Government's claims. The Government's suggestion that, by agreeing to peaceful resolution of the parties' dispute via arbitration, the SPLM/A really compromised its substantive rights is unsupported by any authority and contrary to the essential purpose of an agreement to arbitrate.

#### 1. The Abyei Arbitration Agreement Did Not Waive Pre-Existing Rights

327. Most fundamentally, the parties' agreement to arbitrate did not waive any of their pre-existing legal rights with regard to the ABC Report. That is inherent in the nature of an agreement to arbitrate – which selects a forum and a procedural mechanism, but does not in and of itself alter the parties' substantive rights – and it was specifically agreed by the parties.

328. Thus, the Abyei Road Map provided for resolution of the parties' disputes regarding the ABC Report by arbitration "*without prejudice to the position of either party* on the findings of the Abyei Boundaries Commission (ABC) Report."<sup>355</sup> That caveat made explicit the obvious fact that the agreement to arbitrate did not affect either the Government or the SPLM/A's positions with regard to the validity of the ABC Report, and instead provided a mechanism for the parties' disagreement regarding their positions to be decided.

329. By agreeing to arbitrate, the SPLM/A did not, in any way, "estop" itself from claiming that the Government waived or excluded its rights to claim an excess of mandate. Again, that is confirmed not only by the provision quoted above (from the Abyei Road-Map) but also by the choice-of-law clause in the Arbitration Agreement (at Article 3). As discussed above, Article 3 selected, and in no way limited the applicability of, general

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<sup>352</sup> See above at paras. 92, 264; SPLM/A Reply Memorial, at paras. 354-360, 472.

<sup>353</sup> See SPLM/A Memorial, at paras. 636-642.

<sup>354</sup> GoS Reply Memorial, at para. 121.

<sup>355</sup> *The Road Map for Return of IDPs and Implementation of Abyei Protocol* (National Congress Party/Sudanese People's Liberation Movement) 2008, Art. 4 (preamble), **Appendix G to SPLM/A Memorial**. On the Abyei Road Map generally, see SPLM/A Memorial, at paras. 539-541.

principles of law and practice to govern the parties' dispute.<sup>356</sup> Those principles include rules of waiver and exclusion, which may be fully asserted in these proceedings.

## 2. The Government's Estoppel Arguments Are Confused and Wrong

330. As stated above, the Government contends that the SPLM/A's exclusion and waiver arguments are "frivolous and inadmissible," on the grounds that the SPLM/A "is estopped from raising objections to this Tribunal's unambiguously agreed mandate."<sup>357</sup> According to the Government, this results from the fact that the SPLM/A has agreed on the Tribunal's competence to ascertain whether the ABC experts have exceeded their mandate, and is thus "estopped from raising objections to this Tribunal's mandate."<sup>358</sup>

331. The Government's reasoning is confused from start to finish. First, as a matter of principle, the fact that there exists a right to recourse, of course, does not exclude the application of general principles of estoppel. Second, where this right of recourse results from a specific contractual agreement between the parties (e.g., in ICSID annulment proceedings) it is undisputed that the principle of estoppel or procedural waiver apply. Unsurprisingly, the Government has not cited a single authority in support of its absurd contentions.

### a) The Right of Recourse Does Not Exclude the Fact that Principles of Estoppel Apply

332. The SPLM/A has previously shown that the principle of estoppel or procedural waiver applies in both international and national contexts.<sup>359</sup> This principle forms part of the New York Convention, the UNCITRAL Rules and the ICSID Rules.<sup>360</sup> Most national laws contain similar provisions.<sup>361</sup> Leading European commentators explain that estoppel/waiver constitutes one of the most basic general principles of procedural law and describe its importance thus:

"If [the waiver principle] did not exist, a party witnessing a violation of a procedural rule could remain idle and wait for the resolution of the dispute, i.e. the arbitral award: if it turned out that the award was in its favour, the party could accept it, and if the award was in favour of the opponent, the aggrieved party could dig out the procedural error in order to challenge the award and have it set aside. ... **To prevent such opportunistic behaviour, provisions about implied waivers of the right to object are a staple of modern codes of civil procedure.**"<sup>362</sup>

333. That principle is unanimously considered as a "**manifestation of the principle of good faith and the prohibition of an abuse of law (estoppel)**"<sup>363</sup> and as "**a requirement of**

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<sup>356</sup> Abyei Arbitration Agreement, Art. 3, **Appendix A to SPLM/A Memorial**. See also above at paras. 35, 185, 243.

<sup>357</sup> GoS Reply Memorial, at para. 121.

<sup>358</sup> GoS Reply Memorial, at para. 121.

<sup>359</sup> See SPLM/A Reply Memorial, at paras. 353-362.

<sup>360</sup> See SPLM/A Reply Memorial, at paras. 354-360.

<sup>361</sup> See SPLM/A Reply Memorial, at paras. 358 *et seq.*

<sup>362</sup> Wagner, in K.-H. Böckstiegel, S. Kröll & P. Nacimiento (eds.), *Arbitration in Germany* ZPO, §1027, ¶1 (2007), **Exhibit-LE 29/1** (emphasis added).

<sup>363</sup> Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozeßgesetzen*, Vol. 4 Part 2, §579, ¶2 (2d ed. 2007), **Exhibit-LE 23/19**; see also *Judgment of 7 September 1993*, DFT 119 II 386, 388 (Swiss Federal Tribunal) ("**If [the party] only complains after an award has been issued which is not in its favour, [the party] violates the principle of good faith.**"), **Exhibit-LE 29/5**.

**procedural loyalty.**<sup>364</sup> At the same time, it is a means of ensuring procedural efficiency and the finality of legal proceedings. As a leading Austrian commentator states in the context of the Austrian Code of Civil Procedure:

“Because an objection is excluded at a later stage of the proceedings, **the provision also serves to support the finality of arbitral decisions.**”<sup>365</sup>

334. To the same effect, as leading commentators state in the context of the New York Convention:

“It is essential that there is a duty on the parties to raise an objection promptly. This implies that objection should be raised during the arbitration first if the relevant facts are known to the party objecting. **Otherwise the party may be estopped from raising the objection before the enforcing court as this undermines the purpose of the New York Convention.**”<sup>366</sup>

b) The Abyei Arbitration Agreement Does Not Alter the Application of Principles of Estoppel

335. Principles of estoppel apply specifically where international or national rules provide for recourse against the arbitral award in question. It is the whole purpose of the principle of procedural waiver that the party failing to raise an objection to a procedural error, “**cannot invoke such ground during the annulment proceedings.**”<sup>367</sup> If the existence of annulment proceedings, or even the reliance upon them, excluded an application of the principle of waiver, the whole concept would not exist.

336. Contrary to the Government’s assertion, the foregoing principles are not changed when the right to recourse rests on the parties’ agreement. It is absurd to conclude that, by entering into an agreement conferring adjudicatory powers on a particular tribunal the parties somehow renounced their right to fair treatment in earlier proceedings. Again, the Government does not cite a single authority in support of this untenable proposition – for the simple reason that there is none.

337. To the contrary, in what the Government argues is the conceptually similar context of ICSID annulment proceedings, the GoS’s own authorities note that:

“**a party that has failed to protest against a perceived procedural irregularity before the tribunal, is precluded from claiming that this irregularity constituted a serious departure from a fundamental rule of procedure for purposes of annulment.** To hold otherwise would mean that a party could leave a procedural irregularity

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<sup>364</sup> Gaillard, *La Jurisprudence De La Cour De Cassation En Matière D’Arbitrage International*, 4 Rev. arb. 697, 713 (2007), **Exhibit-LE 29/13**.

<sup>365</sup> Hausmaninger in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozeßgesetzen*, Vol. 4 Part 2, §579 ¶2 (2d ed. 2007), **Exhibit-LE 23/19** (emphasis added).

<sup>366</sup> J. Lew, L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration* ¶26-89 (2003), **Exhibit-LE 23/17** (emphasis added); see also A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* ¶10-44 (2004), **Exhibit-LE 23/15**; A. van den Berg, *The New York Arbitration Convention of 1958* 182-185 (1981), **Exhibit-LE 24/13**.

<sup>367</sup> *Judgment of 28 February 2008*, RG n° 2007/4403 p. 4 of 5 (Paris Cour d’appel), **Exhibit-LE 29/12**.



unopposed to keep it in store as ammunition against a possible unfavourable award in annulment proceedings.”<sup>368</sup>

338. In another of the Government’s authorities, an ICSID *Ad Hoc* Committee confirmed that, pursuant to the ICSID Rules, the Claimant had:

“not established that it made a timely protest against the serious procedural irregularities it now complains of. ... Rule 26 [now Rule 27] of the ICSID Rules of Procedure for Arbitration proceedings would therefore rule out a good part of its complaints.”<sup>369</sup>

In sum, the Government’s suggestion that the parties somehow excluded the basic principles of estoppel and waiver, by agreeing to arbitrate, is nonsensical. Nothing in their agreement – or any other arbitration agreement – would produce such an anomalous and unintended result.

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339. It is striking that the Government makes no effort (other than its implausible counter-estoppel argument) to dispute the SPLM/A’s waiver and exclusion arguments. That silence is understandable: considered in the context of the Comprehensive Peace Agreement as a whole, and in the light of the parties’ representatives’ extensive and active participation in the ABC itself, it made perfect sense for both the SPLM/A and the Government expressly to exclude any possibility of challenging the ABC Report and explicitly to promise to implement the Report forthwith.

340. Finally, as previously discussed, the head of the GoS delegation (Ambassador Dirdeiry) made the following, specific acknowledgment of the ABC Experts’ authority following the GoS’s last presentation to the ABC:

“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.* ... 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

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<sup>368</sup> C. Schreuer, *The ICSID Convention: A Commentary* Art. 52, ¶262 (2001), **Exhibit-LE 27/17** (emphasis added).

<sup>369</sup> Judgment of 3 May 1985 of the Ad Hoc Committee On the Application for Annulment Submitted by *Klöckner* Against the Arbitral Award Rendered on 21 October 1983 in the *Klöckner v. Cameroon Case*, (ARB/81/2) ICSID Review – Foreign Investment Law Journal, 90, 117 (1986), **Exhibit-LE 23/7**.

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.”<sup>370</sup>

341. Ambassador Dirdeiry had been involved in negotiating the agreements regarding the ABC process and had participated throughout that process. He well knew what was meant by the parties’ agreement that the ABC Report would be “final and binding” and entitled to “immediate effect.” As Ambassador Dirdeiry put it, the ABC Experts’ decision “will be *final and binding and everybody shall accept it*,” and “[w]hen 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.*”

342. Put simply, as the Government insisted, both parties had committed themselves to obeying the ABC Report and excluded any possibility of challenge. That remains the case in these proceedings and is a complete answer to the Government’s claims.

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<sup>370</sup> Taped Recording of GoS Final Presentation, dated 16 June 2005, **Exhibit-FE 14/20 and FE 14/21** (emphasis added).

### III. THE GOVERNMENT'S FUNDAMENTALLY REVISED FACTUAL CASE CONFIRMS THE ABC EXPERTS' DECISION AND SUPPORTS THE SPLM/A'S DEFINITION OF THE ABYEI AREA

343. As discussed in Part II above, it is now beyond serious debate that the ABC Experts did not exceed their mandate. As a consequence, the definition of the Abyei Area adopted in the ABC Report is entitled to final and binding effect. That is the complete and straightforward answer to the Government's efforts to relitigate the parties' disputes over the boundaries of the Abyei Area before this Tribunal.

344. Only if this Tribunal were to conclude that the ABC Experts exceeded their mandate is it presented, under Article 2(c) of the Abyei Arbitration Agreement, with the task of "defin[ing] (i.e., delimit[ing]) on map the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the Parties."<sup>371</sup> 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. The Tribunal's task is then only to confirm the delimitation as made by the ABC Experts.

345. If, however, the Tribunal does consider the issue presented in Article 2(c), 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, extending north to latitude 10°35'N (west from the current Darfur Kordofan boundary and east to 29°32'). These include permanent villages located above the 10°22' such as: Dhony Dhoul, Thur [Arabic: Turda], Bakar, and Nyadak Ayueng Achaak (**Map 62**). The SPLM/A Memorial and Reply Memorial set out detailed evidence, from a variety of corroborative sources, which establish that the Ngok Dinka occupied and used this territory and nothing in the Government's Reply Memorial provides any answer to that evidence.

346. Preliminarily, it bears emphasis that the GoS Reply Memorial and attached evidence fundamentally rewrite the Government's factual and historical case. In particular, while initially claiming that, "[p]rior to 1905, *the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab*,"<sup>372</sup> the Government in its Reply Memorial and accompanying evidence now repeatedly concedes that, prior to 1905, the Ngok Dinka were located *north* of the Kiir/Bahr el Arab, extending up to at least the Ngol/Ragaba ez Zarga, with the Ngok Dinka Paramount Chief (Arop Biong, referred to as Sultan Rob) living and holding court at Burakol to the *north* of the Kiir/Bahr el Arab in 1905.<sup>373</sup>

347. As discussed below, the Government's concession alone renders wholly implausible the Government's claim that the definition of the Abyei Area confines the Ngok Dinka to a narrow strip of swampland to the south of the Kiir/Bahr el Arab.<sup>374</sup> In particular, the Government's concessions that the Ngok Dinka and their Paramount Chief were located to the *north* of the Kiir/Bahr el Arab in 1905 makes it inconceivable that the parties' definition of the Abyei Area could have been meant to split the Ngok Dinkas' territory in two – thereby excluding not only substantial portions of the Ngok Dinkas' historic territory from the Abyei Area, but also excluding both Abyei town and the historic seat of the Ngok Dinka Paramount Chief.

<sup>371</sup> Abyei Arbitration Agreement, Art. 2(c), **Appendix A to SPLM/A Memorial**.

<sup>372</sup> GoS Memorial, at paras. 332, 400(d).

<sup>373</sup> See below at paras. 453-463, 549; GoS Reply Memorial, at para. 281.

<sup>374</sup> See below at paras. 361, 744-825.

348. In any event, as detailed in this Part III, there is no more basis for the Government's newly-revised factual case than there was for its previous factual claims. On the contrary, the evidence demonstrates, more clearly now than ever, that in 1905 the Ngok Dinka were located throughout the Bahr region, centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab and extending north through the Bahr region and to a latitude 10°35'N. Nothing in the Government's Reply Memorial or accompanying evidence contradicts this conclusion and, on the contrary, a number of the Government's most recent submissions confirm the SPLM/A case.

349. First, the Government's Reply Memorial abandons its earlier historical claims and concedes that the Ngok Dinka migrated to the area between Muglad and the Ngol/Ragaba ez Zarga in the 18<sup>th</sup> century. Nonetheless, the Government now advances a newly-invented account that the Ngok Dinka later moved again, ending up in the region "*on and around*" the Kiir/Bahr el Arab.<sup>375</sup> As discussed in Part III(A) below, this story, which among other things would place the Ngok Dinka Paramount Chief alone on the north side of the Kiir/Bahr el Arab, separated from the body of the Ngok Dinka people, is flatly contradicted by the documentary record and common-sense.

350. Second, the Government claims for the first time that the Ngok Dinka "suffered severely" during the Mahdiyya and were driven south of the Kiir/Bahr el Arab.<sup>376</sup> This account is contrived and unsustainable. In fact, as discussed in Part III(B), the evidence overwhelmingly supports the conclusion reached by Professor Daly, that the Misseriya suffered disproportionately during the Mahdiyya, while the Ngok Dinka were left largely unscathed.

351. Third, as already noted, the Government's Reply Memorial abandons the claim that the Ngok Dinka were located entirely below the Kiir/Bahr el Arab in 1905 and instead argues that the pre-1905 documentary record shows that the Ngok Dinka "were located *on and around the Bahr el Arab/Kiir, predominantly to the south.*"<sup>377</sup> As discussed in Part III(C), the Government's new position still misstates the documentary record, which makes it very clear that permanent Ngok Dinka villages were located throughout the Bahr region in 1905, including at Burakol, north of the Kiir/Bahr el Arab at the location of present-day Abyei town, where the Ngok Dinkas Paramount Chief resided. The pre-1905 record is entirely consistent with the post-1905 documentary materials, which again attest to the presence of Ngok Dinka settlements and cattle camps throughout the Bahr.

352. Fourth, the Government devotes very little attention to the detailed descriptions of its own witness, Professor Ian Cunnison, whose evidence was heavily relied upon in the Government's Memorial. That is because, as demonstrated in the SPLM/A Reply Memorial, Professor Cunnison's evidence directly contradicts the Government's case, again demonstrating that the Ngok Dinka inhabited the Bahr region, extending north from the Kiir/Bahr el Arab to the *goz* and throughout the Bahr towards Lake Keilak.<sup>378</sup> Cunnison's second witness statement, which is briefly mentioned in the Government's Reply Memorial, is no more helpful to the Government than his previous testimony.

353. Fifth, the Government devotes little attention to the early historical cartographic evidence (instead claiming wrongly that references to the Ngok Dinka on "*19<sup>th</sup> century maps*

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<sup>375</sup> GoS Reply Memorial, at paras. 229, 281 (emphasis added).

<sup>376</sup> GoS Reply Memorial, at paras. 238, 246.

<sup>377</sup> GoS Reply Memorial, at para. 281 (emphasis added).

<sup>378</sup> SPLM/A Reply Memorial, at paras. 1110-1137.

*are likely to be misleading*<sup>379</sup>). That is because, as demonstrated in the SPLM/A Reply Memorial, the historical cartographic evidence (consisting of more than 25 different maps produced between 1860 and 1936) consistently shows the Ngok Dinka territory as extending throughout the Bahr region, centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga; conversely, these maps place the Misseriya to the north of the *goz*, in the Muglad and Babanusa regions.<sup>380</sup>

354. Sixth, the Government's Reply Memorial again fails to address the basic environmental and geographic characteristics of the Abyei Area and the manner in which the Ngok Dinka and Misseriya cultures and identity determine their respective uses and occupancy. That is because, as demonstrated in the SPLM/A Reply Memorial, this essentially immutable physical evidence confirms that the agro-pastoral Ngok Dinka reside in the damp Bahr region to the south of the *goz*,<sup>381</sup> while the nomadic cattle-herding Misseriya are based in the more arid region to the north of the *goz*.<sup>382</sup>

355. Seventh, the Government's Reply Memorial both disputes the value of all witness testimony, while simultaneously submitting some two dozen witness statements. Putting aside the procedural irregularity of the Government's belated submissions, its witness statements appear aimed at nothing more than devaluing the credibility of oral evidence generally.

356. As discussed in Part III(D) below, careful attention to the details of the parties' respective witness evidence demonstrates that the Ngok Dinka witnesses have provided frank, unvarnished testimony as to their historical knowledge, while the Government's witnesses have provided little more than lawyers' briefs disguised as evidence. The Ngok Dinka evidence is also corroborated by the Community Mapping Project, which provides greater detail and specificity regarding the Ngok Dinka use of the Abyei Area.

357. Having abandoned its central historical case, the Government now seeks refuge in the claim that, while the Ngok Dinka were observed in a large number of locations well to the north of the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, they were not observed everywhere in the region encompassed by the ABC Experts' definition of the Abyei Area. In particular, the Government seizes on a handful of Condominium trip reports, which fail to identify Ngok Dinka in various locations to the north of the Kiir/Bahr el Arab, as permitting a negative inference that the Ngok Dinka were confined to only limited parts of the Abyei Area. That argument is untenable.

358. The materials cited by the Government involve only limited routes through particular parts of the Abyei Area, typically undertaken for specific purposes (e.g., map-making and topographic recording). The absence of references in these sorts of materials to Ngok Dinka being observed in particular locations, at particular times, does not support an inference that the Ngok were not in fact present there, or present there at other times – much less that they were not present elsewhere in the Bahr region. Contrary to the Government's elliptical

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<sup>379</sup> GoS Reply Memorial, at para. 228.

<sup>380</sup> SPLM/A Reply Memorial, at paras. 1197, 1272; SPLM/A Memorial, at paras. 978-1004.

<sup>381</sup> Some Ngok are permanently settled in the southern areas of the *goz* at places such as Dhony Dhoul. *See* SPLM/A Memorial at para. 1025. As confirmed in the MENAS Expert Report, the *goz* is well vegetated and could support permanent occupation in areas with a constant water supply; *See* MENAS Expert Report, at para. 153. Other evidence also confirms that the *goz* does have perennial sources of water during the dry season. *See* for example **Map 70** (Abyei Areas; 1:250,000 Series); GoS Reply Memorial Annex 38; Henderson Route Report: Muglad to Abyei, 1933.

<sup>382</sup> SPLM/A Reply Memorial, at paras. 1307-1320; SPLM/A Memorial, at paras. 176-189, 197, 233-248.

suggestion that the SPLM/A is advancing an “*argumentum ab ignorantia*,” this properly reflects the necessarily limited character of the Condominium records and of any negative inferences which may be drawn from those records.

359. Further, the evidence cited by the Government is limited entirely to dry season observations – which, as the Government’s Reply Memorial now concedes, does not reflect the full northern extent of the Ngok Dinka habitation during the remainder of the year. When the seasonal cattle herding patterns of the Ngok Dinka and Misseriya are taken into account, it is clear that at the very least the Government’s own evidence places the Ngok Dinka well to the north of the Ngol/Ragaba ez Zarga during the wet season.

360. More generally, and as discussed below, the Government’s attempted negative inferences produce the untenable result that much of the Bahr region would be entirely uninhabited during all but the dry season: given the exceptionally fertile character of the region, and its historic role as a bridge between north and south, this characterization is implausible. In fact, as a fair reading of the pre-1905 and post-1905 documentary records, as well as the cartographic evidence, the environmental and cultural evidence (including the MENAS Expert Report), the testimony of Professor Cunnison and Mr. Tibbs, the Ngok Dinka witness evidence, and the Community Mapping Project shows, permanent Ngok Dinka villages were located throughout the Bahr region extending north to the *goz* and into the eastern reaches of the Bahr region, both in 1905 and for decades thereafter.

361. Eighth, the Government’s case concerning the putative provincial boundary between Kordofan and Bahr el Ghazal provinces is just as flawed as its discussion of the historic territories of the Ngok Dinka and Misseriya, motivated again by the same desire to reduce the Ngok to occupying a narrow 14 mile wide strip of swampland south of the Kiir/Bahr el Arab. As discussed in Part III(E) below, it is impossible to accept the Government’s claims regarding the putative Kordofan/Bahr el Ghazal boundary at the time of the 1905 transfer of the Ngok Dinka. In fact, prior to 1905, there was simply no definite or determinate provincial boundary between Kordofan and Bahr el Ghazal: the “Bahr el Arab,” even if it was thought of as the putative provincial boundary (which is not certain), could have referred to any of the Kiir/Bahr el Arab, the Ngol/Ragaba ez Zarga, the entire Bahr river system or to something else. Indeed, that continued to be the case for a number of years following 1905.

362. The Government’s Reply Memorial errs just as seriously in its characterizations of the 1905 transfer of the Ngok Dinka. The Government claims that “the present dispute concerns *the transfer of a specific area* at a specific time,”<sup>383</sup> and not a transfer of Ngok Dinka peoples. In fact, the documentary record makes it unmistakably clear that the 1905 transfer was a transfer of the Ngok Dinka (and Twic Dinka) tribes. That is exactly what the 1905 transfer decision and other instruments record, it is precisely what the Condominium’s purposes required and it is precisely what the Government has previously acknowledged.

363. Finally, as discussed in Part III(F) below, the Government’s interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol is also unsustainable. The Government’s Reply Memorial repeatedly asserts that the definition of the Abyei Area meant “the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905”<sup>384</sup> and in particular that “*the area transferred cannot have already been in Kordofan prior to the transfer.*”<sup>385</sup> This interpretation contradicts the ordinary English-language meaning of

<sup>383</sup> GoS Reply Memorial, at para. 88.

<sup>384</sup> GoS Memorial, at para. 19.

<sup>385</sup> GoS Reply Memorial, at para. 112.

Article 1.1.2, as well as basic rules of English grammar, and would produce an arbitrary and anomalous result.

A. *The Government's New Allegations Regarding the Migration of the Ngok Dinka to the Bahr Region Are Implausible and Wrong*

364. The SPLM/A Memorial cited a substantial body of scholarly and other works that recorded the Ngok Dinka migrating to the Bahr river basin surrounding the Ngol/Ragaba ez Zarga in the early 18<sup>th</sup> century.<sup>386</sup> As the SPLM/A Memorial detailed, the Ngok traditions are reported by a number of different sources (Henderson, Howell, Santandrea, Deng, Sabah), all written before the current dispute arose and all providing a largely consistent description of Ngok Dinka occupation of the region;<sup>387</sup> the same traditions are recorded by the contemporary Ngok witness statements.<sup>388</sup> While less extensive, Misseriya oral tradition corroborates the Ngok Dinka descriptions, enhancing its credibility<sup>389</sup> (and thereby rendering largely irrelevant the Government's suggestions that oral traditions are inherently biased or culturally specific<sup>390</sup>).

365. The Government's Memorial ignored virtually all of the relevant historical authorities about the migration of the Ngok Dinka and Misseriya to the Bahr region. Instead, the Government assembled a peculiar assortment of European travellers who never went anywhere close to the Abyei Area (e.g., Palme, Junker, Schweinfurth, Stanford's Compendium).<sup>391</sup> These sources are almost entirely omitted from the Government's Reply Memorial, for the obvious reason that they contain nothing at all of relevance to either the Ngok Dinka or the Misseriya.

366. While ignoring the relevant historical authorities, the Government's Memorial nonetheless pronounced broadly that the Ngok Dinka were "*a subsection of the Western Dinkas*,"<sup>392</sup> that "Sultan Rob's country [was] *squarely south of the Bahr el Arab*,"<sup>393</sup> and that "*[p]rior to 1905, the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab.*"<sup>394</sup> Nowhere did the Government acknowledge that the Ngok Dinka resided anywhere to the north of the Kiir/Bahr el Arab – even going so far in its only (short) quotation from Henderson to attempt to identify the "Gnol" as the Kiir/Bahr el Arab.

367. The Government's Reply Memorial abandons its previous position, while constructing a new account that is equally untenable. The Government now acknowledges "that the ancestors of the early Ngok lived north of the Bahr el Arab,"<sup>395</sup> that "there is *general agreement that some Dinka tribes in the 18<sup>th</sup> century migrated north of the Bahr el Arab*,"<sup>396</sup> and that "*the Ngok migrated to the north up around the Ragaba ez Zarga.*"<sup>397</sup> Needless to say, these express, repeated concessions flatly contradict the Government's previous, equally express claims that the Ngok Dinka were always located south of the Kiir/Bahr el Arab.

<sup>386</sup> See SPLM/A Memorial, at paras. 119-127, 884-896.

<sup>387</sup> SPLM/A Memorial, at paras. 119-127, 883-887.

<sup>388</sup> See SPLM/A Memorial, at paras. 888-889.

<sup>389</sup> See SPLM/A Memorial, at paras. 890-892.

<sup>390</sup> See GoS Reply Memorial, at paras. 33-36.

<sup>391</sup> See GoS Memorial, at paras. 281-295.

<sup>392</sup> GoS Memorial, at para. 336.

<sup>393</sup> GoS Memorial, at para. 349.

<sup>394</sup> GoS Memorial, at para. 332.

<sup>395</sup> GoS Reply Memorial, at para. 218.

<sup>396</sup> GoS Reply Memorial, at para. 221.

<sup>397</sup> GoS Reply Memorial, at para. 229.

368. Thus, it now appears to be acknowledged that, as detailed in the SPLM/A Memorial and **Map 23** (Ngok Migration to Abyei Area), the migration of the Ngok Dinka in the 18<sup>th</sup> century started in Pariang and took the Ngok Dinka and their Paramount Chief to the region centered on the Ngol/Ragaba ez Zarga. That migration history is endorsed by all of the sources cited by *both* the SPLM/A and the GoS.<sup>398</sup>

369. Having abandoned its initial historical account, the Government's Reply Memorial then goes on to invent another untenable story. According to the Government's new story, the Ngok Dinka presence around the Ngol/Ragaba ez Zarga was "short-lived" – an expression that the GoS frequently finds refuge in. Thus, the Government says, "following tribal wars with both the Baggara from the north and other Nilotic tribes to the east, [*the Ngok Dinka*] migrated south and settled in a region later known as 'Sultan Rob's.'"<sup>399</sup> The Government's wholly new historical account is based on obvious distortions of the evidence.

370. In fact, the evidence does not support the Government's claim that the Ngok Dinka people moved away from the region around the Ngol/Ragaba ez Zarga to the Kiir/Bahr el Arab, much less to the south of that river. On the contrary, the evidence indicates only that several Ngok Dinka Paramount Chiefs moved their residence and court south to the general area where the present-day Abyei town is located – which became the historic political, cultural and commercial center of the Ngok Dinka people.<sup>400</sup>

371. Importantly, however, the evidence does *NOT* indicate that all nine Ngok Dinka Chiefdoms and their people moved wholesale to the vicinity of Abyei town. Rather, while the Paramount Chiefs were located in the general area of present-day Abyei town, large numbers of Ngok Dinka remained throughout the Bahr river basin – where they continued to be located in 1905 and in succeeding decades. In this regard, the Government's suggestion (quoted above) that "Sultan Rob's" really meant the entire territory of the Ngok Dinka people is obviously misconceived. "Sultan Rob's" and "Sultan Rob's village" meant the place where Sultan Rob lived, and was clearly not the place where all of the members of the nine Ngok Dinka chiefdoms lived.

372. As summarized below, the evidence does not support the Government's revisionist history. In addition, the evidence also shows that the Government's claims that the SPLM/A Memorial selectively quoted the relevant historical authorities are groundless.<sup>401</sup> On the contrary, as also detailed below, it is the GoS's extracts that are selective and misleading.

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<sup>398</sup> Howell, "Notes on the Ngok Dinka of West Kordofan," 32(2) SNR 239, 242 (1951), **Exhibit-FE 4/3**; Henderson, "A Note on The Migration of the Messiria Tribe into South West Kordofan," 22 (1) SNR 49, 57 (1939), **Exhibit-FE 3/15**; S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**; A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4 (1978), **Exhibit-FE 6/7**; S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 229, 51-52, 154-156 (2004), **Exhibit-FE 12/18**.

<sup>399</sup> GoS Reply Memorial, at para. 229.

<sup>400</sup> The historic role of the location of Abyei town is described in the SPLM/A Memorial, at paras. 904-951, and SPLM/A Reply Memorial, at paras. 950-1003. This form of migration by a small group is consistent with Beswick's description of Ngok migration generally. Beswick states that "[u]ntil recently, Dinka society remained diffuse and dispersed; when a Dinka settlement (a "wut" or cattle camp) reached a certain size, fission and fusion occurred. An ambitious man would gather a group of his own kin and set off to form his own camp or sub-section, a practice typical of the centuries-long centrifugal tendency of all Dinka groups. Dinka chiefs exercised little control over their people, and commanded no form of tribute, judicial authority or military power. In the 1740s the western Ngok (hereinafter the Ngok) were, by all accounts, no more politically centralised than any other Dinka section." Beswick, "The Ngok: Emergence and Destruction of a Nilotic Protostate in Southwest Kordofan" in *Kordofan Invaded: Peripheral Incorporation and Social Transformation in Islamic Africa* 146 (1998), **Exhibit MD-6**.

<sup>401</sup> GoS Reply Memorial, at paras. 222-230.



a) Beswick

373. The Government's Reply Memorial includes a 1 ½ page long quote from Beswick, its primary authority on this subject. That quote supposedly indicates that the Ngok Dinka occupation of the area north of the Ngol/Ragaba ez Zarga was "short-lived."<sup>402</sup> In fact, the reason that the Government simply drops Beswick's lengthy quotation into its Reply Memorial is that there is nothing in the account that supports its claims of a southward migration of the Ngok Dinka chiefdoms.

374. Beswick's description includes a number of specific references to Ngok Dinka presence in the area of Muglad and the Ngol/Ragaba ez Zarga: (a) the Misseriya settled near Muglad "directly north of the various clans of the Western Ngok Dinka;" (b) the Alei "had settled *along the Ngol River* north of the modern-day town of Abyei;" (c) the Alei lived and fought the Misseriya "*along the northern Ngol River area leading up to the modern town of Muglad*, known to the Dinka as Aguoth;" (d) "the Alei were pushed south of the river Ngol once more;" (e) "[a]nother prominent Dinka leader of the time, Moindong (son of Kwai Dit, chief of the Mannyuar), has settled his people *near Hasoba* [on the Ngol/Ragaba ez Zarga];" and (f) the Ngok Dinka and the Baggara formed an "alliance."<sup>403</sup>

375. Despite these numerous references to various of the Ngok Dinka chiefdoms residing in the region of Muglad, the Ngol/Ragaba ez Zarga, near Hasoba (on the north bank of the Ngol/Ragaba ez Zarga), and elsewhere well to the north of the Kiir/Bahr el Arab, the Government pretends to find a conclusion that the Ngok Dinka abandoned these territories and located themselves entirely around the Kiir/Bahr el Arab.<sup>404</sup> That is not a plausible reading of Beswick's account.

376. The closest that Beswick comes to such a statement is her observation that the Ngok Dinka formed an alliance with the Misseriya and "returned with their herds to the Kir/Bahr el-Arab River region for grazing."<sup>405</sup> This general observation that the Ngok Dinka were located in the "region" of the Bahr el Arab in no way indicates that the Ngok had left their historic territories; on the contrary, the description of cattle grazing in the region is consistent with the undisputed location of the Ngok Dinkas' dry season activities, with the Ngok Dinka wet season locations being further to the north.

377. In short, the discussion in Beswick relied upon by the Government shows in extensive detail how the Ngok Dinka were located throughout the Bahr region, extending north as far as Muglad. It also describes how a number of different Ngok Dinka chiefdoms were present in different locations in the Bahr region, encountering and striking alliances with their northern and western neighbors. Contrary to the Government's new-found claims, however, Beswick does *not* say that the Ngok Dinka left their tribal territories en masse; on the contrary, she

<sup>402</sup> GoS Reply Memorial, at paras. 218, 219.

<sup>403</sup> S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 52 (2004), **Exhibit-FE 12/18**.

<sup>404</sup> GoS Reply Memorial, at para. 220. Beswick recounts the same story in her doctoral thesis as in her later book *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* ("Blood Memory"). In The GoS extract from *Blood Memory*, it suggests that only the Abyior and the Achaak sections remained in the north "to join [i]n the battle against the Messiria Zurug leader, Abu Agbar, at a place called Fut." In Beswick's doctoral thesis, which was more closely scrutinized by academia and which covers the same material, Beswick noted that "[w]hile *some Ngok joined* the feki, *others preferred to remain peripheral to the fray* returning south." Beswick's account does not support the proposition that the Ngok Dinka were "pushed back" en masse. The dispersal of some Ngok Chiefdoms further south across the Abyei region is consistent with the pattern of settlement by Chiefdom that is depicted in **Map 13** (Ngok Dinka Chiefdoms, 1905).

<sup>405</sup> S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 56 (2004), **Exhibit-FE 12/18**.

indicates that, through a variety of alliances, they avoided conflicts and retained their historic territories.

378. Thus, in another passage not cited by the Government, Beswick describes the physical location of the Ngok in the mid-1800s following the establishment of the Ngok alliances described above.<sup>406</sup> She describes the “Ngok [as being] to [the] northeast of [the Twic and Malwal], *situated primarily north of the Kir/Bahr el-Arab River*. The Messiria are the most easterly Baggara on the river and their *northern neighbors* are the Fellaita section of the Humr Baggara *and the Ngok Dinka*.”<sup>407</sup>

379. Contrary to the Government’s selective (mis-)quotations, from the work that is the primary source and basis for their argument, Beswick plainly did not conclude that the Ngok Dinka had migrated to below the Kiir/Bahr el Arab or anything of the sort. Rather, as any fair reading of her work shows, Beswick left the Ngok Dinka chiefdoms in the places to which they had migrated, north of the Bahr el Arab and in the Bahr river basin.

b) K.D.D. Henderson

380. The Government next relies on a 1939 article by Henderson, which describes the migration of the Misseriya and, in that context, the migration of “*the Ngork*” as they “*moved west along the G nol [that is, the Ngol/Ragaba ez Zarga]*.”<sup>408</sup> In an earlier unpublished version of the article that was found among his papers, Henderson also quoted accounts that “*the Ngork Dinka* already held the *G nol river (Rageba Zerga)* up to Hugnat Abu Urf” and referred to “*the Ngork*, whose leading man at this time was Deing of Torjok, residing at Debbat El Mushbak, near Hasoba”<sup>409</sup>

381. The Government acknowledges these accounts, but then quotes a later passage which describes “*Kwal Dit’s grandson Alor* subsequently mov[ing] south to Kerreita” and “[*Alor’s son, Biong*] mov[ing] further west to the site now called Sultan Arob.”<sup>410</sup> The Government implies that this latter passage was omitted by the SPLM/A from its Memorial – although the very same passage is included almost verbatim in the SPLM/A Reply Memorial.<sup>411</sup>

382. The passage cited by the Government in no way supports its suggestion that the entire Ngok Dinka tribe moved south from the Ngol/Ragaba ez Zarga. Rather, exactly as detailed in the SPLM/A Memorial, this passage describes how the Ngok Dinka Paramount Chief Alor

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<sup>406</sup> S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 159 (2004), **Exhibit-FE 12/18**.

<sup>407</sup> S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 159 (2004), **Exhibit-FE 12/18**.

<sup>408</sup> K. Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 58 (1939), **Exhibit-FE 3/15**.

<sup>409</sup> K. Henderson, “A Note on History of the Homer tribe of Western Kordofan,” 660/11/1-244 SNR 1, 4 (1930), **Exhibit-FE 3/12** (emphasis added).

<sup>410</sup> K. Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 58 (1939), **Exhibit-FE 3/15**.

<sup>411</sup> SPLM/A Reply Memorial, at para. 1099 (“Henderson notes that the Ngok took over the Ngol/Ragaba ez Zarga ‘one generation before the Baggara came south to Turda. Deing of Torjok [Ale] was then their leading man, and his headquarters were at Debbat El Mushbak, a prominent mound near Hasoba.’ Henderson then describes how in later generations Paramount Chief ‘Alor [Alor Monydhang] subsequently moved south to Kerreita,’ and then refers to ‘Biong [Biong Alor] son of Alor’ having ‘moved further west to the site now called Sultan Arob after his son.’”).

moved to the area of Abyei town.<sup>412</sup> Importantly, and in contrast to Henderson’s earlier description of the movement of “*the Ngork*” or the “*Ngork Dinka*,” he describes only individual Ngok Dinka Paramount Chiefs (“*Kwal Dit’s grandson Alor*” and “*Alor’s son, Biong*”) moving their residences south.<sup>413</sup>

383. Henderson’s description neither says nor implies that all nine Ngok Dinka chiefdoms and their people moved south – but instead that specific Paramount Chiefs did so. Nor is it plausible to suggest that references to individual Chiefs are really references to all nine Ngok Dinka Chiefdoms. Indeed, it would be highly unusual to think either that all nine Chiefdoms moved substantially to the south, without that being mentioned, or that the Ngok Dinka Paramount Chief would have lived at the very northern frontier of the Ngok Dinka territory, immediately next to their Arab neighbors.

384. The GoS also cites a 1930 article by Henderson that includes a footnote which says that “Kwal Arob ... had therefore no right some 50 years later to bestow Tebussaya upon [the] Rueng on the ground that it had once belonged to [Paramount Chief] Kwal Dit.”<sup>414</sup> The GoS relies on the footnote as evidence “in Henderson’s opinion, the Ngok had left the Ragaba ez Zarga region permanently.”<sup>415</sup>

385. That interpretation is unsubstantiated and implausible. Henderson nowhere expresses the “opinion” attributed to him regarding the location of the Ngok Dinka; rather, after commenting on Kuol Arop’s (Kwal Arob’s) ascendancy, “by a series of accidents,” to the Paramount Chiefdom, Henderson questioned Kuol Arop’s (Kwal Arob’s) power to transfer an earlier Paramount Chief’s territory. At most, that opinion reflects nothing more than doubts as to the authority of a Ngok Paramount Chief to remove property rights from a Chiefdom that had acquired them decades before.<sup>416</sup>

c) Santandrea

386. The Government also purports to rely on the work of Stefan Santandrea. The Government’s Reply Memorial acknowledges that Santandrea recounted that “the first [of the Ngok Dinka] to cross the Nile was Kuol [were] 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.’*”<sup>417</sup>

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<sup>412</sup> The SPLM/A Memorial describes Alor’s migration south as follows: “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.” 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 19<sup>th</sup> century.” See SPLM/A Memorial, at para. 126.

<sup>413</sup> Indeed, Henderson’s 1939 article specifically deleted an earlier reference (in his 1930 manuscript notes) to the “rest of the Ngork” moving south, and replaced it with the statement that “Kwal Dit’s grandson Alor subsequently moved south to Kerreita.” 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**; Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22(1) SNR 58 (1939), **Exhibit-FE 3/15**.

<sup>414</sup> GoS Reply Memorial, at para. 227 (citing K. Henderson, “A Note on History of the Homer tribe of Western Kordofan,” 660/11/1-244 SNR 1, 4 (1930), **Exhibit-FE 3/12**).

<sup>415</sup> GoS Reply Memorial, at para. 227.

<sup>416</sup> See Deng, *Property and Value Interplay among the Nilotes of the Southern Sudan*, 51(3) Iowa L. Rev. 548-549 (1966) (“The right of the individual member of the tribal community over his residential land is so strong that even if he abandons it, it must be kept unoccupied unless he gives consent to a relative to take it over.”), **Exhibit-FE 4/15**; Deng, *Property and Value Interplay among the Nilotes of the Southern Sudan*, 51(3) Iowa L. Rev. 548 (1966), “The control of the Chief over land is largely minimal in so far as those already members of his tribe are concerned.”, **Exhibit-FE 4/15**.

<sup>417</sup> S. Santandrea, *The Luo of the Bahr El Ghazal* 195 (1968), **Exhibit-FE 4/18**.

387. The Government then purports to discover that Santandrea went on to say that “*Alor* pushed further on, invading the territory of the Begi or Girma, and arrived as far as Abyei,”<sup>418</sup> suggesting that this again revealed migration of all Ngok Dinka south from the Ngol/Ragaba ez Zarga.<sup>419</sup> In fact, the passage the GoS introduces from Santandrea is already quoted in the SPLM/A Memorial.<sup>420</sup> Again, what that passage describes is only the movement of the residence and court of the Ngok Dinka Paramount Chief to the area around present-day Abyei town – not the migration of all Ngok Dinka to the south.

388. The same treatment is given to “[Alor’s] son Biong, [who] settled south of Abyei on the Kir, in a place called Wunewei [Wunchuei], where he died and was buried.”<sup>421</sup> This shift of Paramount Chief and Court is made even more abundantly clear in the description of “Bion’s heir, Arop, [who] *shifted his headquarters to Mirok*....”<sup>422</sup> These were plainly descriptions of the residences and courts of the Ngok Dinka Paramount Chief, not descriptions of the locations of all of the nine Ngok Dinka chiefdoms.

d) Sabah

389. The Government next relies on Sabah, who it acknowledges wrote that, when the Ngok “moved up to the present Ngowl [Ngol/Ragaba ez Zarga]” under Paramount Chief Kuol Dongbek, the land “*became the Ngok’s permanent home*.”<sup>423</sup> The first move south by a Ngok Paramount Chief following establishment on “the present Ngowl [Ngol/Regaba ez Zarga]” described by Sabah is by “*Alor Maindang’s [Alor Monydang’s] son, Biong* [who] succeeded him.”<sup>424</sup> Sabah recounts that “[*Biong*] and his sons moved to Majak near Abyei town” and “established his chieftanship there.”<sup>425</sup> Again, all of these are descriptions of individual Paramount Chiefs and “their sons,” and not descriptions of all of the Ngok Dinka chiefdoms or people.

390. Nonetheless, the Government goes on to claim that Sabah then described the Ngok migrating further south, citing his statement that, during a “war with the Rizigatt,” the “Ngok retreated to present-day Makair in Tuich-land.”<sup>426</sup> There is no suggestion, however, that this “retreat” was anything more than a tactical action or that it changed what Sabah described as the Ngok Dinka’s “permanent home.” Indeed, it is implausible to suggest that the Ngok Dinka remained in what was indisputably Twic Dinka territory for long.

391. Not surprisingly, therefore, the GoS Reply Memorial omits Sabah’s description that the seat of the Ngok Dinka Paramount Chiefdom moved to the area of Abyei town.<sup>427</sup> Sabah specifically explained that this included the period “when the Sudan entered the Condominium Rule,” which predates 1905.<sup>428</sup>

<sup>418</sup> S. Santandrea, *The Luo of the Bahr El Ghazal* 196 (1968), **Exhibit-FE 4/18**.

<sup>419</sup> GoS Reply Memorial, at para. 224.

<sup>420</sup> SPLM/A Memorial, at para. 126.

<sup>421</sup> S. Santandrea, *The Luo of the Bahr El Ghazal* 196 (1968), **Exhibit-FE 4/18**. Wunchuei is depicted on **Map 59** (Abyei: Satellite Image).

<sup>422</sup> S. Santandrea, *The Luo of the Bahr El Ghazal* 196 (1968), **Exhibit-FE 4/18**.

<sup>423</sup> A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4 (1978), **Exhibit-FE 6/7**.

<sup>424</sup> A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 4-5 (1978), **Exhibit-FE 6/7**.

<sup>425</sup> A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 5 (1978), **Exhibit-FE 6/7**.

<sup>426</sup> GoS Reply Memorial, at para. 225.

<sup>427</sup> See A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 6 (1978), **Exhibit-FE 6/7**.

<sup>428</sup> See A. Sabah, *Tribal Structure of the Ngok Dinka of Southern Kordofan Province* 6 (1978), **Exhibit-FE 6/7**.

e) Francis Deng

392. The Government also attempts unsuccessfully to rewrite the historical accounts collected by Francis Deng. The GoS Reply Memorial acknowledges that Deng described how the “Aleï Chiefdom migrated *even further to the north than the Ngol/Ragaba ez Zarga*,”<sup>429</sup> but goes on to argue that Deng described “the subsequent southern migration,” implying that this took the Aleï south to the Kiir/Bahr el Arab.<sup>430</sup>

393. In fact, what Deng says is that “[t]he Dinka believe that Deinga [the Dinka name for Muglad], the present headquarters of the Missiriya Baggara Arabs, derives its name from the name of Aleï’s leader Deing [or Deng]. Aleï was later forced by increasing Arab pressure to move southward and join the bulk of the Ngok.”<sup>431</sup> The Government twice selectively quotes only the last sentence of this passage,<sup>432</sup> without acknowledging that it describes a southward movement of the Aleï *from Muglad*.

394. In fact, when fairly excepted, Deng’s passage clearly describes the Aleï moving south from Muglad towards the Ngol/Ragaba ez Zarga. He begins his description of the Aleï migration by stating “[a]lthough *most of the Ngok settled on the Ngol River* ... one branch, Thorjok Aleï, *remained in the North* in the area now occupied by the Baggara Arabs [i.e. Muglad].”<sup>433</sup> Deng then notes that “because [the Aleï] had the closest contacts with the Arabs [due to their northern location] the other Dinka saw them as a marginal group, assuming they had mixed with the Arabs racially and culturally.”<sup>434</sup>

395. The Government also refers to Deng’s account of “the conflict between the Dinka and the Rezeigat,”<sup>435</sup> suggesting that tribal fighting between the Ngok Dinka and Rizeygat during the Turkiyya evidences a permanent displacement of the Ngok from their homelands. The GoS Reply Memorial also cites Deng’s reference to the “devastation to Dinkaland”<sup>436</sup> that resulted from the conflict.

396. In fact, Deng’s work describes how the Ngok Dinka Paramount Chief Arop Biong was *temporarily* taken into hiding during the Ngok/Rizeygat conflict.<sup>437</sup> The Government omits to mention that Deng goes on to describe how a Ngok Dinka named Dau Kir then “saved the country,”<sup>438</sup> leading to peace between the Ngok and the Rizeygat. Similarly, the Government’s Reply Memorial chooses not to mention that the peace agreement with the Rizeygat was achieved through the efforts of Paramount Chief Arop Biong, who did not stay in hiding long.<sup>439</sup>

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<sup>429</sup> GoS Reply Memorial, at para. 226 (emphasis added).

<sup>430</sup> See GoS Reply Memorial, at para. 226.

<sup>431</sup> F. Deng, *War of Visions: Conflict of Identities in the Sudan* 253-254 (1995), **Exhibit-FE 8/13**.

<sup>432</sup> See GoS Reply Memorial, at paras. 226 and 230.

<sup>433</sup> F. Deng, *War of Visions: Conflict of Identities in the Sudan* 254 (1995), **Exhibit-FE 8/13**.

<sup>434</sup> F. Deng, *War of Visions: Conflict of Identities in the Sudan* 254 (1995), **Exhibit-FE 8/13**.

<sup>435</sup> GoS Reply Memorial, at para. 230.

<sup>436</sup> GoS Reply Memorial, at para. 230 (citing F. Deng, *War of Visions: Conflict of Identities in the Sudan* 257 (1995), **Exhibit-FE 8/13**).

<sup>437</sup> F. Deng, *War of Visions: Conflict of Identities in the Sudan* 256 (1995), (“Arob [Arop] Biong...had been taken to another tribe for security....So [Dau] was sent to go and bring Arob [Arop] to discuss peace with the Arabs...So Dau went and informed Chief Arob [Arop] Biong. When they returned together, Madibbo greeted Arob [Arop] very warmly....”), **Exhibit-FE 8/13**.

<sup>438</sup> F. Deng, *War of Visions: Conflict of Identities in the Sudan* 255 (1995), **Exhibit-FE 8/13**.

<sup>439</sup> F. Deng, *War of Visions: Conflict of Identities in the Sudan* 256 (1995), (“Arob [Arop] Biong...had been taken to another tribe for security....So [Dau] was sent to go and bring Arob [Arop] to discuss peace with the Arabs...So Dau went and informed Chief Arob [Arop] Biong. When they returned together, Madibbo greeted Arob [Arop] very warmly....”), **Exhibit-FE 8/13**.

397. Continuing in its string of convenient omissions, the Government also fails to mention that Deng concludes by describing how the Ngok Dinka’s tribal boundaries and territories were maintained intact: “[t]hat was how the [Ngok Dinka] land was held.... That was the end of that destruction.”<sup>440</sup> Far from supporting the Government’s recently-invented claim of a Ngok Dinka migration to the south, from a devastated Dinkaland, Deng says in no uncertain terms that the Ngok defended their lands and that the fighting ended.

398. Finally, completing this particular set of Government omissions, Deng explains how the Ngok provided safe haven to “*Homr Arabs [who] had been completely destroyed by famine and dispersed into the wilderness* [by wars and famine].”<sup>441</sup> This magnanimous act was undertaken by Paramount Chief Arop Biong *after* the warfare with the Reizegat ended. In stark contrast to the GoS’s depiction of a displaced leader in “the South for protection,” Arop Biong came to the aid of the Misseriya some years after the Reizegat conflict had maintained the historic Ngok territory. Once more, this account does not support, but comprehensively refutes the Government’s newly-constructed claim of some previously-unknown “southern migration” of the Ngok Dinka.

f) Gessi Pasha

399. The GoS refers to a passage written by Gessi Pasha in 1880 during the Turkiyya.<sup>442</sup> This predates the Mahdiyya, the Condominium and the relevant date of 1905 by some twenty-five years. It is difficult to see how temporary hiding during slave raids a quarter of a century before the relevant transfer date can have any bearing on the dispute. This is reinforced by Gessi’s comment in the passage cited by the GoS that, “after the war [referring to the battle in 1880]” he “persuade[d] [the Dinka] to *return to their native homes*.”<sup>443</sup>

400. In any case, the area of Sudan that Gessi describes in his book is Bahr el Ghazal province to the south of the Kiir/Bahr el Arab. Given that, it is unlikely that Gessi was referring to the Ngok Dinka at all. In any event, his account again does nothing to advance the Government’s newly-discovered historical theory.

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401. In sum, the Government’s revisionist history of the Ngok Dinka migration to the Bahr river basin contains significant concessions, which contradict the Government’s previous claims that the Ngok Dinka were never located north of the Kiir/Bahr el Arab. At the same time, the Government’s new claims – that all of the Ngok Dinka chiefdoms later migrated again to the south – are entirely unsubstantiated: fairly read, none of the historical authorities supports the Government’s new claim and, on the contrary, they all contradict it.

402. The Government’s new claim is also implausible. According to the Government, many thousands of Ngok Dinka migrated to the area around present-day Abyei town – with all of the nine Ngok Dinka Chiefs and their people apparently living in or around Burakol in 1905. That is absurd. Instead, while several of the Ngok Dinka Paramount Chiefs moved south to the general region of present-day Abyei town, the people of the nine Ngok Dinka chiefdoms continued to live in widely-scattered settlements throughout the entire Bahr region in small groupings of tukuls supporting their historic agro-pastoral lifestyle.

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<sup>440</sup> F. Deng, *War of Visions: Conflict of Identities in the Sudan* 256 (1995), **Exhibit-FE 8/13**.

<sup>441</sup> F. Deng, *War of Visions: Conflict of Identities in the Sudan* 258 (1995), **Exhibit-FE 8/13**.

<sup>442</sup> GoS Reply Memorial, at para. 228.

<sup>443</sup> GoS Reply Memorial, at para. 228 (citing R. Gessi & F. Gessi, *Seven Years in the Soudan* 388-89 (1892)).

403. Not surprisingly, the foregoing description is: (a) precisely what the 19<sup>th</sup> and early 20<sup>th</sup> century map evidence (which the Government now brands as “misleading”) shows;<sup>444</sup> (b) precisely what one would expect from the environmental and cultural evidence of the Bahr river basin and the respective ways of life of the Ngok Dinka and the Misseriya;<sup>445</sup> and (c) precisely what the Anglo-Egyptian administrators would later report during the first decades of the 20<sup>th</sup> century.<sup>446</sup>

*B. The Government’s New Allegations Regarding the Differential Impact of the Mahdiyya on the Ngok and Misseriya Are Implausible and Wrong*

404. As detailed in the SPLM/A Memorial, and the Expert Report of Professor Daly, the Mahdiyya had significant effects on the Misseriya, leaving them decimated in the years immediately prior to 1905, while the Ngok Dinka were relatively unscathed.<sup>447</sup> Thus, Deng explains that:

“[u]nlike most Dinka groups who had revolted against the Turks only to face the Mahdists, there was hardly any Turko-Egyptian presence in Ngok area. *Although the Mahdiya was one of the most violent chapters in southern history, it was a relatively peaceful period for the Ngok.* When the non-Mahdist Homr, led by Hamadan Abu Ein, were thrown out of Dar Messiriya, the Ngok accommodated them in the swamps of Baralil and continued to give them protection until the Condominium.”<sup>448</sup>

Although the documentary record does not permit specific territorial conclusions to be drawn from the differential impact of the Mahdiyya, it clearly left the Ngok Dinka free to make full use of their historic territories.

405. The Government’s Memorial made no reference to the Mahdiyya (as noted in the SPLM/A Reply Memorial<sup>449</sup>). In contrast, the Government’s Reply Memorial now excerpts a variety of sources in an effort to show that the Mahdiyya did not have a material differential effect on the Ngok and the Misseriya, claiming that there is no evidence that “the turbulent period of the Mahdiyya gave the Ngok a differential advantage over the Humr.”<sup>450</sup> The Government’s effort to address the Mahdiyya is implausible and wrong.

406. First, the works cited by the Government’s Reply Memorial describe the impact of the Mahdiyya in extremely general terms, never mentioning the Ngok Dinka (either by name or description). Additionally, where specific locations are described by the Government’s new sources, they are not in the Abyei region.<sup>451</sup> These sorts of general statements do nothing more than confirm that the Mahdiyya had very substantial effects on Sudan and its people, and say nothing about the specific positions and condition of the Misseriya and Ngok Dinka.

<sup>444</sup> See SPLM/A Reply Memorial, at para. 1390. See below at paras. 563-609.

<sup>445</sup> See SPLM/A Reply Memorial, at para. 1078. See below at paras. 610-625.

<sup>446</sup> See SPLM/A Reply Memorial, at para. 1100; SPLM/A Memorial, at para. 942.

<sup>447</sup> See SPLM/A Reply Memorial, at para. 915; SPLM/A Memorial, at paras. 128-132; Daly Expert Report, at pp. 23-26.

<sup>448</sup> F. Deng, *The Man Called Deng Majok: A Biography of Power, Polygyny and Change* 47 n. 20 (1986), **Exhibit-FE 7/4**.

<sup>449</sup> See SPLM/A Reply Memorial, at para. 915.

<sup>450</sup> GoS Reply Memorial, at para. 231.

<sup>451</sup> The visit of John Petherick to Meshra el Rek in 1853 is described. Meshra el Rek is not in the Abyei region. Petherick’s visit to the Bongo tribe is described. This is not the Bongo Chiefdom of the Ngok Dinka, but rather a separate, non-Nilotic people wholly unconnected to the Dinka. Anglo-Egyptian Sudan Handbook Series – The Bahr el Ghazal Province 49 (1911), **Exhibit-FE 3/8**. Peel wrote of the impact of the Mahdiyya in areas outside the Abyei region (Wau, Shambe, Chak Chak) and of tribes not including the Ngok Dinka. S. Peel, *The Binding of the Nile and the New Soudan* 194 (1904), **SCM Annex 44**.

407. Second, the GoS spends five pages arguing that, although the Misseriya suffered during the Mahdiyya, the Ngok Dinka also suffered at least as much at the hands of slave traders.<sup>452</sup> (Of course, although the Government ignores it, the SPLM/A discussed the slave raids during the Turkiyya and Mahdiyya in its first Memorial, explaining why the Ngok Dinka avoided the brunt of these depredations from the North.<sup>453</sup>)

408. The GoS's discussion of this period almost entirely addresses tribes other than the Ngok Dinka (e.g., Agar Dinka, Bongo, Jur, Rek Dinka), or areas of Southern Sudan that are not inhabited by the Ngok Dinka (e.g., Wau, Meshra el Rek, Chak Chak), or overly-broad generalizations about "Negroid tribes"<sup>454</sup> or "the whole region [Southern Sudan]."<sup>455</sup> None of these comments, about other tribes and regions has any bearing on the Ngok Dinka; as discussed in the SPLM/A Memorial, the Ngok Dinka were able to avoid the effects of slave-raiding through diplomacy, inaccessibility and courage;<sup>456</sup> the consequences of the Mahdiyya for other tribes can simply not be transferred to the Ngok Dinka (as the Government would do).

409. There is only one reference to the Ngok Dinka in any of the sources cited by the Government's Reply Memorial. That extract does not concern slave-raiding and instead refers to tribute being demanded from the Ngok Dinka "by the Humr and particularly the Reizegat."<sup>457</sup> That comment does not support – and instead contradicts – the Government's claims, suggesting at most that the Ngok Dinka negotiated protection for themselves and their territories.

410. Further, the Government criticizes the SPLM/A's historical evidence, claiming that it "seems to rely entirely on the writings of Francis Deng, which are [] shrouded in mist and myth."<sup>458</sup> In fact, the SPLM/A's historical claims are supported by the expert testimony of Professor Daly (a pre-eminent historian of Sudan) and by a number of other authorities (including Salih and Holt, as well as accounts by Henderson and Slatin Pasha). At the same time, Francis Deng is a leading scholar on Sudan, whose conclusions are entitled to no less weight than others in the field.<sup>459</sup>

411. The SPLM/A's account of the effects of the Mahdiyya on the Ngok Dinka is based on the conclusions of Henderson (cited by Deng as well as the SPLM/A Memorial),<sup>460</sup> who stated:<sup>461</sup>

"The majority of the Homr joined the Khalifa at an early stage and were led by Hammad Rigeyat of the Fayarin, but suffered heavy casualties at the Battle of Toski. ...The non-Mahdists ... resisted an expedition [and subsequent attacks] and [t]he

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<sup>452</sup> GoS Reply Memorial, at paras. 231-245.

<sup>453</sup> SPLM/A Memorial, at paras. 129-132.

<sup>454</sup> GoS Reply Memorial, at para. 241 (citing R. Collins, *Land Beyond the Rivers: The Southern Sudan 1898-1918* 42 (1971), **SCM Annex 24**).

<sup>455</sup> GoS Memorial, at para. 239 (citing Anglo-Egyptian Sudan Handbook Series – The Bahr el Ghazal Province 52 (1911), **Exhibit-FE 3/8**).

<sup>456</sup> SPLM/A Memorial, at paras. 128-132; Daly Expert Report, at pp. 25-26.

<sup>457</sup> GoS Reply Memorial, at para. 246.

<sup>458</sup> GoS Reply Memorial, at para. 235.

<sup>459</sup> Francis Deng wrote the text relied on in this context (The Man Called Deng Majok: A Biography of Power, Polygyny, and Change) as a Senior Research Associate at the Woodrow Wilson International Centre for Scholars, an internationally recognized research institution.

<sup>460</sup> SPLM/A Memorial, at paras. 897-903.

<sup>461</sup> SPLM/A Memorial, at para. 231.



*survivors under Hamdan Abu Ein of the Kelabna, found asylum until the futeh with Chief Arob Biong in the swamps of Baralil.*<sup>462</sup>

In addition, Henderson concluded:

“Kwal Arob, chief of the Ngork, *spared his people most of these troubles* [referring to warfare and slave raiding] *by coming to terms with the Homr and enrolling himself at El Obeid as a subject of Kordofan*. He was given a robe of honour in 1916, and while the sons of his rival, Alar or Mai Nweir, were busy killing each other, he quietly assumed an unofficial suzerainty over all the Ngork, and later over the Rueng Ajuba at Kerreita.”<sup>463</sup>

412. Characteristically, when the GoS cites sources that purportedly support its argument concerning the Mahdiyya, the extracts have nothing to do with the Ngok Dinka. Thus, the Government’s Reply Memorial relies on the 1911 *Anglo-Egyptian Handbook* for a description of slave raids in Meshra el Rek.<sup>464</sup> The Government does not mention that this is an area in Bahr el Ghazal province that is over 100 miles from the Abyei region. Similarly, the GoS mistakenly identifies the “Bongo tribe” as the Bongo Chiefdom of the Ngok Dinka.<sup>465</sup> As the SPLM/A explained in its Reply Memorial, the Bongo tribe (located in Bahr el Ghazal province) is not even a Nilotic people, let alone Ngok Dinka.<sup>466</sup>

413. The Government makes the same error in its reference to Peel, writing in 1904 about slave raiding in Bahr el Ghazal province. When referring to the impact of the Mahdi on “the smaller tribes, Jur, Bongo, Golo, etc.,” Peel is not referring to the Chiefdom of the Ngok Dinka, but instead the non-Nilotic people to the south and the west of the Dinka.<sup>467</sup> Thus, the areas in Bahr el Ghazal that Peel identifies (Wau, Rumbek, Shambe, Chak Chak, etc.) are not Ngok Dinka territories, but instead the Rek, Gok, Agar and other southern Dinka tribes.<sup>468</sup>

414. The Government then refers to Cunnison to explain “the influence of the Mahdiyya” and its “disastrous impact.”<sup>469</sup> Cunnison’s explanation is entirely consistent with the SPLM/A case since he only discusses the impact of the Mahdiyya on the Misseriya.<sup>470</sup> Indeed, Cunnison does not even mention the Ngok in his discussion of the Mahdiyya.

415. The Government next cites Collins, a noted Sudan historian, to support its allegation of the disastrous impact of the Mahdiyya on the Ngok. In fact, if Collins’ works are not entirely distorted through selective citation, he does not support the GoS’s position, but

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<sup>462</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 69 (1939), **Exhibit-FE 3/15**.

<sup>463</sup> Henderson, “A Note on The Migration of the Messiria Tribe into South West Kordofan,” 22 (1) SNR 71 (1939), **Exhibit-FE 3/15**.

<sup>464</sup> GoS Reply Memorial, at para. 239.

<sup>465</sup> GoS Memorial, at para. 239.

<sup>466</sup> SPLM/A Reply Memorial, at para. 1341.

<sup>467</sup> S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 78 (2004), **Exhibit-FE 12/18**.

<sup>468</sup> GoS Reply Memorial, at para. 242 (citing S. Peel, *The Binding of the Nile and the New Soudan* 194 (1904)). This geographical breakdown by tribe is shown on **Map 12** (Southern Sudan: Tribes).

<sup>469</sup> GoS Reply Memorial, at paras. 243-244.

<sup>470</sup> It is only the Misseriya who displayed “adherence” to the Mahdi, and in the words of Cunnison “[t]his adherence in the end proved disastrous.” Cunnison, “*Humr and their Land*,” 35(2) SNR 50 (1954), **Exhibit-FE 4/5**.

contradicts it: he concludes that, following one unsuccessful Mahdist military expedition across the Kiir/Bahr el Arab in 1893-94, “*the Dinka were left alone by the Mahdists.*”<sup>471</sup>

416. Citing Collins, the Government also claims that, during the Mahdiyya, “the Dinkas declared that the Bahr el Arab was their northern boundary.”<sup>472</sup> Again, that is an egregious and unsupportable misstatement. In fact, what Collins said is that it was the “*Chak Chak, the leading Dinka south of the Bahr al-‘Arab*” – and *NOT* that the Ngok Dinka, that declared that the Kiir/Bahr el Arab was *their* boundary.<sup>473</sup> Of course, the location of other Dinka tribal groups south of the Kiir/Bahr el Arab is precisely consistent with the Ngok Dinka being located further to the north, in the Bahr river basin above the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga. Indeed, with the Kiir/Bahr el Arab constituting the northern frontier of other Dinka tribes, it is obvious that the Ngok Dinka could only have been located further to the north.

417. Once more citing Collins, the Government goes on to claim that “inter-tribal wars between the Dinka themselves” caused population losses to the Ngok Dinka.<sup>474</sup> The GoS is plagued again with a case of mistaken identity. The tribes living in the area to which Collins refers (Agar, Cic [Ciec], Aliab) are not the Ngok Dinka and are not even located close to the Ngok, but much further south into Bahr el Ghazal province in a “triangle of territory formed by Mashra’ ar-Raqq [Meshra el Rek], Rumbek and Shambe – the Eastern District of the Bahr al-Ghazal Province.”<sup>475</sup>

418. Next, the GoS introduces a final reference from Collins to the supposedly devastating impact of the Mahdiyya on the Dinka.<sup>476</sup> Again, the reference is not to the Ngok Dinka. For the third time, the GoS refers to the Bongo tribe “near Wau” – some 70 miles to the southeast – which is not the same as the Bongo Chiefdom of the Ngok Dinka. In fact, the Bongo are located even further south near Tonj, in Bahr el Ghazal province. The Bongo of Bahr el Ghazal province is a completely separate tribe, and not even a Nilotic people, let alone Ngok Dinka.

419. Finally, the Government refers briefly to a map produced by Collins in his 1971 text.<sup>477</sup> That map does not purport to be a contemporaneous depiction of Southern Sudan in the Mahdiyya (or circa 1905), and it has nothing to do with the differential impact of the Mahdiyya.

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420. In sum, the Government’s efforts to address the effects of the Mahdiyya do nothing to advance its case, and instead confirm that of the SPLM/A. Thus, the Government’s Reply Memorial expressly concedes the devastating effects of the Mahdiyya (between 1881 and 1898) on the Misseriya: (a) “it is undeniable that the Baggara of Kordofan suffered under the

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<sup>471</sup> R. Collins, *Land Beyond the Rivers: The Southern Sudan 1898-1918* 186 (1971), **SCM Annex 24**.

<sup>472</sup> GoS Reply Memorial, at para. 246 (citing R. Collins, *Land Beyond the Rivers: The Southern Sudan 1898-1918* 189 (1971), **SCM Annex 24**).

<sup>473</sup> R. Collins, *Land Beyond the Rivers: The Southern Sudan 1898-1918* 188 (1971), **SCM Annex 24**.

<sup>474</sup> GoS Reply Memorial, at para. 246.

<sup>475</sup> R. Collins, *Land Beyond the Rivers: The Southern Sudan 1898-1918* 190 (1971), **SCM Annex 24**.

<sup>476</sup> GoS Reply Memorial, at para. 246 (citing R. Collins, *Land Beyond the Rivers: The Southern Sudan 1898-1918* 189 (1971), **SCM Annex 24**).

<sup>477</sup> GoS Reply Memorial, at para. 247.

Mahdiyya;<sup>478</sup> (b) “[n]o doubt the Humr suffered severely during the Mahdiyya;<sup>479</sup> and (c) “the disastrous impact of the Mahdiyya.”<sup>480</sup>

421. At the same time, the Government’s scatter-shot effort to demonstrate that the Ngok Dinka also suffered seriously fails entirely. In most instances, the authorities cited by the Government concern other tribes in other areas – **NOT** the Ngok Dinka. In this regard, the Government’s Reply Memorial continues the unhelpful tactic of its Memorial – being to confuse the Ngok with other Dinka (or none Dinka) tribal groups.<sup>481</sup>

422. In fact, the Government’s Reply Memorial does not advance a single piece of evidence that suggests that the Ngok Dinka suffered as much, if at all, under the Mahdi. On the contrary, multiple commentators (Henderson, Deng, Collins) specifically describe how the Ngok Dinka enjoyed a “*relatively peaceful period*,” were “*spared ... most of these troubles*” and were “*left alone by the Mahdi*.”

423. While the Government’s Reply Memorial bristles with innuendo and rhetoric, the historical record once more does not support, and instead flatly contradicts, the GoS claims. When the sources are examined, the Government’s recent claims about the Ngok Dinka and the Misseriya during the Mahdiyya are just as unsustainable as its earlier claims about the Ngok Dinkas’ purported “southern migration.” Instead, as detailed in the SPLM/A Memorial, the historical record shows very clearly that the Ngok Dinka were spared the devastation of the Mahdiyya, being left just a few years before 1905 in a relatively enhanced position vis-à-vis that Misseriya.

C. *The Documentary Record Provides No Support For, and Instead Contradicts, the Government’s Claims Regarding the Location of the Ngok Dinka in 1905*

424. The Government’s Reply Memorial next addresses the documentary record, selectively discussing a variety of pre-1905 and post-1905 sources. The Government’s discussion of the documentary evidence does little to advance its case, instead conceding (for the first time) the location of Ngok Dinka to the north of the Kiir/Bahr el Arab. As discussed below, the Government’s new case rests principally on an effort to draw negative inferences about the extent of Ngok Dinka territory in 1905; given the serious limitations on, and gaps in, the documentary record, this inference is inappropriate and does nothing to contradict the SPLM/A claims.

1. The Pre-1905 Condominium Documents Record Provides No Support for, and Instead Contradicts, the Government’s Claims Regarding the Location of the Ngok Dinka in 1905

425. The Government first presents a truncated discussion (a dozen pages) of the critical period between 1898 and 1905. The brevity, and lack of attention to detail, of the Government’s analysis is striking, both because of the importance of this period and because of the Government’s repeated insistence that there is an extensive record of relevant Condominium documents from this period.<sup>482</sup>

<sup>478</sup> GoS Reply Memorial, at para. 238.

<sup>479</sup> GoS Reply Memorial, at para. 243.

<sup>480</sup> GoS Reply Memorial, at para. 244.

<sup>481</sup> See SPLM/A Reply Memorial, at paras. 239, 242, 246.

<sup>482</sup> GoS Reply Memorial, at para. 32.

426. The Government’s discussion of the pre-1905 Condominium documentary record is also striking because it acknowledges – both expressly and in the evidence it cites – that the GoS’s original historical case is untenable and must be abandoned. In particular, the Government’s own submissions and evidence now acknowledge that the Ngok Dinka were **NOT** located entirely to the south of the Kiir/Bahr el Arab in 1905 and that they were instead indisputably located in villages extending at least as far north – **on the Government’s own newly-revised case** – as “Bombo,”<sup>483</sup> “Etai,”<sup>484</sup> “Burakol,”<sup>485</sup> “Achak,”<sup>486</sup> an unidentified location near the Ngol/Ragaba ez Zarga,<sup>487</sup> and “Bongo ... at 9.32’N.”<sup>488</sup>

427. Needless to say, the Government’s new case is in complete contradiction to its earlier claims that, “[p]rior to 1905, the Western Dinkas (including the Ngok Dinka) were located to the south of the Bahr el Arab.”<sup>489</sup> Even on the Government’s own case, this claim can now be disposed of – along with whatever credibility the Government’s historical accounts may ever have held.

428. The Government’s new historical case instead claims that the Ngok Dinka were “located **on and around the Bahr el Arab/Kir, predominantly to the south**”<sup>490</sup> and that “the nine Ngok Dinka chiefdoms remained **essentially located on and around the Bahr el Arab** ... [including] at the ‘new village,’ Burakol, between the Bahr el Arab and the Umbieiro.”<sup>491</sup> The Government also (now) asserts that Ngok Dinka “[c]laims to occupation and use of the area north to 10.35’N are entirely unsubstantiated in the documentary record contemporary with the [1905] transfer.”<sup>492</sup>

429. In fact, as discussed in the SPLM/A Reply Memorial and below, the pre-1905 documentary record demonstrates – based on first-hand observations by Condominium officials – that a significant population of Ngok Dinka lived in permanent settlements with extensive cattle herds and agricultural fields dotted throughout the Bahr region, centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab and extending north to the *goz*. It is also clear that the Paramount Chief of the Ngok Dinka in 1905 (Arop Biong or “Sultan Rob”) lived to the **north** of the Kiir/Bahr el Arab in the Ngok Dinka village identified by contemporaneous travel accounts (and maps) as “**Burakol**,” located very close to the location of the present day Abyei town.

430. Importantly, all of the foregoing observations – including those now conceded by the Government – **were made during relatively isolated explorations by Condominium officials during the dry season**. The Condominium explorations were also made under conditions that, the evidence shows, engendered fear among the Ngok Dinka, who took active steps to avoid contact with the Condominium officials. As discussed below, these various limitations on the Condominium explorations, and the resulting records, are highly important in assessing what those records reveal.

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<sup>483</sup> GoS Reply Memorial, at para. 256.

<sup>484</sup> GoS Reply Memorial, at para. 257.

<sup>485</sup> GoS Reply Memorial, at para. 271.

<sup>486</sup> GoS Reply Memorial, at para. 275.

<sup>487</sup> GoS Reply Memorial, at para. 275.

<sup>488</sup> GoS Reply Memorial, at para. 281.

<sup>489</sup> GoS Memorial, at para. 332.

<sup>490</sup> GoS Reply Memorial, at para. 281.

<sup>491</sup> GoS Reply Memorial, at para. 306.

<sup>492</sup> GoS Reply Memorial, at para. 306.

a) The Limitations of the Condominium Documentary Record

431. The Government's Reply Memorial criticizes the SPLM/A for identifying limitations to the Condominium documentary record, claiming that this amounts to advancing an "*argumentum ab ignorantia*."<sup>493</sup> The Government's argument is empty rhetoric. In truth, there are material limitations on the Condominium documentary record, which the Government does not substantively dispute and which must be taken into account in evaluating the evidence.

432. The pre-1905 documentary record (mainly trek reports and similar records by Condominium administrators) is limited in material respects:

a. The Bahr region covered a wide expanse that was largely unexplored (by Condominium officials as well as anyone else other than the Ngok themselves).<sup>494</sup> There were no roads and few tracks, while seasonal flooding and disease made access in the wet season impossible.<sup>495</sup> The region was thinly populated and its inhabitants had very little contact or experience with outsiders.

b. Prior to 1905, the Condominium administration lacked personnel to explore even accessible regions: the first six civil recruits to the Political Service arrived in the Sudan in 1901, three more joined in 1902, two in 1903, three in 1904. The Condominium officers who passed through Ngok territory during those first treks in southern Kordofan, were doing little more than "showing the flag."<sup>496</sup> When Dupuis visited the Abyei region in 1921 there was still no permanent Sudan Government post in south-western Kordofan; the nearest permanent station was at al-Uddaya (El Odaiya), where no British official was stationed.<sup>497</sup>

c. Although there was at least a rudimentary documentary record during the Condominium period – as opposed to nothing at all in earlier years – it is not credible for the Government to pretend that "there is an abundance of evidence" about the Ngok Dinka and Misseriya in the Condominium archives.<sup>498</sup> In total, there are no more than two dozen documents produced by the parties recording the locations of the Ngok Dinka and the Misseriya prior to 1910.<sup>499</sup> Equally, the Condominium officials made only a very limited number of visits, on a limited number of routes that did not penetrate the vast majority of the Abyei Area.

d. All of the Condominium officials' explorations of the Bahr region were undertaken during the dry season when the Ngok Dinka cattle herders and their cattle were further south.<sup>500</sup> The Condominium officials thus could not observe the extent of the Ngok herds, the entire community's use of their settlements, or the Ngok's northern wet season grazing areas.

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<sup>493</sup> GoS Reply Memorial, at para. 250.

<sup>494</sup> Annual Report on the Sudan, 1906, at p. 17, **Exhibit-FE 2/19**. Annual Report on the Sudan, 1909, at p. 52, **Exhibit-FE 3/6**.

<sup>495</sup> Witness Statement of G. Michael Tibbs; at p. 2, ¶¶10-11.

<sup>496</sup> M & A Tibbs, *A Sudan Sunset* (1999), p. 248, **Exhibit-FE 8/17**.

<sup>497</sup> Kordofan and the Region to the West of the White Nile, Anglo-Egyptian in Handbook Series, 1912, p. 103, **Exhibit-FE 3/8a**.

<sup>498</sup> GoS Reply Memorial, at para. 12.

<sup>499</sup> SPLM/A Memorial, at paras. 908-944; SPLM/A Reply Memorial, at paras. 933-1066; GoS Memorial, at paras. 332-355; GoS Reply Memorial, at paras. 248-306.

<sup>500</sup> SPLM/A Memorial, at paras. 200-201, 1074-1075.

e. The Condominium officials were travelling when slave raiding was feared and the documentary record shows that the Ngok Dinka avoided Condominium officials out of fear they were slave raiders.<sup>501</sup> Likewise, there is unequivocal evidence that the Ngok Dinka Paramount Chief concealed the locations of his people's settlements in an attempt to protect them from possible slave raiding.<sup>502</sup>

f. The Condominium officials were typically Arab-speaking and familiar with Arab cultures (and administered) the Arabs to a much greater degree than the Ngok. Treks were guided by Arab guides and this would have unavoidably biased the Condominium officials' views of non-Arab occupied areas.

g. The Government enjoys full access to the Khartoum archives of the Survey Department and has used that access to produce extracts of various new documents that accompanied its Reply Memorial. In contrast, the SPLM/A's requests for similar access have not been granted and, in at least some significant instances, the Government has not disclosed cartographic materials which appear to be of significant probative value. Among other things, and as discussed below, the Government has not disclosed significant portions of sketch maps prepared by or for Wilkinson, Percival, Hallam and Whittingdon.<sup>503</sup>

433. These limitations of the Condominium documentary record should be largely non-controversial. The number of documents and the times and routes of Condominium officials' explorations are hardly open to debate – raising the question why the Government insists so strenuously that there is some extensive documentary record concerning the Abyei region.

434. The reason that the Government pretends that the Condominium records are so extensive (“an abundance of evidence”) is that its historical case rests fundamentally on the claim that any gaps in the evidence of Ngok Dinka occupation of the Abyei Area give rise to a negative inference that the Ngok Dinka were not present in the region.

435. By pretending that a supposed lack of contemporaneous evidence in support of Ngok presence occurs in the context of an extensive and comprehensive documentary record, the Government attempts to attach disproportionate weight to what is missing from inevitably sketchy and limited historical sources. In effect, the Government claims that negative inferences about the locations of the Ngok Dinka must be drawn from the limitations in Condominium records and observations.

436. This inference is entirely inappropriate. In fact, it is entirely to be expected that there would be only limited Condominium reports about the Ngok Dinka – and no negative inferences can properly be drawn about the Ngok Dinka from those limitations. That is particularly true given the Government's failure to provide complete copies of at least some potentially significant materials (noted below).

437. It is also necessary to consider the negative inferences that the Government attempts to draw from the documentary record in the context of the other evidence before the Tribunal. The Government's inferences contradict a substantial body of other evidence, including cartographic evidence, witness testimony, post-1905 documentary evidence (Cunnison,

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<sup>501</sup> For a discussion of Percival's trek, see SPLM/A Reply Memorial, at para. 991. Saunders had a similar experience; see SIR, No. 74, October 1900, Appendix A, p. 3, **Exhibit-FE 17/8**.

<sup>502</sup> For a discussion of the 1906 report by Huntley Walsh, see SPLM/A Reply Memorial at paras. 1006-1007.

<sup>503</sup> See below at paras. 446, 458-460, 485.

Tibbs) and environmental evidence. More generally, and as discussed below, *the Government's inferences produce the untenable result that much of the Bahr region would be entirely uninhabited during all but the dry season*: given the exceptionally fertile character of the region, and its historic role as the meeting point or bridge between north and south, this characterization of an uninhabited no-man's-land is wholly implausible.

- b) The Pre-1905 Documentary Record Demonstrates that the Ngok Dinka Inhabited Permanent Villages Throughout the Bahr River Basin to the North of the Kiir/Bahr el Arab

438. It appears that only three Condominium officials documented their travels to the Abyei Area between 1898 and 1905 – Mahon, Wilkinson, and Percival.<sup>504</sup> The account of each man supports the SPLM/A's historical case, while contradicting the Government's case (both its old and new case). As a consequence, it is not surprising that the Government's Reply Memorial devotes little serious attention to any of these records.

- (1) Mahon (1901 and 1902)

439. The Government's Reply Memorial devotes only a single paragraph to discussing the two separate trip reports by Mahon (Governor of Kordofan) around Kordofan – in 1901<sup>505</sup> and 1902.<sup>506</sup> That is unsurprising because Mahon's reports clearly demonstrate: (a) the confused terminology with respect to the rivers in the Bahr region (with Mahon using both the "Bahr el Arab" and "Bahr el Homr" to refer to the Ngol/Ragaba ez Zarga);<sup>507</sup> (b) the Misseriya clearly being confined to the area around Muglad, migrating south to the Ngol/Ragaba ez Zarga only during the dry season;<sup>508</sup> and (c) the Ngok Dinka clearly being located on the Ngol/Ragaba ez Zarga during the dry season.<sup>509</sup>

440. Thus, Mahon's 1901 report notes the locations of the Homr in Kordofan, with the Homr (Agair) having their "*headquarters*" at Muglad and moving south to the Ngol/Ragaba ez Zarga in the dry season,<sup>510</sup> while Mahon's 1902 report on his trek to the Abyei Area located "*Sultan Rob's country on the Bahr El Homr [Ngol/Ragaba ez Zarga]*, about 2 days from Ambady."<sup>511</sup> The GoS Reply Memorial draws attention to the approximated, second-hand distance from "Sultan Rob's country" to Ambady.<sup>512</sup> As noted in the SPLM/A Reply Memorial, considered in context, this reference to the "Bahr el Homr" is almost certainly a reference to the Ngol/Ragaba ez Zarga.<sup>513</sup>

441. Ignoring these various observations, the Government's Reply Memorial comments only that Mahon did not single out the Ngok Dinka as particularly prosperous (compared to other tribes). In fact, Mahon said, with specific reference to the Ngok Dinka: "[t]hese people are well off and own immense heads of cattle"<sup>514</sup> and "some of them are very rich in cattle,

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<sup>504</sup> Whilst Bayldon and Saunders report on the "Bahr el Arab" it is not entirely clear that either went into the Abyei Area; for a discussion of Bayldon's reports, see SPLM/A Reply Memorial at paras. 1023-1028, and Saunders, SPLM/A Reply Memorial, at paras. 933-938.

<sup>505</sup> See SPLM/A Reply Memorial, paras. 940-942.

<sup>506</sup> See GoS Reply Memorial, at para. 252.

<sup>507</sup> See SPLM/A Reply Memorial, at paras. 940-942, 943-952.

<sup>508</sup> See SPLM/A Reply Memorial, at paras. 940-942.

<sup>509</sup> See SPLM/A Reply Memorial, at paras. 943-982.

<sup>510</sup> Sudan Intelligence Report, No. 90, dated 31 January 1902, Appendix E, at pp. 9-10, **Exhibit-FE 17/9**.

<sup>511</sup> Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 19, **Exhibit-FE 1/16** (emphasis added).

<sup>512</sup> GoS Reply Memorial, at para. 252.

<sup>513</sup> SPLM/A Reply Memorial, para. 945.

<sup>514</sup> Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 20, **Exhibit-FE 1/16**.

*especially the Dinka.*<sup>515</sup> While hardly the most significant aspect of Mahon's reports, the relative wealth of the Dinka confirms the differential effects of the Mahdiyya and the relative security that they enjoyed at the time.

(2) Wilkinson (1902)

442. The Government's Reply Memorial also treats Wilkinson's report lightly, asserting that "only a few comments are necessary here."<sup>516</sup> This is unsurprising, given that a close inspection of Wilkinson's dry season trek report reveals his identification of permanent Ngok Dinka villages scattered between the Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab (including at Bombo, Tehak, Etai, Mareg, Masian, Gohea and El Nyat) and almost certainly permanent Ngok villages above the Kiir/Bahr el Arab at Fut, Um Geren and El Jaart.<sup>517</sup>

443. The Government's Reply Memorial nonetheless claims that "Wilkinson [does not] state that the Ngok lived in permanent villages," citing his observation that the Ngok and their cattle were absent from the villages during the dry season.<sup>518</sup> That is specious.

444. As discussed in detail in the SPLM/A Memorial, there is a wealth of anthropological, ethnographic and cultural evidence – including from Professor Cunnison and virtually all other visitors in the region – describing the permanent nature of Ngok Dinka homes and villages.<sup>519</sup> The fact that the younger Ngok Dinka men (and some women) seasonally took their cattle to graze to the south of their permanent villages in no way altered the permanent character of those villages or their homes, to which the same Ngok Dinka returned year after year.<sup>520</sup> The Government's effort to suggest otherwise is deliberately misleading.

445. Equally, the Government's claim that one of the Ngok villages visited by Wilkinson (Bombo) had to be completely empty is misplaced and irrelevant.<sup>521</sup> As detailed in the SPLM/A Reply Memorial, given well-recorded Ngok Dinka customs, there are much more likely explanations for Wilkinson's failure to observe any inhabitants in this village than it truly being deserted during the dry season.<sup>522</sup> In any event, little turns on the point, given the numerous other villages observed by Wilkinson in the area.

446. The Government also discloses part of Wilkinson's Sketch Map in its Map Atlas at GoS Map 13b. Wilkinson's map is noteworthy for the following reasons:

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<sup>515</sup> Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 19, **Exhibit-FE 1/16**.

<sup>516</sup> GoS Reply Memorial, at para. 253. The Government relies instead on the superficial discussion in its Memorial at paras. 314-321 and the First Macdonald Report at paras. 3.9-3.10 but little more is said on those occasions. A detailed discussion of Wilkinson's trek is found in the SPLM/A Reply Memorial at paras. 953-972.

<sup>517</sup> Wilkinson specifically describes these as "small villages" of "three or four huts," perfectly describing a typical Ngok village. Further he does not note any Arabs in those places as he consistently does in every other area he comes across them. As discussed in the SPLM/A Reply Memorial, Wilkinson's descriptions of "villages," "collection of three or four huts," "Dinka dwellings are dotted about" and then of "large settlements" of Dinka, "neatly built" houses, the "headquarters" of a local chief and several descriptions of "much dura cultivated" are also consistent with the permanent character of Ngok villages and homes and the centralized character of their political structure. See SPLM/A Memorial, at paras. 206-216; SPLM/A Reply Memorial, at paras. 1361-1367.

<sup>518</sup> GoS Reply Memorial, at paras. 259-260.

<sup>519</sup> SPLM/A Memorial, at paras. 206-216; SPLM/A Reply Memorial, at paras. 959, 965, 1127-1137.

<sup>520</sup> SPLM/A Memorial, at paras. 199, 207.

<sup>521</sup> See GoS Memorial, at paras. 260-261.

<sup>522</sup> See SPLM/A Reply Memorial, at para. 970. These explanations included fear of Wilkinson's Arab troop contingent, who would have been mistaken as slave raiders (for example, see SPLM/A Reply Memorial at para. 991).



a. First, Wilkinson's sketch map confirms that Sultan Rob's country extends west to the "Shaht (Shatt)" territory. Hallam's record, relied on by the Government,<sup>523</sup> confirms that the Shatt are located in 'Dar Reizegat,' which is in Southern Darfur,<sup>524</sup> near to Dawas at a latitude of approximately 10°N. Lloyd's December 1907 trek also locates the Shatt on the Darfur border.<sup>525</sup> This confirms that Sultan Rob's territory extended west from his "old" village to the current Darfur/Kordofan boundary.

b. Second, Wilkinson's sketch map makes clear that he distinguished temporary Homr feriqs (which he marked as such) from permanent villages. Locations not marked by Wilkinson as 'feriqs' or '?' (connoting locations provided to him by Ali Gula) are permanent villages – with the only people in the region having permanent villages being the Ngok Dinka.<sup>526</sup> The Ngok occupation of this region is depicted on **Map 62**.

c. Finally, Wilkinson's sketch map notes that the "Arab name" for the Kiir/Bahr el Arab is "El Gurf," not the Bahr el Arab (further confirming the terminological confusion surrounding rivers in the area).

### (3) Mahon (1903)

447. The Government devotes greater attention to Mahon's third (1903) trip report, largely in an effort to obscure its plain meaning. Mahon's 1903 trek clearly locates Sultan Rob at his new village of "**Burakol**" in that year (1903). As the MENAS Expert Report explains, Mahon's report places Sultan Rob at his "new village" of "Burakol," as depicted on **Map 40** (Northern Bahr El Ghazal: Sheet 65, Survey Office Khartoum, 1907).<sup>527</sup> In turn, this is very near to the present day location of Abyei town.

448. In particular, it is clear that, proceeding from Um Semima,<sup>528</sup> Sultan Rob's "old village" is at least due south, if not slightly southeast, while Sultan Rob's "new village" is to the southwest. Mahon's description of "Sultan Rob's" being "west" is thus far more consistent with Sultan Rob being located at "Rob's new village," near what is now Abyei town, rather than in "Rob's old village," just south of the Kiir/Bahr el Arab. This is also consistent with the subsequent record from Percival that places Sultan Rob at Burakol.<sup>529</sup>

449. Despite this, the Government (and the Second Macdonald Report) argues that Mahon's description of "Sultan Rob's" being located "west" of Um Semima is explicable by Mahon being an "enthusiastic trekker" and taking a "loop" before returning to Sultan Rob's old village.<sup>530</sup> The Government's suggestion that "west" really means "east" is implausible and contrary to the evidence.

450. Mahon obviously sought to record the directions of his journey (which would hardly be accomplished by saying he went "west" when he went "east"). This is confirmed by other parts of Mahon's report, which contain descriptions of courses "south-east" and "north-

<sup>523</sup> GoS Reply Memorial, at paras. 291-295.

<sup>524</sup> **Map 36a** (The Anglo-Egyptian Sudan, Intelligence Office, Khartoum, 1904-Detail).

<sup>525</sup> Sudan Intelligence Report, No. 162, dated January 1908, Appendix G, at p.55, **Exhibit-FE 17/30**.

<sup>526</sup> It is worth noting that many of these possible feriqs (marked '?') were not ultimately accepted for incorporation in the official 1:250,000 Map Series maps.

<sup>527</sup> MENAS Expert Report, at paras. 27-29; *see also* **Map 23** (Ngok Dinka Migration to Abyei Area).

<sup>528</sup> **Map 63** (Abyei Area, 1:250,000 Series Maps), where Abyei, rather than Burakol, is marked.

<sup>529</sup> *See* SPLM/A Reply Memorial, at paras. 983-1010. *See below* at paras. 451-468.

<sup>530</sup> GoS Reply Memorial, at para. 267; Second Macdonald Report, at para. 25.

west.”<sup>531</sup> It would also be illogical for Mahon to do a “loop” west, returning to the Kiir/Bahr el Arab to visit Rob then return west again to Tosh and the Rizeigat country.

(4) Percival (December 1904)

451. The Government next devotes several pages to two treks by Percival in 1904 and 1905. These trips are of importance (and are dealt with extensively in the SPLM/A Reply Memorial).<sup>532</sup> The Government’s treatment of Percival’s trips serves largely to obscure a number of important observations and concessions.

452. First, Percival indisputably locates Sultan Rob’s residence above the Kiir/Bahr el Arab prior to 1905. Thus, Percival refers to Sultan Rob’s “*old*” residence, clearly indicating the place where Rob had formerly resided, while stating that Sultan Rob was *now* residing in Burakol: Percival described proceeding via “*Bongo to village Burakol, where Sultan Rob is at present living* (4 ½ miles). The Yamoi [Nyamora/Ragaba Um Bieiro] is nearly as big as the Kir, which it joins, and comes from a N.W. direction.”<sup>533</sup>

453. There is no ambiguity in Percival’s record and the Government now concedes that the Ngok Dinka Paramount Chief lived to the north of the Kiir/Bahr el Arab in 1904, immediately before the 1905 transfer.<sup>534</sup> Again, this stands in stark contrast to the Government’s previous claims that all the Ngok Dinka – including in particular their Paramount Chief – lived south of the Kiir/Bahr el Arab in 1905.<sup>535</sup> In particular, the Government claimed that Arop Biong lived nowhere near the location of Abyei town, but instead resided much further south and west in Mithiang.<sup>536</sup>

454. The Government now abandons that allegation and instead claims that “the fact that Sultan Rob was ‘at present’ living in Burakol does not mean he had abandoned Mithiang.”<sup>537</sup> There is absolutely no basis for this statement. Nor does the Government provide any evidence to support its claim, much less make any effort to explain why Mithiang would be called “Sultan Rob’s *old* village” if this were not the case.

455. The truth was that the *only* British official who ever recorded locating Arop Biong (Sultan Rob) at Mithiang was Wilkinson in 1903.<sup>538</sup> Based on this one visit, the location of Arop Biong at the time of those meetings was recorded as “Sultan Rob’s Village.” By early 1904, Percival recorded Arop Biong as living instead in Burakol and from that point on he is consistently described as being located in that area, as was his son (in 1906) Kuol Arop. In any event, even if he had retained a residence in or near Mithiang (and there is no express

<sup>531</sup> Sudan Intelligence Report, No. 104, dated March 1903, Appendix E, at p.19, **Exhibit-FE 1/21**.

<sup>532</sup> SPLM/A Reply Memorial, at paras. 983-1011, 1014-1022.

<sup>533</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13** (emphasis added).

<sup>534</sup> GoS Reply Memorial, at para. 271 (“Burakol (Sultan Rob’s new village)”).

<sup>535</sup> GoS Memorial, at paras. 332, 349, 354, 400(d). It is also in stark contrast to the Government’s previous interpretation of the report on Percival’s March 1905 trek, which the Government said “puts Sultan Rob’s country squarely south of the [Kiir/]Bahr el Arab and in the province of Bahr el Ghazal”: See GoS Memorial, at para. 349. This is just another example of the Government misinterpreting the historical record to suit its needs.

<sup>536</sup> GoS Memorial, at para. 359 (“Further, there has never been any confusion between the Kir and any other river: all sources (including Wilkinson) report the Ngok under Sultan Rob as living at this time along the Kir, i.e., along the Bahr el Arab. Sultan Rob was their Paramount Chief: his village was to the south of the river, in Bahr el Ghazal: see paragraph 338 above. In the wet season he went south to the River Lol, not north.”). See *also* GoS Memorial, at para. 400(d).

<sup>537</sup> GoS Reply Memorial, at para. 275.

<sup>538</sup> It is only assumed Mahon met him there in 1902: See Sudan Intelligence Report, No. 92, dated 31 March 1902, Appendix F, at p. 19, **Exhibit-FE 1/16** and in 1903: See Sudan Intelligence Report, No. 104, dated March 1903, Appendix E, at p.19, **Exhibit-FE 1/21**.

evidence that he did), by 1904 Arop Biong's (Sultan Rob's) new residence and court was clearly in Burakol – to the north of the Kiir/Bahr el Arab.

456. Second, the Government also obscures the fact that Burakol was located very close to the location of present day Abyei town – instead claiming in passing that “Burakol was not in the *same place* as” Abyei town.<sup>539</sup> In fact, the Government concedes elsewhere that Burakol is located only some two miles to the south of Abyei town (although it was likely even closer).<sup>540</sup> That is precisely consistent with the SPLM/A's case that the area of Abyei town has been the historic center of Ngok Dinka political, commercial and cultural life for more than a century.<sup>541</sup>

457. Third, the Government concedes that “he [Percival] assumes the (as yet unknown) Ragaba ez Zarga to be the Bahr el Arab,” but then goes on to say that this “proves nothing.”<sup>542</sup> In truth, this fact, which was previously denied by the Government,<sup>543</sup> proves several important things:

- a. Percival's terminological confusion of the “Bahr el Arab” and Ngol/Ragaba ez Zarga demonstrates that Wilkinson's nomenclature for the geography of the region was still highly influential almost three years after his trek.
- b. Percival's confusion was not just a casual observation: his findings were adopted by the governor of Bahr el Ghazal, W.A. Boulnois, in his subsequent letter to Governor General Wingate on 23 December 1904.<sup>544</sup> This is further proof that Percival's identification of the Ngol/Ragaba ez Zarga influenced senior levels of the Sudan Government and that successive British officers continued to confuse the Ragaba ez Zarga and the Bahr el Arab.
- c. As discussed below, these facts are directly contrary to the Government's case with regard to the location of the putative Kordofan/Bahr el Ghazal provincial boundary.<sup>545</sup>

458. Fourth, despite requests from the SPLM/A, the Government has only provided a partial sketch map for Percival's entire trip from Lake Keilak to Wau at GoS Map 14B. Thus, the sketch map provided by the Government shows only part of Percival's trip, beginning in the immediate region around Burakol and ending south at Wau, but omitting any sketch of Percival's trek north of the Kiir/Bahr el Arab from Keilak to Burakol.

459. Even this partial sketch map very clearly identifies a number of Ngok Dinka villages *above* the Kiir/Bahr el Arab around Burakol, Achwang, Lahr and Yai; although the legend on the map is unclear, it appears that there were several dozen villages or settlements in this region. Moreover, Percival identifies *many more* Ngok settlements *above* the Kiir/Bahr el Arab than below.

460. Percival's trek notes also demonstrate that he came across Ngok shortly after crossing the Ngol/Ragaba ez Zarga on his way south from Lake Keilak,<sup>546</sup> and that he came across

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<sup>539</sup> GoS Reply Memorial, at para. 276.

<sup>540</sup> GoS Reply Memorial, at para. 304.

<sup>541</sup> See SPLM/A Memorial, at paras. 961-967, 1021; SPLM/A Reply Memorial, at paras. 1184-1193.

<sup>542</sup> GoS Reply Memorial, at para. 274.

<sup>543</sup> See GoS Memorial, at paras. 332, 349, 354, 400(d).

<sup>544</sup> See Letter from W.A. Boulnois to Governor General Wingate, dated 23 December 1904, **Exhibit–FE 17/10**.

<sup>545</sup> See *below* at paras. 743-799.

other Ngok villages, namely “Amakok” and “Achak,” prior to arriving at Burakol.<sup>547</sup> It is these sections of his trek, however, as to which the Government has not provided the sketch maps that must surely exist.

461. Fifth, the Government’s Reply Memorial purportedly devotes considerable attention to Percival’s “description of the countryside,”<sup>548</sup> but avoids commenting on Percival’s observation, just south of the Ngol/Ragaba ez Zarga, of Ngok Dinkas “*who were driving cattle S. as hard as they could.*”<sup>549</sup> Percival’s observations contradict the Government’s passing claim that “there were no Dinkas living near” the Ngol/Ragaba ez Zarga and that it was instead “frequented” by Arabs (yet the Government provides no evidence that Arabs migrated south of the Ngol/Ragaba ez Zarga in that area during the dry season).<sup>550</sup>

462. In fact, as discussed in the SPLM/A Reply Memorial, Percival’s observations meant that the Ngok Dinka he encountered near the Ngol/Ragaba ez Zarga, driving their cattle *to the south*, were *coming from the north*. In particular, consistent with the Ngok Dinka’s seasonal grazing patterns,<sup>551</sup> the Ngok that Percival encountered had to have been moving south from their permanent villages which were necessarily located further to the north. Given that Percival reported that he had not found Ngok villages on the south bank of the Ngol/Ragaba ez Zarga in this area, it is very likely that the villages in question had to have been to the north of the river (such as those identified by Wilkinson). Contrary to the Government’s suggestion, Percival did not report the presence of any Misseriya anywhere south of Keilak.

463. Finally, the Government cites Percival’s comment that there are no “Ngok Dinkas west of Burakol as far as I could see and Sultan Rob told me that there are only Homr Arabs west of him.”<sup>552</sup> This comment is dealt with in the SPLM/A Reply Memorial.<sup>553</sup> In addition, the Wilkinson sketch map (GoS Map 13b) states that “Dinkas say Shaht(?) [Shah] adjoins Robe’s [sic] country on west.” The Shatt were located in Darfur, and this is consistent with the western limit of the Abyei Area as determined by the ABC (see **Map 10**) and the SPLM/A evidence (see **Map 13**). This throws further doubt onto the reliability of Percival’s report.<sup>554</sup> The most likely explanation was, as set out in the SPLM/A Reply Memorial,<sup>555</sup> that Sultan Rob was deliberately misinforming Percival as to the extent of his lands in order to protect his people.

(5) Percival (March 1905)

464. The GoS Reply Memorial also devotes brief attention to Percival’s March 1905 trip report. In particular, the Government claims that Percival “is unable to identify any Dinka boundary north of the Bahr el Arab” and that he “merely comment[s] that Rob considered the Ragaba ez Zarga as the ‘Arab frontier.’”<sup>556</sup>

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<sup>546</sup> SPLM/A Reply Memorial, at para. 994.

<sup>547</sup> SPLM/A Reply Memorial, paras. 994-1001.

<sup>548</sup> GoS Reply Memorial, at para. 274 (see generally 271-277).

<sup>549</sup> Percival, *Keilak to Wau* (1904) in E. Gleichen, *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. II, 25 (1905), **Exhibit-FE 17/13**.

<sup>550</sup> See GoS Reply Memorial, at para. 275.

<sup>551</sup> See SPLM/A Reply Memorial, at paras. 950, 959; SPLM/A Memorial, at paras. 196-205, 1064-1081.

<sup>552</sup> GoS Reply Memorial, para. 275.

<sup>553</sup> See SPLM/A Reply Memorial, at paras. 1002-1007.

<sup>554</sup> See Sudan Intelligence Report, No. 162, dated January 1908, Appendix G, at p.55, **Exhibit-FE 17/30**.

<sup>555</sup> See SPLM/A Reply Memorial, at paras. 1004-1007.

<sup>556</sup> GoS Reply Memorial, at para. 276.

465. The first of these two statements is unclear, but there is certainly no basis for suggesting that Percival ever considered that the Kiir/Bahr el Arab was the Ngok Dinka's northern boundary. On the contrary, as discussed above, Percival had observed (and trekked through) Ngok Dinka villages well to the north of the Kiir/Bahr el Arab and had seen Ngok Dinka heading south in the dry season from north of the Ngol/Ragaba ez Zarga. As a consequence, if Percival had identified any Ngok boundary, it would have been based on speculation but would have been substantially to the north of the Ngol/Ragaba ez Zarga.

466. The Government's second statement (quoted above) about the Ngol/Ragaba ez Zarga as the "Arab frontier" is consistent with Mahon's description of "Sultan Rob's country on the Bahr El Homr," a reference to the Ngol/Ragaba ez Zarga.<sup>557</sup> (As discussed below, it is notable that in May 1905, several months *after* the transfer of the Ngok to Kordofan, Condominium officials were using the term Bahr el Arab to describe the Ngol/Ragaba ez Zarga.<sup>558</sup>)

467. Nonetheless, the Government's effort to suggest that the Ngol/Ragaba ez Zarga was the Ngok Dinka's "Arab frontier" is groundless. The Misseriya had their headquarters around Muglad,<sup>559</sup> and any frontier with the Misseriya would necessarily be much further north than the Ngol/Ragaba ez Zarga. Moreover, as already noted, Percival had observed Ngok Dinka heading south from the Ngol/Ragaba ez Zarga, almost certainly placing Ngok villages further to the north. A reference to the Ngol/Ragaba ez Zarga as an "Arab frontier" would instead almost certainly have meant the southern extent of dry season grazing by the Misseriya, and not the northern extent of Ngok Dinka territory.

468. Although the Government does not mention it, Percival places the Ngok eastern boundary at the Shilluk, locating the Ngok past a longitude equivalent to Miding [Heglig], see **Map 6** (Southern Sudan: Tribes); and **Map 36a** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (In Gleichen, 1905) - Detail). The western boundary of the Ngok is placed adjacent to the Chak Chak, running north.<sup>560</sup> This is consistent with the Ngok western boundary being at the Darfur border (near the Shatt as indicated on Wilkinson's Sketch). These eastern and western boundaries are consistent with the location of the Ngok in 1905.<sup>561</sup>

#### (6) Gleichen Compendium 1905

469. The use of Gleichen's 1905 *Compendium* in the Government's Reply Memorial belies the fact that it had cited this same source in its Memorial, but for the erroneous description of "Dinkas" in Bahr El Ghazal completely unrelated to the Ngok. Only in its Reply Memorial does the Government now acknowledge that the *Compendium* describes Kordofan province as including "Sultan Rob, and Dar Jange."<sup>562</sup>

470. The Government makes no effort to reconcile the *Compendium's* treatment of the Ngok Dinka with its previous claims that the Ngok were located entirely south of the

<sup>557</sup> SPLM/A Memorial, at paras. 913-916; SPLM/A Reply Memorial, paras. 943-952.

<sup>558</sup> See below at paras. 760-775; SPLM/A Reply Memorial, at paras. 1014-1022.

<sup>559</sup> See SPLM/A Memorial, at paras. 226, 970; SPLM/A Reply Memorial, at paras. 1144-1147.

<sup>560</sup> See **Appendix 1** Sketch Map of Percival from Pongo to Taufikia (provided by GoS at SPLM/A's request on 23 February 2009). See also **Map 36a** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905) - Detail).

<sup>561</sup> See SPLM/A Memorial, at paras. 1025, 1032; **Map 13** (Nine Ngok Dinka Chiefdoms, 1905).

<sup>562</sup> E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. I, 337 (1905), at p. 337, **Exhibit-FE 2/14**.

Kiir/Bahr el Arab.<sup>563</sup> Similarly, the Government continues studiously to ignore the substance of the statement in Gleichen’s 1905 *Compendium* that describes the boundary of Kordofan as “*southwards to the Bahr El Arab leaving the Maalia and Rizeigat to Darfur, and the Homr and Dar Jange to Kordofan.*”<sup>564</sup> This reference is important and warrants close scrutiny.

471. The Gleichen reference indicates that the Ngok Dinka were located to the *north* of the Bahr el Arab (not elaborating as to whether this is the Ngol/Ragaba ez Zarga or the Kiir/Bahr el Arab). That description flatly contradicts the Government’s previous claims (that the Ngok were located entirely to the south of the Bahr el Arab (whether it was the Kiir or the Ngol)) and its current claims (that the Ngok were located “predominantly” to the south of the Kiir/Bahr el Arab). In fact, the Gleichen description places the Ngok Dinka predominantly to the north of the Kiir/Bahr el Arab, in the Bahr region – just as the SPLM/A Memorial and Reply Memorial have consistently described.

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472. In sum, the pre-1905 documentary record allows a number of important conclusions. The record unequivocally places the Ngok Dinka in permanent villages scattered throughout the Bahr region extending north of the Kiir/Bahr el Arab to the Ngol/Ragaba ez Zarga. Moreover, although Wilkinson and Percival did not meaningfully explore the region to the north of the Ngol/Ragaba ez Zarga, both officials’ trek reports almost certainly locate permanent Ngok Dinka villages north of the Ngol/Ragaba ez Zarga, including at El Jaart and Um Geren.

473. Furthermore, the pre-1905 record describes the Ngok Paramount Chief, Arop Biong (Sultan Rob), residing at Burakol which is also to the north of the Kiir/Bahr el Arab, starting in at least 1903. The same evidence establishes that Burakol was located very close to the place of the present day Abyei town.

474. The Government does little or nothing to dispute the evidence that results in these conclusions. Rather, it now attempts to suggest that the Ngok Dinka were really located “predominantly” to the south of the Kiir/Bahr el Arab,<sup>565</sup> and not “to the north up to 10.35’N.”<sup>566</sup>

475. In actual fact, there is again no evidence suggesting that the Ngok Dinka were located “predominantly” to the south of the Kiir/Bahr el Arab. Rather, the 1905 Gleichen *Compendium* described the Ngok as being located entirely north of the Kiir/Bahr el Arab.<sup>567</sup> That is also consistent with the descriptions of Mahon, Wilkinson and Percival, who describe Ngok Dinka villages to the north – and virtually never to the south – of the Kiir/Bahr el Arab.

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<sup>563</sup> The Government remarks cryptically that “if [Sultan Rob] and his village were situated far north of the 9’ parallel, there would have been no need to mention him in this context.” GoS Reply Memorial, at para. 279. It is unclear how the Gleichen reference can imply any northern limit on the Ngok territory, with the Government’s remark providing no assistance.

<sup>564</sup> The description in Gleichen’s 1905 *The Anglo-Egyptian Sudan* refers to the Kordofan boundary running “southwards to the Bahr el Arab, leaving the Maalia and Rizeigat to Darfur, and the Homr and Dar Jange to Kordofan”: E. Gleichen (ed.), *The Anglo-Egyptian Sudan: A Compendium Prepared by Officers of the Sudan Government* Vol. I, 337 (1905), **Exhibit-FE 2/14**.

<sup>565</sup> GoS Reply Memorial, at para. 281.

<sup>566</sup> GoS Reply Memorial, at para. 281.

<sup>567</sup> See above at paras. 469-471.

476. It is not surprising that no Condominium accounts of Ngok Dinka territories extending “north up to 10.35’N”<sup>568</sup> have thus far been identified (or produced). As discussed above,<sup>569</sup> that is because the Condominium observations were made in the dry season, on limited trek routes (guided by Arabs) and were not intended to map or find out the locations of all of the Ngok. As a result, the Condominium officials necessarily could not identify the full extent of the Ngok Dinka territories – particularly to the north in the wet season – and their reports cannot provide the basis for negative inferences about the extent of Ngok Dinka territory.

477. In fact, when the Condominium reports are considered in their full context, the very strong inference is that Ngok Dinka permanent villages were located substantially to the north of the Condominium officials’ dry season sighting – placing them squarely in the region above the Ngol/Ragaba ez Zarga and extending to the *goz* and toward Lake Keilak. It is clear that this was not an area inhabited by the Misseriya other than during a couple of months in the dry season (the Misseriya were in the area of Muglad and Babanusa the rest of the year) and it is improbable that this region was then uninhabited. This is confirmed by the environmental and cultural evidence (including the MENAS Expert Report), as well as by the Ngok witness evidence and the testimony of Professor Cunnison and Mr. Tibbs, all of which locates the Ngok Dinka territory extending north to the *goz* and throughout the Bahr region.

2. The Post-1905 Condominium Documents Record Provides No Support for, and Instead Contradicts, the Government’s Claims Regarding the Location of the Ngok Dinka in 1905

478. The GoS Memorial initially asserted that “it is strictly unnecessary to consider what happened to the Ngok Dinka and their Baggara neighbours in the years since 1905.”<sup>570</sup> That qualification is entirely absent from the discussion of the post-1905 documentary record in the Government’s Reply Memorial.<sup>571</sup> Nonetheless, the treatment of post-1905 documentary evidence in the Government’s Reply Memorial is as flawed and selective as its discussion of pre-1905 evidence.

479. Contrary to the Government’s claims, the post-1905 record consistently describes the Ngok Dinka as scattered widely throughout the Bahr region, centered on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, extending north to the *goz* and toward Lake Keilak. A number of reports from diverse sources uniformly describe the Ngok Dinka as occupying prosperous villages with well-maintained homes, dotted throughout the region, and having substantial cultivated fields and large cattle herds. These descriptions included published first-hand accounts by Professor Cunnison (the Government’s witness in this arbitration, who is almost entirely omitted from the Government’s Reply Memorial).

a) Comyn Sketch Map (1906)

480. The Government’s Reply Memorial relies on Comyn’s 1906 sketch map. As discussed in the SPLM/A Reply Memorial, Comyn did not travel to the Abyei Area.<sup>572</sup> His sketch (GoS Reply Map 15) and report place both the Ngok Dinka and the Misseriya almost

<sup>568</sup> GoS Reply Memorial, at para. 281. That is in part because a material part of the area between 10.10’N and 10.35’N was the largely uninhabited *goz*, which the Ngok used, but did not inhabit on a wide scale.

<sup>569</sup> See above paras. 359-360, 430-437. See also SPLM/A Memorial, paras. 270-279, 908-912; SPLM/A Reply Memorial, at paras. 919-932.

<sup>570</sup> GoS Memorial, at para. 384.

<sup>571</sup> See GoS Reply Memorial, at paras. 282 *et seq.*

<sup>572</sup> See SPLM/A Reply Memorial, at paras. 1033-1034, 1213-1214.

entirely outside of the Abyei Area (See Figure 6 to GoS Reply Memorial), and are not credible sources of information about either tribe.

b) Hallam Route Report (1907)

481. The Government's Reply Memorial devotes substantial attention to a 1907 trek report by Hallam, who accompanied Lloyd on a trek from El Obeid to Dawas in December 1907.<sup>573</sup> Hallam later parted from Lloyd at Dawas, taking with him 30 men of the Slavery Repression Department.<sup>574</sup> Hallam's report focuses almost exclusively on locating dry season water sources, which appears to have been the primary purpose of his exploration (as was Lloyd's).<sup>575</sup>

482. Nonetheless, Hallam's report again confirms that the Ngok Dinka Paramount Chief Kwai Arop resided at Burakol.<sup>576</sup> Notably, subsequent to Mahon's 1903 trek report, all Condominium documentary records are of the Ngok Paramount Chief residing either at Burakol, or at Abyei, both well above the Kiir/Bahr el Arab.

483. The GoS Reply Memorial claims that Hallam's report and sketch map confirm Arab "settlements" just to the north of the Bahr el Arab.<sup>577</sup> The Government's use of the word "settlements" is a misleading attempt to connote permanent habitation of the Bahr region by the Misseriya. In fact, Hallam's report refers to "arab camps,"<sup>578</sup> "arab camps in the dry season,"<sup>579</sup> an "Arab camping ground in dry season,"<sup>580</sup> and "a camping ground."<sup>581</sup>

484. These references do not support the Government's claims. Hallam's report only records dry season observations of temporary Misseriya camps in the west of the Abyei Area. These camps were entirely consistent with the seasonal cattle herding patterns of the Ngok Dinka and Misseriya, where nomadic Misseriya would bring their cattle south of the *goz* for dry season grazing only. There is no suggestion that this was not Ngok Dinka territory; on the contrary, all the evidence confirms that the Misseriya were coming into the area of Ngok permanent settlements during these migrations.<sup>582</sup> At the time, the Ngok cattle and some of the Ngok themselves were further south.

485. It is also notable that the Government has not relied upon or produced records for the part of Hallam's journey from Sultan Rob's "old" village to Keilak. Lloyd's January 1908 report shows that Hallam proceeded from Burakol to Keilak and Kadugli, yet the records of

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<sup>573</sup> See Sudan Intelligence Report, No. 162, dated January 1908, Appendix G, at p. 54, **Exhibit-FE 17/30**. Hallam and Lloyd's trek was in November and December 1907 and they marched from El Obeid to Muglad and then took a western road to Dawas, Dawas is within the Ngok Dinka exclusive land use area determined by the ABC. **Map 10** (*Abyei Area Boundaries: Map 1*, Abyei Boundaries Commission, 2005).

<sup>574</sup> See Sudan Intelligence Report, No. 162, dated January 1908, Appendix G, at p. 54, **Exhibit-FE 17/30**.

<sup>575</sup> See Hallam, *Kordofan Routes: Dawas to Dar Jange*, December 1907, pp. 1-2 (GoS Reply Memorial Annex 31).

<sup>576</sup> See Hallam, *Kordofan Routes: Dawas to Dar Jange*, December 1907, pp. 1-2. (GoS Reply Memorial Annex 31).

<sup>577</sup> GoS Reply Memorial, at para. 295.

<sup>578</sup> Hallam, *Kordofan Routes: Dawas to Dar Jange*, December 1907, p.1 (GoS Reply Memorial Annex 31).

<sup>579</sup> Hallam, *Kordofan Routes: Dawas to Dar Jange*, December 1907, p.1 (GoS Reply Memorial Annex 31).

<sup>580</sup> Hallam, *Kordofan Routes: Dawas to Dar Jange*, December 1907, p.1 (GoS Reply Memorial Annex 31).

<sup>581</sup> Hallam, *Kordofan Routes: Dawas to Dar Jange*, December 1907, p.1 (GoS Reply Memorial Annex 31).

<sup>582</sup> See I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 16 n. 6 (1966), **Exhibit-FE 4/16**, Witness Statement of G. Michael Tibbs, at p. 3, ¶18 ("The Humr Misseria would travel south to the rivers and ragabas in the dry months from about December, and would be back in Muglad and Babanusa about April"); and SPLM/A Memorial, at paras. 238-248, 1076-1081; SPLM/A Reply Memorial, at paras. 1148-1151, 1308-1309, 1322-1333.



Hallam's trek have not been disclosed by the GoS.<sup>583</sup> In the absence of disclosure of such records, the proper inference must be that the records identify additional Ngok presence along Hallam's route north to Keilak.

c) Lloyd Report on Kordofan Province (October 1908)

486. The Government relies on Lloyd's October 1908 Report on Kordofan Province for a description of Homr *dry season* camping grounds. That description does nothing to advance the Government's case, indicating nothing more than areas used temporarily by Misseriya for a few months in the dry season. Of more interest, Lloyd correctly records that the Homr have "their cultivation and rain camps near Muglad."<sup>584</sup> These same groups had their dry season camps at Fauwel, Fut, Kwok and Turda,<sup>585</sup> confirming that they did not use those places year round.

d) Willis Notes (1909)

487. The Government relies in passing on Willis's 1909 notes, which report that the Ngok Dinka go only as far north as "Bongo or El Myat," because of fears of the "Arabs."<sup>586</sup> This is at best a second-hand account, likely of dry season grazing patterns (when the Ngok cattle are taken south in any event), and provides an example of the Government's uncritical approach to Condominium records. As highlighted in the SPLM/A Reply Memorial, Willis "*lacked the trained staff to evaluate information, check local conditions, or even investigate the motives of his informants,*"<sup>587</sup> and "was highly selective in choosing what he would accept, and that *this selection was not based on the experience or knowledge of his informants.*"<sup>588</sup>

e) Coningham Sketch Map (1909)

488. The GoS Memorial and Reply Memorial do not mention the 1909 Coningham Route Sketch (although it is referred to in passing by the Second Macdonald Report). The purpose of Coningham's trek was to survey the Kordofan Jebels (hills) in the Nuba region.

489. Coningham arrived at Lake Abyiad (to the east of the Abyei Area: **Map 62** (Ngok Presence 1905) where he proceeded to Meshra El Rek (see **Map 36a** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904 (in Gleichen, 1905) - Detail).<sup>589</sup> It appears from his sketch that Coningham briefly visited the area around Mellum and Ajaj and areas to the east outside the Abyei Area.<sup>590</sup> However, he purposefully avoided taking a course along the "Bahr el Arab" because of "intertribal disputes" and notably proceeded to Hofrat-el-Nahas

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<sup>583</sup> See Sudan Intelligence Report, No. 162, dated January 1908, Appendix G, at p. 55, **Exhibit-FE 17/30**.

<sup>584</sup> Sudan Intelligence Report No. 171, October 1908, Appendix D, at p. 53, **Exhibit-FE 17/31**. See also SPLM/A Memorial, at para. 223-227; SPLM/A Reply Memorial, at paras. 1035-1053, in particular paras. 1050-1051.

<sup>585</sup> **Map 62** (Ngok Dinka Presence, 1905). Sudan Intelligence Report, No. 162, dated January 1908, Appendix G, at p. 56, **Exhibit-FE 17/30**; Sudan Intelligence Report No. 171, October 1908, Appendix D, at p. 53, **Exhibit-FE 17/31**.

<sup>586</sup> GoS Reply Memorial, at para. 298.

<sup>587</sup> SPLM/A Reply Memorial, at para. 1366; Johnson, *Willis and the "Cult of Deng: A Falsification of the Ethnographic Record in History in Africa* 133 (1985), **Exhibit-FE 18/31** (emphasis added).

<sup>588</sup> SPLM/A Reply Memorial, para. 1366; Johnson, *Willis and the "Cult of Deng: A Falsification of the Ethnographic Record in History in Africa* 140 (1985), **Exhibit-FE 18/31** (emphasis added).

<sup>589</sup> Reports on The Finance, Administration and Condition of the Sudan, 1909, at p. 556, SCM Annex 55.

<sup>590</sup> Second Macdonald Report, at pp. 9-10, citing Survey Department Topographical Archive, Talodi to Meshra el Rek Route sketch, No. 513 (1909).

(**Map 36**) “by the ordinary route,” indicating that the Bahr el Arab was still infrequently visited.<sup>591</sup>

490. Coningham’s purpose was similar to that of Hallam (and later Whittingham, Dupuis and Heinekey), being to record the area’s topography, rather than to identify and locate local inhabitants. Notably, even those areas whose topography had previously been thought to be understood, *including the headwaters of the “Bahr el Arab”* were subject to “considerable” error: “As has been suspected, the position[s] given to Hofrat-el-Nahas....[was] found to be considerably in error.”<sup>592</sup> Again, this undermines the Government’s case that the location and identity of the “Bahr el Arab” was well known four years earlier in 1905.

f) Whittingham Sketch Map (1910)

491. The GoS Reply Memorial makes much of a sketch and letter by Whittingham, a British officer. In reality, these materials do nothing to support the GoS case.

492. The Government does not identify Whittingham or the purpose of his trek. It is apparent from his letter, however, that Whittingham intended to gather mapping data from several areas, “(1) Country N. of Turda, and S. to Dawas and Abyia,” “(2) Turda to Koak,” “Bara to Mellum” and “(3) Abut off Bari to Wul.”<sup>593</sup> (Conspicuously, the Government again only discloses a sketch of the first section of Whittingham’s trip and does not disclose any materials regarding Whittingham’s treks around Bara<sup>594</sup> and Mellum<sup>595</sup> or from Turda<sup>596</sup> to Koak (Kwok<sup>597</sup>).

493. The Government suggests that Whittingham thought he was “breaking new ground” when he trekked along parts of the Nyamora/Ragaba Um Bieiro, and mapped the Ngok settlement of “Abyia,” a reference to the present day Abyei town.<sup>598</sup> Several points are noteworthy:

a. This was almost certainly Whittingham’s first visit to the area. The focus of his trek was clearly to mark the locations of watering spots – for the most part this is all his sketch map identifies. His Route Map does not mark any villages in the area, although many obviously existed (even on the Government’s case), other than to describe Abyei as “Abyia – Mek Koal’s village.”<sup>599</sup>

b. The Government incorrectly states that Whittingham “travelled through much of the ABC’s ‘Shared Rights Zone’ on his way to the south.”<sup>600</sup> Whittingham took a direct route (almost certainly along a track used by Arab dry season feriqs) and he does not map or record any excursions off route, as can be seen from GoS Reply Memorial **Maps 18a and 18b**.

<sup>591</sup> Reports on The Finance, Administration and Condition of the Sudan, 1909, p. 556, GoS Reply Memorial Annex. 55.

<sup>592</sup> Reports on The Finance, Administration and Condition of the Sudan, 1909, p. 556, GoS Reply Memorial Annex. 55; First Macdonald Report, at para. 1.4.

<sup>593</sup> GoS Reply Memorial, para. 300 (citing letter, Whittingham to Pearson, 26 April 1910, p. 1).

<sup>594</sup> **Map 62** (Ngok Presence 1905), Witness Statement of Mijok Bol Atem (Diil Elder), at p.2, ¶9; Witness Statement of Ring Makuac Dhel Yak (Achaak elder), at p. 2, ¶9.

<sup>595</sup> **Map 62** (Ngok Presence 1905).

<sup>596</sup> **Map 62** (Ngok Presence 1905); Witness Statement of Peter Nyuat Agok Bol (Alei elder and sub-chief), at p. 2, ¶4-11.

<sup>597</sup> **Map 62** (Ngok Presence 1905); Witness Statement of Ring Makuac Dhel Yak (Achaak elder), at p. 2, ¶4.

<sup>598</sup> GoS Reply Memorial, at para. 300.

<sup>599</sup> GoS Reply Map 18b.

<sup>600</sup> GoS Reply Memorial, at para. 305.

c. Whittingham makes two comments regarding “the Homr” in his letter (“the S. leg of the Homr”<sup>601</sup> “the eastern part of the Homr”<sup>602</sup>). Whittingham’s use of these terms is a reference to the Ngol/Ragaba ez Zarga, and not to the Homr Arabs. Whittingham’s Route Map also notes a number of fords along the Nyamora/Ragaba Um Bieiro and watered areas (in February) in the *goz*, including at Seiteb [Dinka: Kol Cum<sup>603</sup>] and Zerafat (Dinka: Awol Baiet).<sup>604</sup>

494. The Government also relies on Whittingham’s reference to what he called a “Probable DINKA-HOMR Boundary.”<sup>605</sup> As even the Government concedes, Whittingham “does not explain on what basis he surmised the boundary to be located there.”<sup>606</sup> Moreover, Whittingham had no experience of the area or the Ngok Dinka and his (first) visit occurred in the dry season. Equally significant, Whittingham’s tentative suggestion was never adopted – for the obvious reason that it bore no relation to the real locations of the Ngok Dinka and the Misseriya. Certainly, given the limitations on his knowledge and experiences, no conclusions can be drawn from his tentative reference.

g) Anglo-Egyptian Sudan Handbook Series: *Kordofan and the Region to the West of the White Nile*

495. The Government makes no reference to relevant extracts from the *Kordofan and the Region to the West of the White Nile*, which was part of the Anglo-Egyptian Sudan Handbook Series and the first book-length Intelligence Department survey of Kordofan. The text provides little discussion of southwest Kordofan. “Dinka” have but four entries in the Index; “Homr” get only three. Nonetheless, the following passages from the 1912 *Handbook* are relevant:

*“Country.- To the south of Dar Nuba and living in the open plains (locally called fawa) which extend to the Bahr el Arab there is a considerable Dinka population. In the rains the tribesmen collect for the most part in the neighbourhood of Lake Abiad 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.*

*Occupations.- Like their brethren in the Bahr el Ghazal Province, they are a pastoral people and possess large herds of fine, big cattle with long horns, quite different to those kept by the baggara Arabs, which they are very loath to part with. They subsist on milk and the bean of a plant called kordala, which they grind up and soak in milk. They own a few sheep and goats and have a little land under cultivation. In customs and appearance they resemble the Dinka of the Bahr el Ghazal.*

*Organisation.- The three main divisions are: - On the east, the Ruweng section under Sultan Anot; in the centre, the followers of the late Sultan Rob, who are now under his*

<sup>601</sup> GoS Reply Memorial, at para. 300 (citing letter, Whittingham to Pearson, 26 April 1910, p. 1).

<sup>602</sup> GoS Reply Memorial, at para. 300 (citing letter, Whittingham to Pearson, 26 April 1910, p. 2).

<sup>603</sup> Witness Statement of Deng Chier Agoth (Abyior elder), at p. 2, ¶9.

<sup>604</sup> Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16. As discussed in the MENAS Expert Report, the *goz* does support crops, and is well vegetated in the wet season, able to support men and cattle in the dry season in the event there were sources of water. See MENAS Expert Report, at para. 142.

<sup>605</sup> GoS Reply Memorial, at para. 305.

<sup>606</sup> GoS Reply Memorial, at para. 305.

son, Kanoni; and to the west, a number of Rob’s ex-followers, under another of his sons, named Kwal. Their country is difficult to traverse at all times of the year and is so distant from an administrative centre that it has been rarely visited.”<sup>607</sup>

496. As with Gleichen’s 1905 *Compendium*,<sup>608</sup> this account places the Ngok Dinka entirely to the *north* of the Kiir/Bahr el Arab – and not “predominantly” to the *south* as the Government’s Reply Memorial now claims. The same report indicates that the Ngok lived well to the north of the Kiir/Bahr el Arab during the wet season, moving only slowly to that river as the dry season progressed. Furthermore, it precisely corroborates the Ngok Dinka evidence that their neighbors in the north-east of the Abyei Area, toward the edge of the Bahr,<sup>609</sup> were the Nuba<sup>610</sup> at places such as Nyadak Ayueng,<sup>611</sup> and that the Ngok occupied the eastern regions of the Abyei Area (at places such as Miding and Mardhok).<sup>612</sup>

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497. In sum, the documentary record between 1905 and 1918 again confirms the presence of Ngok Dinka in permanent villages scattered throughout the Bahr region to the north of the Kiir/Bahr el Arab, extending up to the *goz* and across the open plains toward the Nuba (around Lake Keilak) in the north and in the east toward (though not to) Lake Abyad. In particular, like Gleichen’s 1905 *Compendium*, the Intelligence Department’s *Kordofan and the Region to the West of the White Nile* places the Ngok entirely to the north of the Kiir/Bahr el Arab and across the open plains to neighbor the Nuba near Lake Keilak, and toward (though not to) Lake Abyad in the east.

498. The records of treks by Hallam and Whittingham confirm the location of the Ngok Dinka Paramount Chief to the north of the Kiir/Bahr el Arab. In part because important portions of these records are missing, they do not provide detailed information about Ngok Dinka settlements further to the north. Nonetheless, given the seasonal migration patterns of the Ngok Dinka and Misseriya, it is impossible not to infer the existence of such settlements – as is directly confirmed by the witness evidence, environmental and cultural evidence and Community Mapping Project.

### 3. The Inter-War Period (1918 to 1936)

499. The GoS Reply Memorial contends that the position subsequent to 1918 (indeed 1905) “*did indeed not change to any degree*,”<sup>613</sup> asserting that “Ngok Dinka settlements remained on and around the Bahr el Arab.”<sup>614</sup> This is another fundamental revision of the Government’s historical case.

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<sup>607</sup> Anglo-Egyptian Sudan Handbook Series: *Kordofan and the Region to the West of the White Nile*, December 1912, at pp. 73-74, **Exhibit-FE 3/8a**.

<sup>608</sup> See above at paras. 469-471.

<sup>609</sup> **Map 68** (Bahr Region).

<sup>610</sup> 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 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.”).

<sup>611</sup> **Map 62** (Ngok Presence 1905); **Map 15** (Achaak Chiefdom, 1905); Witness Statement of Mijak Kuot Kur (Achaak elder) at p. 3, ¶11.

<sup>612</sup> **Map 62** (Ngok Presence 1905); **Map 15** (Achaak Chiefdom, 1905); Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 3, ¶¶10-11.

<sup>613</sup> GoS Reply Memorial, at para. 308.

<sup>614</sup> GoS Reply Memorial, at para. 308.

500. The Government’s Memorial pretended that, immediately after 1905, the Ngok Dinka undertook a “*process of extension northwards, which could be traced in the movement of the Ngok Dinka village which even some time after his death went by the name of Sultan Rob.*”<sup>615</sup> This supposed “process of extension” is completely manufactured, as set out in detail in the SPLM/A Reply Memorial.<sup>616</sup> Among other things, the Government’s original case was based on a single sentence in a single 1921 report, and rested on the false premise that Sultan Rob resided at his “old” village on the Kiir/Bahr el Arab and remained there until his death in 1906. The Government’s case was also squarely contradicted by its own witness (Professor Cunnison), as well as by the expert findings of the ABC Report and a wealth of other historical evidence.<sup>617</sup>

501. The Government’s Reply Memorial now abandons its earlier, untenable claims of a “process of extension,” instead accepting that there was historical continuity in the locations of the Ngok Dinka and Misseriya. This now accords with the SPLM/A position that the locations of these tribes did not change materially following 1905, until the displacements caused by civil war in the 1960s. Remarkably, the Government makes no effort to explain this (additional) fundamental rewriting of its historical case.

a) Heinekey Route Reports (February-March 1918)

502. The Government relies on three route reports by G. A. Heinekey, emanating from the Sudan Survey Department.<sup>618</sup> As with Hallam, Heinekey’s mandate was to record the topography of the area for the Survey Department, and not to survey the tribal populations. Consistent with this, his reports (made during the dry season) are directed almost entirely to topographical observations.<sup>619</sup>

503. The Government’s Reply Memorial says that Heinekey’s reports “largely speak for themselves”<sup>620</sup> and provides only limited commentary on the reports. That is because, as noted above, the reports are directed almost exclusively to unelaborated topographic observations, focusing on watering places and similar features and providing almost no use in identifying the occupants of the Abyei Area (i.e. the Ngok).

504. Thus, even when Heinekey passed through villages that were indisputably Ngok Dinka settlements – such as El Naam (Dinka: Noong)<sup>621</sup> – he made no reference to the identity of the village or its inhabitants. His only comment is to identify “Mek Kwal” (Paramount Chief Kuol Arop) at his village at Burakol (the reference to a rest house certainly a reference *tukul* made available to him) where he says there is “much cultivation all around.” Heinekey’s efforts mirror those of earlier mapping expeditions, namely Hallam, Whittingham and Conington. Again, the intention of the Condominium officials on these trips was to gather topographical information – not to record demographic data.

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<sup>615</sup> GoS Memorial, at paras. 366 - 367.

<sup>616</sup> SPLM/A Reply Memorial, at paras. 1069-1087.

<sup>617</sup> SPLM/A Reply Memorial, at paras. 774, 1069-1087; Supplementary Witness Statement of Ian Cunnison, at p. 1, ¶3.

<sup>618</sup> GoS Reply Memorial, at paras. 309–310.

<sup>619</sup> Macdonald does not refer to these Survey Department records in either of his reports (although he does cite Survey Department sources for other purposes): *See* Second Macdonald Report, at para. 31. Note also the marking on each of Heinekey’s three Route Reports “S. S. D-Topo,” an obvious reference to the Reports emanating from the Sudan Survey Department topography files.

<sup>620</sup> GoS Reply Memorial, at para. 310.

<sup>621</sup> GoS Reply Memorial, at para. 315; Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), p. 2, ¶5; and p. 3, ¶13.

505. In any event, contrary to the Government’s suggestion,<sup>622</sup> Heinekey followed a single route that did not touch on the vast majority of the territory of the Abyei Area. Heinekey’s reports provide no evidence as to regions (most of the Abyei Area) that he did not travel to.

b) Dupuis Sketch Map (1921)

506. The GoS Reply Memorial cites a 1921 sketch map of a District Commissioner of Western Kordofan, C.J. Dupuis.<sup>623</sup> That sketch map does not advance the Government’s case and instead, again, provides observations of Ngok Dinka dry season locations well to the north of the Kiir/Bahr el Arab.

507. In particular, it identifies Dinka locations occupied and used by the Ngok throughout the Bahr. In addition to identifying Ngok villages north of the Kiir/Bahr el Arab (in this regard the Government incorrectly states (paragraph 311 of its Reply Memorial) that Anyanga is not Ngok, yet it is a Diil village), Dupuis locates *dugdugs* near to “El Timar” (north-west of Abyei town, past Lukji),<sup>624</sup> “Um Seggar,” “El Gadein” and “El Khardud”<sup>625</sup> all of which are to the northwest of Abyei town. Given Ngok Dinka husbandry practices, these *dugdugs* are almost certainly at or near permanent Ngok villages.<sup>626</sup> In fact, Dupuis locates a number of Ngok villages in the west of the Abyei Area, near to and past El Timar; “Abu Angeito,” which is the Ngok village of Wuc Anguam<sup>627</sup> (depicted on GoS Reply Map 34 (*Abyei*: Sheet 65-K, 1931) as “Waiyamgwam”), “Aman,” which is the Ngok village of Amiin,<sup>628</sup> and the Ngok village of Buk.<sup>629</sup>

508. However, the Government misconceives the purpose of the Dupuis sketch. Dupuis’ map is a topographical survey sketch, not a survey of the inhabitants of the Abyei Area and his purpose was the same as that of Hallam and Heinekey – to record topography. That is confirmed by the legend to Dupuis’ sketch (which notes only descriptions of water sources). As a consequence, the Dupuis sketch frequently provides no description of either Ngok *or* Misseriya in areas where they were plainly located during the dry season (for example, in the west around Grinti, and in the east Baar, Pawol/Fauwel and Ajaj).

509. Thus, the Government’s effort to rely on Dupuis’ sketch as negative evidence of an absence of Ngok Dinka is entirely misplaced. Even apart from the fact that it was a dry season observation, Dupuis’ purpose was not to record the locations of tribal groups and the absence of such records does not imply an absence of inhabitants. His fleeting references to a small number of *dugdugs* and simplistic generalizations about the location of some Dinka groups is not to be mistaken for even a limited survey of the inhabitants of the area.

510. The GoS Reply Memorial’s suggestion that Dupuis passed through a “vast expanse” of the Abyei Area is also misleading.<sup>630</sup> In fact, Dupuis followed a direct path along a single route (again, during the dry season) and he spent a considerable part of his trek outside the

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<sup>622</sup> GoS Reply Memorial, at para. 310.

<sup>623</sup> GoS Reply Memorial, at para. 311.

<sup>624</sup> **Map 63** (Abyei Area, 1:250,000 Series Map).

<sup>625</sup> The *dugdugs* in this area are depicted on **Map 63** (Abyei Area 1:250,000 Series Maps).

<sup>626</sup> SPLM/A Memorial, at para. 198; Howell, “Notes on the Ngok Dinka of West Kordofan” 32/2 SNR 239, 243-245 (1951), **Exhibit-FE 3/14**.

<sup>627</sup> Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13. See also **Map 62** (Ngok Presence 1905).

<sup>628</sup> Witness Statement of Deng Chier Agoth (Abyior elder), at p. 4, ¶21; See also Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13. **Map 62** (Ngok Presence 1905).

<sup>629</sup> Witness Statement of Mijok Bol Atem (Diil elder), at p. 3 ¶11. See also **Map 62** (Ngok Presence 1905).

<sup>630</sup> GoS Reply Memorial, at para. 311.

Abyei Area (as is obvious from GoS Reply Map 39a). His trip did not come close to travelling through the vast majority of Ngok Dinka territory in the Abyei Area and thus cannot be relied upon to indicate that there were no Ngok Dinka in these areas.

c) Titherington Sketch Map (1921)

511. The Government's Reply Memorial relies on a 1924 sketch by Titherington of the Bahr el Ghazal.<sup>631</sup> Titherington's sketch contains nothing of relevance to the locations of the Ngok Dinka or the Misseriya.

512. The Government cites a parenthetical comment on Titherington's sketch for the proposition that Kuol Arop has been located at Abyei town only since 1918.<sup>632</sup> In fact, that parenthetical is only a reference to the time at which the Condominium maps began to identify Abyei (and not an historical report). In any event, as discussed below, it is clear that Kuol Arop and his predecessor had resided in the immediate vicinity of what is today Abyei town for some time previously, so the point is of no importance.<sup>633</sup>

513. The Government also argues that the "straight-line southern boundary" identified on Titherington's sketch "was associated with the return of the Twic Dinka to Bahr el Ghazal."<sup>634</sup> The more relevant point is that the boundary demonstrates the very limited extent of the Ngok Dinka territory to the south of the Kiir/Bahr el Arab. That directly contradicts the Government's case – by suggesting that almost the entire Ngok Dinka population was crowded into a narrow and swampy strip of land immediately to the south of the Kiir/Bahr el Arab. That is entirely untenable.

d) Henderson Route Report (1933)

514. The next "route report" the Government presents is of K.D.D. Henderson in 1933.<sup>635</sup> Again, this report is of virtually no assistance to the Government's efforts to demonstrate that the Ngok Dinka were not present in the Abyei Area.

515. The limitations of Henderson's report as a source of information on the Ngok are obvious: Henderson "motored"<sup>636</sup> (in a truck) from Muglad to Abyei and over the "dry weather motor road,"<sup>637</sup> and it would appear that he made this trip in a single day (it being only 204 kilometres<sup>638</sup>). Henderson did not venture off the road he travelled on and the observations he recorded are at best of a basic, preliminary kind consistent with someone unfamiliar with the area.

516. The Government suggests that it "would have been easy" for Henderson to have left the road,<sup>639</sup> but provides no evidence that this was true, much less that it in fact happened. In any event, it is undisputed that Henderson did not travel east of Abyei town, or toward the north-east of the Abyei Area to Ngok settlements above the Ngol, such as Nyama, Miding, or

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<sup>631</sup> GoS Reply Memorial, at paras. 312-313.

<sup>632</sup> GoS Reply Memorial, at para. 313.

<sup>633</sup> GoS Reply Memorial, at para. 313.

<sup>634</sup> GoS Reply Memorial, at para. 312.

<sup>635</sup> GoS Reply Memorial, at para. 314 (citing Henderson, Route Report *Muglad to Abyei*, March 1933).

Henderson's report is not mentioned in the First Macdonald Report or the Second Macdonald Report.

<sup>636</sup> GoS Reply Memorial, at para. 314.

<sup>637</sup> GoS Reply Memorial, at para. 314.

<sup>638</sup> GoS Reply Memorial, at para. 314 (citing Henderson, Route Report *Muglad to Abyei*, March 1933).

<sup>639</sup> GoS Reply Memorial, at para. 315.

Nyadak Ayueng.<sup>640</sup> The Government does not mention that Henderson observed that the limit of Humr cultivation was 37 kilometres outside Muglad.<sup>641</sup>

517. Henderson observed that the first Ngok Dinka houses that he saw were located at Lukji (approximately 10 miles north of the Kiir/Bahr el Arab).<sup>642</sup> This is obviously only a record of what Henderson observed, not the northernmost limit of Ngok occupation, which even in the region Henderson was travelling in was much further north, such as at Kol Arouth (near to Meiram),<sup>643</sup> Wun Deng Awak<sup>644</sup> and Dhony Dhoul.<sup>645</sup>

<sup>640</sup> SPLM/A Memorial, at paras. 46, 1032.

<sup>641</sup> Henderson, Route Report *Muglad to Abyei*, March 1933 (GoS Annex. 38).

<sup>642</sup> **Map 62** (Ngok Presence 1905).

<sup>643</sup> **Map 62** (Ngok Presence 1905). **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.”).

<sup>644</sup> **Map 62** (Ngok Presence 1905). **Map 14** (Abyior Chiefdom, 1905); Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶38 (“Abyior... extends north to Wun Deng Awak.”); Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶12 (“The Abyior lands... extend up as far as Wun Deng Awak [Arabic: Umm Sakina] in the northwest”); Witness Statement of Alor Kuol Arop (Abyior elder), at pp. 2-3, ¶¶10-11; Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶13 (“A known permanent village of the Abyior was Wun Deng Awak.”).

<sup>645</sup> **Map 62** (Ngok Presence 1905). **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 SPLM/A Memorial, 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 Tebeldiya. 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.



518. When Henderson's route is considered, it is apparent why he did not observe the Ngok Dinka settlements at Dhony Dhoul and Wun Deng Awak: they were not on the main road he travelled along. Thus, **Map 63** (Mosaic of 1:250,000 Series Maps) shows the road that Henderson took, passing through Angareib, Tebeldiya and to "Intilla" [Antilla]. Dhony Dhoul is located to the west, and Wun Deng Awak to the east of the road, as can be seen from **Map 62** (Ngok Presence 1905).

519. Henderson's observations should also be contrasted with Tibbs, who travelled down the same road, describing Ngok settlement at Antilla, to the north of the Ngol/Ragaba ez Zarga (at a latitude of approximately 10°00' N and approximately 25 miles north of the Kiir/Bahr el Arab):

"I always considered the area south from Antilla, on our direct road route from Muglad to Abyei, to be within Ngok territory. From that road, *as soon as we reached Antilla I would see Ngok luaks (which were permanent round cattle byres for Ngok cattle herds, otherwise referred to as "dugdugs") and typical Ngok villages dotted about.* A typical Ngok village, as indicated above, consists of 2 or 3 luaks, the unique Dinka construction that house both people and animals with small tukuls as grain stores, dotted around with areas of permanent cultivation."<sup>646</sup>

520. The Government claims that "Henderson's report is likewise completely inconsistent with the SPLM/A claim [to occupation and use of areas to 10°35' N]."<sup>647</sup> That is unsustainable. Henderson's account of a single, 200 kilometer truck ride on a dry season road did not even remotely purport to survey the extent of the Ngok Dinka territories and provided only a limited glimpse through a very narrow keyhole. Given that, it is misplaced to suggest that Henderson's observations are inconsistent with either the SPLM/A's claims or the ABC Experts' conclusions.

521. Indeed, applying the Government's logic, Henderson's report would demonstrate that the Misseriya were not located anywhere in the Abyei Area during the dry season (his report is dated 2 March 1933): Henderson makes no mention of any Misseriya at any location within the Abyei Area which, on the Government's analysis, would demonstrate their absence from the region. In reality, like other Condominium records, Henderson's report was necessarily a limited set of observations which cannot be relied upon, as the Government seeks, to prove the absence of either Ngok Dinka or Misseriya inhabitants in the region.

e) Civil Secretary Files (1933)

522. The Government's Reply Memorial relies on a sketch attached to the minutes of a 1933 meeting regarding Malwal Dinka claims in Darfur and, to a limited extent, on the western fringes of the Abyei Area.<sup>648</sup> The sketch does not support the Government's claims and instead corroborates Ngok Dinka occupation and use of the Abyei Area.

523. The Government asserts that "the interests of the Ngok Dinka were not considered as relevant at the meeting of 28 October 1933."<sup>649</sup> That is hardly surprising, given the subject matter and attendees at the meeting. The meeting did not include any Ngok Dinka representatives (or anyone from Kordofan at all) and it concerned the dry season grazing

<sup>646</sup> Witness Statement of G. Michael Tibbs, at p. 4, ¶22.

<sup>647</sup> GoS Reply Memorial, at para. 315.

<sup>648</sup> GoS Memorial, at para. 316.

<sup>649</sup> GoS Reply Memorial, at para. 316.

rights of other tribal groups mostly outside the Abyei Area (with no mention of Ngok Dinka villages in the discussion).

524. In these circumstances, it would have been very unusual for the meeting to discuss the Ngok Dinka or their interests (even if they had been affected). The Government nonetheless claims that “the clear implication is that the Rizeigat and the Homr, not the Ngok, were interested in grazing rights on the Bahr el Arab west of 28°05’E.”<sup>650</sup>

525. The Government’s attempted inference is untenable. There is no reason that a meeting regarding other tribes in different locations, not involving either Ngok Dinka or Kordofan representatives, should be expected to deal with the Ngok Dinka and their rights.

526. The Government nonetheless relies on the sketch map apparently prepared for (or at) the meeting. In this regard, several points are significant:

a. The sketch map has no provenance and the minutes do not refer to any map being prepared for or drawn at the meeting. The Government gives no author for the minutes to which the sketch map is said to have been attached. There is no way to identify either the knowledge, motivations or reliability of the sketch map or its author.

b. The sketch map crudely indicates various undifferentiated “waterless areas.” These depictions are simply wrong, as the maps themselves show in indicating wells and villages.<sup>651</sup> The Government’s effort to “confine” the Ngok Dinka to some 500 square miles between these areas is therefore equally flawed.

c. The sketch-maker’s objective, acknowledged by the Government, was to indicate claims of the “Malwal,” “Rizeigat” and Humr *south of the Bahr al-Arab*. The Government’s suggestion that the map thus demonstrates a “maximum northerly reach” of “about 9°30’N in 1933”<sup>652</sup> is untenable; the sketch map simply was not intended to address such matters.

527. At best, the sketch crudely identifies dry season grazing areas, not settlement locations. In this regard, the sketch depicts Ngok dry season grazing to the north-west of Abyei – confirming that some Ngok cattle remained around the Kiir/Bahr el Arab river system rather than moving south as the vast majority did during the dry season.<sup>653</sup>

528. It is also notable that the Ngok are identified to have significantly more cattle than the Homr in the area during the dry season (an estimated 50,000 – 60,000 compared to 29,300 for the Homr). This is notwithstanding the fact that almost all of the Ngok cattle would be in the *tooc* (many south of the Kordofan/Bahr el Ghazal boundary) and therefore presumably not included in these figures (for there would be no purpose to include them in the context of dry season grazing concerned solely within Kordofan).

529. Rather than support the Government’s case this information confirms that the Ngok had significant cattle. Moreover, it confirms that their permanent settled lands would be extensive so as to accommodate all of those cattle. This leads to the assumption that for all of

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<sup>650</sup> GoS Reply Memorial, at para. 316.

<sup>651</sup> **Map 63** (Abyei Area, Mosaic of 1:250,000 Series Maps).

<sup>652</sup> GoS Reply Memorial, at para. 316.

<sup>653</sup> SPLM/A Memorial, at paras. 200-201, 1073-1075.

the year save for the several months of dry the Ngok cattle, all of their cattle so many more than 50,000, would be spread throughout the Abyei Area – over an area at least equal to (but certainly greater than) all of the coloured areas on GoS Reply Map 22a, through the *goz* and toward Keilak in the rains.

f) Miscellaneous Sources Relied on by the Government

530. The Government next cites an “illustrative, not exhaustive”<sup>654</sup> collection of “[o]ther contemporary documents to similar effect.”<sup>655</sup> None of these materials has any relevance to the parties’ dispute or merits any more attention than that afforded by the Government.

531. The Government cites a 1938 Map of Native Administration of Kordofan Province.<sup>656</sup> This unsophisticated map, supposedly drawn for the purpose of determining a local government area, is not credible evidence of the areas of the nine Ngok Dinka.

532. Whatever information it is based on is unknown, and it almost certainly did not involve any consultation with the Ngok. The sources, if any, used to prepare it are likely to be, at best, a smattering of those considered above and universally discredited as uninformed and inaccurate. Rather, the provenance of this map is found in the Sudan Government’s policy of “Indirect Rule,” a concept not unfamiliar to the Ngok, whom had been largely ignored for 40 years of the Condominium prior to this map’s creation.

4. The Period Prior to Independence: Contemporary Documents

533. The Government’s Reply Memorial also refers to what it calls “two distinguished scholars” – Lienhardt and Cunnison. The works of both have been dealt with in detail by the SPLM/A Reply Memorial.<sup>657</sup>

a) Lienhardt

534. Contrary to the Government’s suggestion, Lienhardt is in no way an authority on the Ngok Dinka (or Misseriya). As detailed in the SPLM/A Reply Memorial: “at the time of drawing his sketch map, Lienhardt had no personal or even directly relevant secondary experience of the Ngok Dinka or their territory. Nor did Lienhardt purport to discuss the Ngok Dinka in his research or writing. Consequently, his tribal map, cited by the Government, cannot seriously be considered as a credible or reliable source.”<sup>658</sup> That remains true and his sketch map is of no probative value.

535. The Government also refers briefly to its witness, Professor Cunnison, whose evidence is discussed below. Suffice it to say that the Government’s lack of attention to Professor Cunnison’s views arises from the direct contradiction between those views and the Government’s case.

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<sup>654</sup> GoS Reply Memorial, at para. 317.

<sup>655</sup> GoS Reply Memorial, at para. 317.

<sup>656</sup> GoS Reply Memorial, at para. 317.

<sup>657</sup> SPLM/A Reply Memorial, at paras. 1267-1272, 1336-1340, 1110-1170.

<sup>658</sup> SPLM/A Reply Memorial, at para. 1272.

b) Cunnison

536. The GoS Memorial placed great weight on the observations of Professor Cunnison, attaching a witness statement and quoting substantially from his published writings.<sup>659</sup> As discussed in the SPLM/A Reply Memorial, Professor Cunnison's observations on a wide range of issues were in direct contradiction to the Government's case, and instead provided powerful corroboration of the SPLM/A case.

537. Among other things:

a. Professor Cunnison's definitions and descriptions of the terms "Bahr el Arab" and "Bahr" simultaneously confirmed the widespread terminological confusion attending these terms and, together with his other observations, the presence of permanent Ngok Dinka villages throughout the Bahr region.<sup>660</sup>

b. Professor Cunnison's testimony and writings regarding the substantial historic continuity of the Ngok Dinka and Misseriya land use and habitation confirmed the conclusions of the ABC Experts and the SPLM/A case in this arbitration, while directly contradicting the Government's claims that no such continuity existed.<sup>661</sup>

c. Professor Cunnison's testimony and writings specifically and repeatedly described the existence of *permanent* Ngok Dinka villages scattered throughout the Bahr,<sup>662</sup> confirming both that the Ngok inhabited permanent villages (contrary to the Government's latest claims in its Reply Memorial<sup>663</sup>) and that those villages were precisely where the SPLM/A describes them as being. In Professor Cunnison's words: "***Much of the Bahr has permanent Dinka settlements ...the Nuer and Dinka have permanent homes from which they move for part of the year.***"<sup>664</sup>

d. Professor Cunnison's testimony and writings specifically attested to the nomadic character of the Misseriya and the location of their "headquarters" north of the *goz*, in Muglad and Babanousa: "***The Muglad is regarded by the Humr as their home. ... This is almost the only place where the people have anything like permanent houses. It is where they cultivate and store their grain as their forefathers did.***"<sup>665</sup>

e. The Misseriya spent only limited time south of the *goz*, in the Bahr region, on seasonal cattle grazing migrations.<sup>666</sup>

538. Cunnison's further witness statement, and the GoS's second opportunity to extract from his oral testimony something useful to its case, again supports the SPLM/A position. For example:

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<sup>659</sup> See Witness Statement of Ian Cunnison; GoS Memorial, at paras. 392-394.

<sup>660</sup> SPLM/A Reply Memorial, at paras. 1112-1122.

<sup>661</sup> SPLM/A Reply Memorial, at paras. 1123-1126.

<sup>662</sup> SPLM/A Reply Memorial, at paras. 1127-1137.

<sup>663</sup> GoS Reply Memorial, at paras. 259, 261, 298, 323-324. See also above at paras. 453-463.

<sup>664</sup> Cunnison, "*Some Social Aspects of Nomadism in a Baggara Tribe*" in The Effect of Nomadism on the Economic and Social Development of the People of the Sudan, Proceedings of the Tenth Annual Conference 11th-12th January 1962, 112, **Exhibit-FE 4/11** (emphasis added).

<sup>665</sup> Cunnison, "*The Humr and their Land*," 35(2) SNR 54-55 (1954), **Exhibit-FE 4/5** (emphasis added).

<sup>666</sup> SPLM/A Reply Memorial, at paras. 1148-1151.

a. Cunnison affirms the SPLM/A case that Ngok homes in the Bahr region were permanent, substantial and occupied throughout the year, saying that the Ngok would leave “others behind to care for their substantial houses.”<sup>667</sup> Despite the GoS’s effort to rewrite Cunnison’s broad definition of the Bahr for the purpose of these proceedings to include only “the area centred on the Bahr el Arab and Regaba,” Cunnison is consistently clear in his writings that “Bahr” is the area he describes as the regaba repeating pattern starting immediately below the *goz*.<sup>668</sup>

b. Cunnison affirms the SPLM/A case that during the dry season, i.e. the period when both the Ngok and the early British explorers visited the Bahr region, a large portion of Ngok and their cattle were away from the region, saying that “for much of the season that the Humr were in this region, many Ngok were further south with their herds.”<sup>669</sup>

c. Cunnison does not say that there were *no* Ngok north of the Bahr: the most that he says is that “there was never any *collective presence* [of the Ngok] north of the area I refer to as the Bahr.”<sup>670</sup>

d. Cunnison does not say that the *goz* was unoccupied by the Ngok, and certainly does not say that the *goz* was not used by the Ngok; he does say that the *goz* “was not occupied *in any relevant sense* by the Ngok,” adding that it was not occupied at all by the Humr but used only as “a transit area.”<sup>671</sup>

539. It is also noteworthy that Cunnison interprets the SPLM/A Memorial as suggesting that “the Humr had no rights or interests further south [of Muglad].”<sup>672</sup> This is quite clearly not what the SPLM/A Memorial says. The SPLM/A has consistently recognized Misseriya grazing rights, as protected in the express language of the Abyei Protocol, which provides that “[t]he Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.” It is not clear what has been communicated to Cunnison, but his impression of the SPLM/A claim in these proceedings is unfortunately skewed.

540. Taken together, Cunnison’s published works and witness statement describe the existence of substantial numbers of permanent Ngok Dinka settlements and homes dotted throughout the region of the Bahr and the Bahr el Arab. That region was specifically and carefully described by Cunnison to include the entire region south of the *goz*, and, in particular, the area centered on the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. Cunnison also made very clear that this territory was the “traditional” homeland of the Ngok people, which he considered had been the case since at least the Reoccupation (in 1898). At the same time, Cunnison also squarely confirmed the nomadic character of the Misseriya, who moved south from their home territories in the Muglad and Babanusa only during the dry season.

541. Perhaps for these reasons, and in striking contrast to its Memorial, the Government’s Reply Memorial devotes only a few passing paragraphs to Cunnison’s views. It refers to Cunnison’s views about the Mahdiyya – an incongruous reference, given the focus of

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<sup>667</sup> Supplementary Witness Statement of Ian Cunnison, at p. 2, ¶3.

<sup>668</sup> SPLM/A Reply Memorial, at paras. 1112-1117.

<sup>669</sup> Supplementary Witness Statement of Ian Cunnison, at p. 1, ¶3.

<sup>670</sup> Supplementary Witness Statement of Ian Cunnison, at p. 1, ¶3.

<sup>671</sup> Supplementary Witness Statement of Ian Cunnison, at p. 1, ¶7.

<sup>672</sup> Supplementary Witness Statement of Ian Cunnison, at p. 1, ¶3.

Cunnison's witness statement, academic focus and personal experiences.<sup>673</sup> The Government's Reply Memorial also cites Cunnison in passing for relatively peripheral views about cattle.<sup>674</sup>

542. The reason for the Government's conspicuous efforts to avoid discussion of Professor Cunnison's evidence is straightforward. As detailed above, and in the SPLM/A Reply Memorial, Professor Cunnison's testimony and publications are directly contrary to the Government's case and, instead, corroborate much of the SPLM/A case. Needless to say, whether or not the Government ignores the Cunnison evidence, it remains on the record and is irreconcilable with the Government's case.

c) Davies

543. The GoS refers to the previously cited extract from Reginald Davies, an administrator and magistrate in Kordofan and Darfur in the early 20<sup>th</sup> century.<sup>675</sup>

544. The GoS interprets the extract from Davies to describe "Dinka life as centered on the Bahr el Arab; migrating *south* in the wet season."<sup>676</sup>

545. However, when one refers to the text, it is clear that Davies describes the Dinka as moving "south into the Bahr el Ghazal Province [in the dry season; but when the rains came and the Arabs took their cattle north to the area of El Maglad the Dinka, whose small breed of cattle had acquired immunity to fly-borne disease, *moved up* [i.e. north] and occupied the river region where their animals profited by the first green grass."<sup>677</sup> Once corrected, it is clear that the Government concedes the Ngok took their cattle north in the wet season. This corroborates Ngok wet season grazing patterns.

5. The Government's New Claims Regarding Abyei Town

546. The Government's Memorial claimed that Abyei town was a comparatively recent creation (dating to Whittingham's trek in 1910).<sup>678</sup> It also repeatedly claimed that Arop Biong (Sultan Rob) had resided exclusively to the south of the Kiir/Bahr el Arab.<sup>679</sup>

547. As discussed above, the Government's Reply Memorial now acknowledges that Arop Biong (Sultan Rob) lived to the north of the Kiir/Bahr el Arab prior to 1905.<sup>680</sup> The Government instead apparently suggests that Arop Biong (Sultan Rob's) residence was not of importance because Condominium officials had supposedly located the Ngok Paramount Chief in three different places (all in the vicinity of present day Abyei town) between 1902 and 1910.<sup>681</sup>

548. The Government does not attempt to explain why it would be important if (Arop Biong's) Sultan Rob's seat was relocated several times. In any event, the Government's

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<sup>673</sup> GoS Reply Memorial, at paras. 243-244.

<sup>674</sup> GoS Reply Memorial, at paras. 259, 261, 298, 323-324.

<sup>675</sup> GoS Memorial, at para. 389; GoS Reply Memorial, at para. 324 (citing R. Davies, *The Camel's Back* 130 (1957), SCM Annex 35).

<sup>676</sup> GoS Reply Memorial, at para. 324 (emphasis added).

<sup>677</sup> R. Davies, *The Camel's Back* 130 (1957), GoS Memorial Annex 35. *See also* SPLM/A Reply Memorial, at para. 1324. *See also* SPLM/A Memorial, at paras. 196-205, 1064-1072.

<sup>678</sup> GoS Reply Memorial, at para. 299.

<sup>679</sup> GoS Memorial, at paras. 70, 238, 319, 338, 349, 359, 367, 371, 383, 400.

<sup>680</sup> *See above* at paras. 453-463.

<sup>681</sup> GoS Reply Memorial, at paras. 303-304.

attempt to suggest that Abyei town has moved is contrived. Even on the Government's case, the movements would be a matter of a few miles, which must be understood in the context of relatively inaccurate estimates (Whittingham notes that Abyei town is "about" three and half miles from the Kiir/Bahr el Arab).

549. In fact, as the Government now essentially concedes, the evidence shows that the general region around what is present-day Abyei town has, for more than a century, been the center of Ngok Dinka political, cultural and commercial life. That is detailed in the SPLM/A Memorial and Reply Memorial,<sup>682</sup> and it is now clear that this location was to the north of the Kiir/Bahr el Arab at the time of the transfer of the Ngok Dinka in 1905.

## 6. The Government's Criticisms of Professor Daly

550. The GoS Reply Memorial levels a number of criticisms at Professor Daly. Notably, those criticisms are made without the benefit of any historical expert put forward by the Government.

551. The Government first criticizes Professor Daly for concluding that the "British knowledge of the Ngok was based on a few hours' path crossing."<sup>683</sup> The Government's Reply Memorial labels this observation as "misleading,"<sup>684</sup> "untrue"<sup>685</sup> and "unfair."<sup>686</sup>

552. Despite its rhetoric, the Government provides no substantive basis for disputing Professor Daly's obviously accurate expert opinion. In fact, when one examines the two dozen or so Condominium reports between 1898 and 1956, it is impossible not to see their grave limitations. Simply put, there was a very limited number of documents containing inherently limited observations about a very large and inaccessible territory that was relatively thinly populated. Although these documents contain important information (discussed in detail in the SPLM/A's submissions), it blinks at reality to ignore their limitations.

553. The Government claims that the "travel itineraries of these [pre-1905 Condominium] journeys, often taking months... took great care in measuring distances and triangulating their positions."<sup>687</sup> The Condominium officials did take care in measuring their distances and triangulating their positions (although often making material mistakes), but this misses the point. The Condominium observations were: (a) limited to the dry season when Ngok cattle camps were further south; (b) limited to a few specific routes, which did not penetrate into the vast majority of the territory of the Abyei Area; (c) made for other purposes (e.g., topographical mapping); and (d) were made in circumstances in which the Ngok Dinka likely concealed themselves from Condominium forces.

554. The Government's other criticisms of Professor Daly's treatment of the documentary record are equally wrong and misleading.

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<sup>682</sup> SPLM/A Memorial, at paras. 54, 86, 876, 904, 915, 951, 953, 960-966; SPLM/A Reply Memorial, at paras. 85, 951, 1000, 1184-1193.

<sup>683</sup> Daly Expert Report, at p. 43.

<sup>684</sup> GoS Reply Memorial, at para. 250.

<sup>685</sup> GoS Reply Memorial, at para. 251.

<sup>686</sup> GoS Reply Memorial, at para. 251.

<sup>687</sup> GoS Reply Memorial, at para. 251.

- a. *“Documentary sources for the study of southern Sudanese history before the early twentieth century are meager.”*<sup>688</sup> No serious historian of Sudan would dispute this conclusion. It is undeniable that there is a lack of documentary evidence concerning southern Sudan before the early 20<sup>th</sup> century.
- b. *“The Abyei region was both remote and, during the annual rainy season, almost inaccessible to government officials in the early twentieth century.”*<sup>689</sup> The Government suggests that “the remoteness of the area is greatly exaggerated.” This is patently false, arising from the Government’s ignorance of the environmental evidence (the area was completely inaccessible for all but the dry months of the year). As Lloyd (and Tibbs, who was able to travel by motor vehicle) explain, the expanse of the district made it “impossible” to oversee all of its inhabitants (Lloyd himself never records encountering the Ngok despite seven years of service in Kordofan).<sup>690</sup>
- c. *“There was essentially no administration of the Abyei area by the Anglo-Egyptian regime during the first decade of the twentieth century.”*<sup>691</sup> The Government attempts to equate what it says were “frequent visits” to the Abyei Area with governmental administration. It is abundantly clear from the evidence that there was no administration of any kind.
- d. *“Provisional [sic] boundaries in general in early twentieth-century southern Sudan were vague and frequently altered.”*<sup>692</sup> The Government does not appear to disagree with this proposition, offering now only its view that the Bahr el Arab was a cultural divide. Yet even if the boundary was along something called the “Bahr el Arab,” this provides no greater certainty. The discussion in the SPLM/A Memorial,<sup>693</sup> Reply Memorial<sup>694</sup> and the MENAS Expert Report,<sup>695</sup> demonstrates that the identity and location of the Bahr el Arab was uncertain for some years following the 1905 transfer. Professor Daly’s description of provincial boundaries is plainly correct.
- e. *“There is evidence that the Ngok Dinka resided north of the Ragaba al-Zarga/Ngol River in and around 1905.”* The evidence in support of this proposition is set out in detail elsewhere.<sup>696</sup>
- f. *“Ignorant of the Ngok Dinka and their territory, and without having delimited definite boundaries between Kordofan and Bahr el Ghazal provinces, the Sudan Government decided in 1905 that the Ngok Dinka chiefdoms would in future be administered by and included within Kordofan.”*<sup>697</sup> The Government takes issue with Professor Daly’s description of the Sudan Government as ignorant of the Ngok. As

<sup>688</sup> Daly Expert Report, at p. 4; GoS Reply Memorial, at para. 361.

<sup>689</sup> Daly Expert Report, at p. 4; GoS Reply Memorial, at para. 362.

<sup>690</sup> SPLM/A Reply Memorial, at paras 919-932; Witness Statement of G. Michael Tibbs, at p. 3 ¶11, p. 5 ¶26; Sudan Intelligence Report No. 171, October 1908, Appendix G, at pp. 56-57, **Exhibit-FE 17/31**.

<sup>691</sup> Daly Expert Report, at p. 5; GoS Reply Memorial, at para. 363.

<sup>692</sup> Daly Expert Report, at p. 5; GoS Reply Memorial, at paras. 364, 396-399.

<sup>693</sup> SPLM/A Memorial, at paras. 328-330.

<sup>694</sup> SPLM/A Reply Memorial, at paras. 1459-1463.

<sup>695</sup> MENAS Expert Report, at paras. 81-90.

<sup>696</sup> For example, *see* SPLM/A Memorial, at paras. 917-928, 994-995, 1000-1001, 1005-1014, 1015-1034, 1035-1046, 1047-1057, 1058-1063, 1064-1081, 1082-1084; SPLM/A Reply Memorial, at paras. 943-950, 953-972, 975-1011, 1014-1020, 1045, 1082, 1098-1099, 1110-1170, 1180-1181, 1239, 1240-1246, 1249-1250, 1252-1256, 1263-1266, 1288-1301, 1308-1320. *See also above* at paras. 495-497.

<sup>697</sup> Daly Expert Report, at p. 5; GoS Reply Memorial, at para. 366.



demonstrated elsewhere,<sup>698</sup> that is clearly correct. As to the boundary, whilst some documents refer to a provincial boundary before the 1905 transfer as the Bahr el Arab, that name was more commonly given to the Ngol/Ragaba ez-Zarga prior to 1905.

g. “*The Missiriyya nomads, who ranged mainly from the north, around the Babanusa, moved south through the Ngok region between the Bahr al-Ghazal/Kir and Ragaba al-Zarga/Ngol rivers during the dry season.*”<sup>699</sup> The Government agrees with this conclusion, objecting only to the term “Ngok region.”<sup>700</sup>

555. The Government’s attempts to undermine the conclusions of Professor Daly confirm its lack of expert historical analysis its unfamiliarity with the historical and documentary record. In turn, the Government mischaracterizes and draws unsustainable conclusions from the Condominium period documentary record.

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556. In sum, the post-1905 documentary record contains incontrovertible evidence that the Ngok Dinka inhabited permanent villages located predominantly to the north of the Kiir/Bahr el Arab and extending north to and including the *goz* and throughout the Bahr region. In particular, the post-1905 documentary record flatly contradicts the Government’s claim that “there is no contemporary document so far in the case file which shows the Ngok Dinka exercising grazing or other rights of occupation and use at 10°35’N or anywhere remotely close to it.”<sup>701</sup> In fact, although the Government chooses to omit reference to these materials, the record contains a host of materials with specific, first-hand references to Ngok Dinka occupation and use of territories throughout the Bahr river basin, extending up to and including the *goz*.

557. The post-1905 documents, which the Government pretends to ignore, include:

- a. Professor Cunnison’s detailed, first-hand descriptions of Ngok Dinka permanent villages scattered throughout the Bahr river basin, extending up to the *goz*.<sup>702</sup>
- b. Mr. Tibbs’ first-hand description of permanent Ngok Dinka villages extending at least as far north as Antilla (approximately 25 miles north of the Kiir/Bahr el Arab).<sup>703</sup>
- c. The *Kordofan Province Handbook* which describes the Kiir/Bahr el Arab as the *southern* (not *northern*) boundary of the Ngok Dinka<sup>704</sup> and its **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913),<sup>705</sup> which marks “*Dar Jange*” as

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<sup>698</sup> See above at paras. 431-437; SPLM/A Memorial, at paras. 908-912; SPLM/A Reply Memorial, at paras. 919-932.

<sup>699</sup> Daly Expert Report, at p. 5-6.

<sup>700</sup> GoS Reply Memorial, at para. 367.

<sup>701</sup> GoS Reply Memorial, at para. 325.

<sup>702</sup> See SPLM/A Reply Memorial, at paras. 1110-1170.

<sup>703</sup> Witness Statement of G. Michael Tibbs, at p. 4, ¶22.

<sup>704</sup> See above at paras. 495-496; *Kordofan Province Handbook* 73 (1912), **Exhibit-FE 3/8a**.

<sup>705</sup> **Map 48** (*Kordofan Province*, Survey Office Khartoum, 1913); **Map 49** (*Kordofan Province*, Survey Office Khartoum, 1913 – Overlay).

extending from the Bahr el Arab, through the Ngol/Ragaba ez-Zarga River to Turda in the north and past Miding [Arabic: Heglig] to Lake Abyad in the north east;<sup>706</sup>

d. *Kordofan and the Region to the West of the White Nile* which places the Ngok to the north of the Kiir/Bahr el Arab and across the open plains to neighbor the Nuba near Lake Keilak.

e. A July 1921 Sudan Intelligence Report (No. 324), discussed above, which described the Ngok Dinka “extending their permanent villages *farther to the north of the Gurf*;<sup>707</sup>

f. Dupuis’ 1927 sketch map which identifies Dinka *dugdugs* located near “El Timar” (north-west of Abyei town), farther north-west to the permanent Ngok village of Wac Anguam,<sup>708</sup> farther again the permanent Ngok village of Buk<sup>709</sup> and Amiin.<sup>710</sup> To the west of Abyei toward the Ngol/Ragaba ez Zarga, Dupuis locates *dugdugs* at “Um Seggar,” “El Gadein” and “El Khardud;”<sup>711</sup>

g. Henderson’s first-hand observations in 1933 (albeit from a truck) of permanent Ngok Dinka villages at *Lukji* (approximately 10 miles north of the Kiir/Bahr el Arab).<sup>712</sup>

h. Howell’s 1951 observation that the Ngok occupy an area “on the Bahr el Arab *extending northwards along the main watercourses of which the largest is the Ragaba Um Biero*;<sup>713</sup>

i. The 1965 Abyei Agreement which recorded the Misseriya and Ngok Dinka’s mutual acknowledgement that “the Ngok could *return to their homesteads* at ‘*Ragaba Zarga* and other places where *they used to live*;<sup>714</sup>

j. The villages classified in 1977 as forming part of the Abyei Rural Council some of which are identified on **Map 13** (Ngok Dinka Chiefdoms, 1905) and **Map 62** (Ngok Presence 1905), and are distributed throughout the territory identified by the ABC as the Abyei Area, including Abyei town, Langar [Arabic: Goleh], Dokura, Thigei, Alal, Tajalei, Mabek [Abu Azala], Nyadak Ayueng and Dakjur [Arabic: Dembaloya]; and

k. The 1978 report by a representative of the Sudanese Ministry of Agriculture, which summarized the Abyei region’s habitation as follows: “Ngok Dinka live in this

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<sup>706</sup> The reference to semi-permanent villages is clearly wrong – as discussed above the Ngok inhabited permanent villages, with only the young men (and sometimes young women) joining the cattle camps during dry and wet seasons. See SPLM/A Memorial, at para. 199.

<sup>707</sup> GoS Memorial, at para. 366.

<sup>708</sup> Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), p. 3, ¶13. See also **Map 62** (Ngok Presence 1905).

<sup>709</sup> Witness Statement of Mijok Bol Atem (Diil elder), at p. 3 ¶11. See also **Map 62** (Ngok Presence 1905).

<sup>710</sup> Witness Statement of Deng Chier Agoth (Abyior elder), at p. 4, ¶21; Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13. **Map 62** (Ngok Presence 1905).

<sup>711</sup> The *dugdugs* in this area are depicted on **Map 63** (Abyei Area 1:250,000 Series Maps).

<sup>712</sup> See above at paras. 380-385.

<sup>713</sup> GoS Memorial, at para. 390 (quoting Howell, “Notes on the Ngork Dinka of West Kordofan,” 32(2) SNR 239, 243 (1951)), **Exhibit-FE 4/3** (emphasis added).

<sup>714</sup> “The First Peace Agreement Between The Misiriyya Humur And The Ngok Dinka, Concluded At Abyei, March 3, 1965”, Appendix 12 to A. D Saeed “The State And Socioeconomic Transformation In The Sudan: The Case Of Social Conflict In Southwest Kurdufan” (January 1, 1982). ETD Collection for University of Connecticut. Paper AAI8213913, **Exhibit-FE 18/30**.

area the year round; Misseriya Humr during the dry season. Bahr El-Ghazal and Upper Nile Dinka come during the rainy season.” The same author concluded that “Ngok Dinka are more the settlers compared to these other tribes,” on the basis that they cultivated around their homes, while others only use the land seasonally.

558. To be sure, there is no uniform, comprehensive description that locates the Ngok Dinka (or the Misseriya) at all of the points in the Abyei Area (or elsewhere). That is a result of the inherent limitation of the documentary record, as detailed elsewhere in the SPLM/A submissions.<sup>715</sup>

559. It is also precisely the reason why the parties agreed upon the ABC Experts – with substantial and complementary expertise in Sudanese history, anthropology ethnography, culture and population movements – to define the boundaries of the Abyei Area. It is also precisely the reason that the parties provided the ABC Experts with extensive, first-hand opportunities to visit the Abyei Area, to interview its people and to investigate all conceivably relevant archives and other sources of information. If there had been a comprehensive source of information about the Abyei Area and Ngok Dinka, there would have been no reason for either the ABC Experts or these investigatory efforts.

560. Nonetheless, contrary to the Government’s rhetoric, it is indisputable that the post-1905 documentary record contains a substantial number of first-hand observations of Ngok Dinka settlements in numerous locations around the territory defined by the ABC Experts as the Abyei Area. Not surprisingly, these observations are most detailed and generally extend furthest north when made by individuals who spent (relatively) more time in the Abyei Area (specifically, Cunnison and Tibbs though even their experiences and travels in the region were limited).

561. Moreover, the post-1905 materials make it very clear that the Misseriya were headquartered in Muglad, north of the *goz*, and came south to the Bahr region only in the dry season. Given the character of the Bahr as a bridge between north and south, it is virtually impossible not to infer that the Ngok Dinka were present in this region, particularly during the wet season. Any other conclusion would leave the region essentially uninhabited, which is particularly implausible given the Bahr’s fertility and suitability for the Ngok Dinka way of life.

562. The same inferences are compelled by the fact that the post-1905 documentary record indicates that the Ngok Dinka were located predominantly to the north of the Kiir/Bahr el Arab. Put simply, if tribes other than the Ngok were located to the south of the Kiir/Bahr el Arab, then the Ngok must have inhabited a reasonably extensive expanse of territory to the north of the river. Again, these inferences are fully corroborated by the other evidence in the record.

## 7. The Cartographic Evidence

563. In its Reply Memorial, the GoS lumps its discussion of the cartographic evidence together with its treatment of pre-1905 (paragraphs 248 to 282) and post-1905 (paragraphs 283 to 325) documentary evidence. In so doing, the Government avoids discussion of much of the map evidence, instead concluding broadly that “**19<sup>th</sup> century maps are likely to be**

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<sup>715</sup> See above at paras. 431-437; SPLM/A Memorial, at paras. 908-911; SPLM/A Reply Memorial, at paras. 919-932.

*misleading.*<sup>716</sup> The Government’s view appears to extend to 20<sup>th</sup> century maps because, with a few exceptions, the GoS Reply Memorial also avoids discussing these materials in any real detail.

564. The Government’s general aversion to historic cartographic evidence is striking. The Government possesses unfettered access to the Sudan Survey archive and other Condominium records in Khartoum and would be free to provide a wide range of historical maps. Indeed, the GoS offered a variety of previously unpublished maps with its Reply Memorial. The Government also would be able to provide the SPLM/A with access to the Khartoum archives (although it has ignored the SPLM/A’s request that it do so).

565. Despite its access to cartographic resources, the Government has almost entirely avoided this category of evidence, instead characterizing it as “misleading.” The reality, as detailed in the SPLM/A Reply Memorial, is that virtually every extant map of the region – totaling some 25 separate maps from a range of different dates and provenances – shows the Ngok Dinka inhabiting the territory of the Bahr region, extending north from the Kiir/Bahr el Arab, and the Ngol/Ragaba ez Zarga, and the Misseriya as located further north.

566. The Government’s Reply Memorial claims that the map evidence does not “show[] the Ngok Dinka exercising grazing or other rights of occupation and use at 10°35’N or anywhere remotely close to it.”<sup>717</sup> In fact, the Government’s argument is another effort to transform the limited Condominium cartographic record – at least limited so far as the Government has disclosed – into negative evidence of an absence of Ngok Dinka.

567. The Government’s attempted sleight-of-evidentiary-hand shows nothing other than the fact that the Condominium cartographic record is limited, covering only a narrow set of routes, charted *only* in the dry season, often for purposes other than recording the location of local inhabitants. A limited record of this nature does not permit the drawing of negative inferences about an absence of Ngok Dinka (or others) from the Abyei Area.

568. Rather, what the cartographic record does permit is secure conclusions that: (a) the Ngok Dinka had been observed in a large number of specific locations throughout the Bahr region, including north of the Ngol/Ragaba ez Zarga, during the dry season; and (b) Condominium and pre-Condominium sources consistently and uniformly depicted the Ngok Dinka territories as encompassing the entire Bahr river basin.

569. The following discussion does not review the cartographic evidence, which is detailed in the SPLM/A Reply Memorial.<sup>718</sup> Rather, it reviews the (very few) additional maps discussed by the Government’s Reply Memorial. Where appropriate, it also notes the Government’s refusal to permit SPLM/A representatives access to particular materials and identifies the evidentiary consequences of that refusal. In particular, it notes the Government’s failure to provide copies of: (a) portions of Wilkinson’s sketch maps; (b) portions of the sketch of Percival’s trek from Keilak to Wau; (c) portions of the sketch of Hallam’s journey from Sultan Rob’s “old” village to Keilak; and (d) materials regarding Whittingham’s treks around Bara and Mellum and from Turda to Koak (Kwok).

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<sup>716</sup> GoS Reply Memorial, at para. 228.

<sup>717</sup> GoS Reply Memorial, at para. 325.

<sup>718</sup> SPLM/A Reply Memorial, at paras. 1197-1273 and **Appendix B**.

a) GoS' New Pre-1905 Cartographic Evidence

570. The Government has adduced virtually no new pre-1905 cartographic evidence. At **Maps 13b** and **14b** of its Supplemental Map Atlas, the GoS has included selected extracts from sketch maps prepared by Wilkinson and Percival of their treks in January/February and May 1902 and December 1904, respectively, which were recovered by the Government from the Sudan Survey Department archives in Khartoum.

571. The extracts exhibited by the GoS are oddly truncated. The Wilkinson sketch map at **Map 13b** is clearly a small segment cut from a much larger map, cut off as Wilkinson approaches the Ngol/Ragaba ez Zarga (which he calls the Bahr el Arab), while the Percival sketch map at **Map 14** covers the portion of his trek from Wau to Burakol, but does not provide the far more relevant section of his trek from Burakol to Keilak.

572. Despite requests by the SPLM/A, the GoS has failed to produce *complete* versions of either **Map 13b** or **Map 14b**, and to date has ignored requests to permit SPLM/A representatives access to the Sudan Survey Department archive to inspect the same. In response to the SPLM/A requests for these items, the GoS has only provided a further cut out section of the Wilkinson map, which excludes the area between Mellum (on the Ngol/Ragaba ez Zarga) and Fut, and a second, largely irrelevant, Percival trek note covering his journey from Pongo to Taufikia.<sup>719</sup>

573. As discussed in the SPLM/A Reply Memorial, Wilkinson's trek notes indicate that Wilkinson he passed through what were almost certainly Ngok Dinka villages well north of the Ngol/Ragaba ez Zarga near Pawol/Fauwel. Wilkinson described those settlements as "small villages" being "mere collection[s] of three or four huts passed at El Jaart and Um Geren."<sup>720</sup> The locations of both El Jaart and Um Geren are identified on the second Wilkinson sketch map segment provided only after chasing by the SPLM/A. That second segment does not in any way suggest that the settlements Wilkinson encountered were Arab feriqs rather than Ngok Dinka villages.

574. The Government still has not provided the segment of Wilkinson's sketch map for the area from Um Geren south to Mellum. That failure to produce portions of a cartographic record which clearly exists (and has been selectively relied upon by the Government) gives rise to obvious inferences. In particular, the appropriate conclusion is that, if the map segments were disclosed, they would show that Wilkinson identified Ngok Dinka villages in this region, just as his trek notes indicate.

575. Similarly, the sketch map of Percival's trek provided by the GoS adds nothing to its claims. As indicated above, the Percival sketch map is for a route from the Kiir/Bahr el Arab south to Wau. Obviously, the record of a trek going *south* of the Kiir/Bahr el Arab is not going to provide meaningful cartographic detail to the area *north* of the Kiir/Bahr el Arab. Despite the SPLM/A requests of the GoS's counsel and agent, this sketch map has not been provided. Yet, Percival would almost certainly have prepared a sketch map for the portion of his trek from Keilak to the Kiir/Bahr el Arab and any such map would be held in the Sudan Survey Department archive in Khartoum; nonetheless, the Government has not given the SPLM/A access to either the map or the archive.

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<sup>719</sup> See **Appendix A to SPLM/A Rejoinder**.

<sup>720</sup> See SPLM/A Reply Memorial, at paras. 967-972.

576. In these circumstances, there is no basis for the evidentiary inference that the Government claims – namely, that an alleged absence of map evidence indicates an absence of Ngok Dinka. In fact, insofar as the cartographic record is sketchy, it is because of its inherent limitations and because the Government has chosen not to disclose relevant materials. On the contrary, the obvious inference is that the withheld Percival sketch maps in fact identify additional Ngok Dinka villages in places that contradict the Government’s case.

b) GoS’ New Post-1905 Cartographic Evidence

577. The GoS has also submitted a limited body of new post-1905 cartographic evidence, in the form of six additional sketch maps. This includes sketch maps from Comyn (1906), Hallam (1907), Coningham (1909), Whittingham (1910), Dupuis (1921) and Titherington (1924).

578. Preliminarily, none of the Government’s six new sketch maps supports either the GoS’s previous case that the Ngok Dinka were located solely below the Kiir/Bahr el Arab or the GoS’s new case that the Ngok Dinka were located “predominantly” to the south of the Kiir/Bahr el Arab. To the contrary, virtually all six maps clearly place the Ngok well north of that river. Moreover, these various maps, and particularly the 1924 “sketch” map (Titherington), illustrate the limited extent of Condominium observations of the Abyei region, even two decades after the 1905 transfer.

(1) Comyn Sketch Map

579. First, the Comyn sketch map of 1906 is presumably the sketch map from which the map at GoS’s Map 9, Sketch Map of the Western Sources of the Nile, was prepared. The value (or lack thereof) of this map is discussed at paragraphs 1033 to 1034 and 1213 to 1214 of the SPLM/A Reply Memorial. The original sketch confirms that Lieutenant Comyn was only able to show the “approximate[ ] course of Rivers.” To illustrate just how approximate the course of the Kiir/Bahr el Arab was, it has been added to the SPLM/A **Map 61**, map of “The Bahr el Arab as Depicted on Maps Pre-1905,” as attached. **Appendix B** shows, Comyn had no idea as to the actual course of the Kiir/Bahr el Arab, which he charted in a wildly inaccurate manner.

580. It is noteworthy that Comyn did not place Arop Biong (Sultan Rob) on his original sketch map. This goes some way toward explaining how it came to be located south of the river Lol in the map adapted from Comyn’s original sketch. Moreover, the original sketch map records the routes of Comyn: quite clearly his traverse through Ngok land was extremely limited and he did not alter his course north of the Kiir/Bahr el Arab until he was on the far east of Ngok territory.

(2) Hallam Sketch Map

581. Second, the Hallam sketch map dated December 1907 adds very little, apart from confirming the provenance of the description of Burakol from 1918 as “Kwol Wad Arop” in the 1:250,000 map series (as the words “Kwal son of Rob” can be made out in pencil in the bottom right corner of the sketch). Also in pencil is the note that the location of Burakol (here marked “Kual’s villages”) is also “Abyia of Whittingham 576.” This is the same as the cross-referenced annotation on the Percival sketch, which is shown by the circling of a Ngok village identified by Percival as Bongo (immediately south of Burakol) and marking the same “Abyia 576.” This confirms that the collection of settlements that included Burakol was the

same grouping that was later to be described as “Kual’s villages” and “Abyia,” which ultimately included the original Abyei town.

582. There is a handwritten note in the top right corner of the Hallam sketch map from the Governor of Kordofan. The Governor makes three observations, all of which support the SPLM/A case:

- a. “Rob’s *old* village is on Wilkinson Bey’s and I think in Percival Beys’ sketches;”
- b. “Mr Hallam’s route in red dots. Rivers drawn in where seen and dotted elsewhere.” In this regard, it is significant that the entire Kiir/Bahr el Arab is dotted west of Kual’s villages, as is the vast majority of the Nyamora/Umm Beiero – confirming the continuing lack of exploration or mapping; and
- c. “All these rivers however wind very much” – although the rivers are depicted on the maps as straight lines, not representing this noticeable winding at all.

583. As discussed above, Hallam’s identification of dry season Misseriya camp sites in the areas he visited was in no way inconsistent with Ngok Dinka occupation of the area. On the contrary, it makes sense that, during the dry season, the Ngok Dinka and their cattle would have been predominately further to the south.<sup>721</sup> Notably, however, the evidence also makes very clear that the places in which the Misseriya made their dry season cattle camps were the places where the Ngok Dinka resided – which is precisely why the region was regarded as a cultural bridge or meeting place.<sup>722</sup>

### (3) Coningham Sketch Map

584. The Coningham sketches offer little assistance as they were clearly only prepared for the purpose of a very limited topographical survey. They certainly do not even pretend to identify all of the region’s inhabitants. Further, Coningham avoided the Ngok region because of what he feared were “inter-tribal disputes” along the Kiir/Bahr el Arab.<sup>723</sup>

### (4) Whittingham Sketch Map

585. The Government also relies on a sketch map by Whittingham in 1910. Whittingham’s map again confirms the SPLM/A case as to the presence of Ngok Dinka throughout the areas of the Bahr region that Whittingham visited.

586. Conspicuously, the Government only discloses a sketch of one section of Whittingham’s trip and does not disclose any sketch of Whittingham’s treks around Bara<sup>724</sup> and Mellum<sup>725</sup> and from Turda to Koak (Kwok<sup>726</sup>). That omission of materials showing

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<sup>721</sup> See above at para. 432(d); SPLM/A Memorial, at paras. 200-201; 1073-1075. This is also the conclusion of the MENAS Expert Report, at paras. 157-159.

<sup>722</sup> See above at paras. 360, 437.

<sup>723</sup> Reports on the Finance, Administration and Condition of the Sudan, 1909, p. 556, GoS Reply Memorial, **Annex 55**.

<sup>724</sup> **Map 62** (Ngok Presence 1905).

<sup>725</sup> **Map 62** (Ngok Presence 1905).

<sup>726</sup> **Map 62** (Ngok Presence 1905).

significant portions of Ngok Dinka territory gives rise to obvious inferences about what those materials would demonstrate.<sup>727</sup>

587. Whittingham's map confirms the location of "Abyia," near a ferry, on the Nyamora/Um Beiero. This is within meters of the site of modern Abyei town and the existence of the ferry confirms that the Ngok were using both banks of the river. The GoS claims that "[t]his cannot be Burakol, which Percival noted was on the right bank, 2 miles north up the Ragaba Umm Bieiro."<sup>728</sup>

588. In fact, a merged map, combining the four available versions of Sheet 65-K (and one early version of Sheet 65-L) illustrates very clearly that the locations of "Burakol," "Kwal Wad Arop's" and "Abyia" are all very closely centered in the same area, within a few hundred meters of one another. The merged map is at Appendix C.

589. The Government suggests that the absence of references to Ngok Dinka villages on Whittingham's map implies that such villages did not exist. As discussed above, however, the purpose of Whittingham's trek was to mark the locations of watering spots – for the most part this is all his sketch map identifies. In particular, Whittingham's sketch map does not mark any villages in areas where many obviously existed (even on the Government's case), other than to describe Abyei as "Abyia – Mek Koal's village."<sup>729</sup>

590. The GoS cites the supposed "Probable DINKA-HOMR Boundary" recorded in the Whittingham sketch map.<sup>730</sup> The Government fails to note, however, that this observation was not considered to be credible enough to have been incorporated on the 1:250,000 official map series, nor for that matter any other official map or report of the period.

#### (5) Dupuis Sketch Map

591. The Government also relies on Dupuis' sketch map of 1921. Again, this map in fact supports the SPLM/A evidence of Ngok presence well north of the Kiir/Bahr el Arab.

592. The GoS Reply Memorial concedes that Dupuis' map shows Ngok Dinka in various locations north of the Kiir/Bahr el Arab,<sup>731</sup> but then goes on to claim that "[t]he sketch shows no trace of any northerly Ngok possession or use." That is inaccurate, as it identifies Dinka *dugdugs* located near to "El Timar" (north-west of Abyei town, past Lukji), "Um Seggar," "El Gadein" and "El Khardud,"<sup>732</sup> all of which are to the west of Abyei town toward the Ngol/Regaba ez Zarga. Given Ngok Dinka husbandry practices, these *dugdugs* are almost certainly near permanent Ngok villages.<sup>733</sup> That Ngok *dugdugs* are located within the vicinity of their permanent villages is confirmed by Dupuis, who locates a number of Ngok villages in the west of the Abyei Area: "Abu Angeito," the Ngok village of Wuc Anguam<sup>734</sup>

<sup>727</sup> The GoS Reply Memorial suggests that Whittingham mapped Turda, which he did not. He started further south "I was unable to start this sketch from Turda." GoS Reply Memorial, at para. 300 (citing letter, Whittingham to Pearson, 26 April 1910, p. 1).

<sup>728</sup> GoS Reply Memorial, at para. 302.

<sup>729</sup> GoS Reply Memorial, **Map 18b**.

<sup>730</sup> GoS Reply Memorial, at para. 305.

<sup>731</sup> GoS Reply Memorial, at para. 311.

<sup>732</sup> The *dugdugs* in this area are depicted on **Map 63** (Abyei Area 1:250,000 Series Maps).

<sup>733</sup> SPLM/A Memorial, at para. 198; Howell, "Notes on the Ngok Dinka of West Kordofan" 32/2 SNR 239, 243-245 (1951), **Exhibit-FE 3/14**.

<sup>734</sup> Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13. See also **Map 62** (Ngok Presence 1905).



(depicted on GoS Reply Map 34 (*Abyei*: Sheet 65-K, 1931) as “Waiyamgwam”); “Aman,” is the Ngok village of Amiin;<sup>735</sup> and the village of Buk.<sup>736</sup>

593. It is also notable that Dupuis’ circular route did not penetrate either the vast bulk of the Abyei Area, or the heart of that area. The Government’s suggestion that Dupuis mapped “the vast expanse” of the Abyei region and found few Ngok is therefore entirely misleading. Dupuis in fact mapped only the outer perimeter of the region and could have had no idea whatsoever what lay within that circle. Moreover, any information he did obtain in relation to the outer circle was restricted to what he could see from his route or track, which was based on dry season land usage and almost certainly guided by Arabs.

594. Finally, Dupuis records the presence of a rest house at Kuol Arop’s village; there was, of course, only one Condominium rest house in the region, which was in Abyei town a photograph of which is at Appendix H, Figure 4 of the SPLM/A Memorial. Even the GoS concedes therefore that, by 1921, “Sultan Kwal Arob is located approximately where Abyei town now is.”<sup>737</sup> What the Government does not address is the fact that the rest house was built where it was because that was the location of the Ngok Dinka Paramount Chief and the center of Ngok Dinka political and cultural life.

(6) Titherington

595. Finally, the GoS relies on a 1924 Titherington sketch map.<sup>738</sup> Again, the Government’s case is not supported by the map.

596. Preliminarily, the Titherington sketch map only covers the area immediately north of Abyei town and, therefore, provides limited information about the extent of Ngok Dinka territory. The fact that Titherington did not map more northerly areas provides no evidence, one way or the other, as to what was located there.

597. As discussed above, the Government relies on a notation on the Titherington sketch stating “Abyei [Ch Kwol Arob’s since 1918].” The GoS claims that this “is good evidence, from a knowledgeable Condominium official, of the date from which Kwal Arop took up residence in Abyei.”<sup>739</sup>

598. In fact, that parenthetical is self-evidently nothing more than a reference to the time at which the Condominium maps began to identify Abyei (and not an historical report). Moreover, the Government’s argument ignores the collection of villages, all clustered in the same area of a few hundred meters, described variously as “Abyia,” “Burakol” “Kwal Wad Arop’s” or “Kuol’s” village. The essential point is that, while eventually named and referred to on Condominium maps as “Abyei town,” the villages in this immediate area had historically been the center of the Ngok Dinka political, commercial and cultural life for generations.

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<sup>735</sup> Witness Statement of Deng Chier Agoth (Abyior elder), at p. 4, ¶21; Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶13; **Map 62** (Ngok Presence 1905).

<sup>736</sup> Witness Statement of Mijok Bol Atem (Diil elder), at p. 3, ¶11. *See also* **Map 62** (Ngok Presence 1905).

<sup>737</sup> GoS Reply Memorial, at para. 311.

<sup>738</sup> The very existence of this sketch illustrates that, even two decades after the transfer, the Sudan government had massive gaps in its knowledge of the Ngok lands.

<sup>739</sup> As evidence of Titherington’s purported knowledge, the GoS cites his works on the Raik Dinka, a completely different people to the Ngok.

c) The Government's Self-Serving Post-Independence Maps

599. Having failed to find any historical material to support its claims, the GoS turns to what it describes as “Map Evidence of Tribal Areas.”<sup>740</sup> The GoS's primary sources are three “tribal” maps which, while plainly self-serving, acknowledge considerably greater Ngok presence in the Abyei region than the GoS admits.

600. The GoS submits three maps of “Tribal Districts” at Figure 19 and GoS Reply Map 20 and GoS Reply Map 21. The GoS also submits, at Map 22a, a previously undisclosed political map of “Grazing Areas.” At best, this map reflects dry season grazing only (January to May) and even then is obviously, on its face incomplete. Figure 19 is not new and is discussed at paragraphs 1265 to 1266 of the SPLM/A Reply Memorial. It is a Native Administration map that places the Ngok well north of both the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga. In so doing, it directly contradicts the GoS's own case.

601. GoS Reply Map 20 purports to be a “Map of Tribal Districts,” which was produced by the Sudan Survey Department decades after the 1905 transfer. As such, the map is self-serving as the GoS was already seeking to Arabicize the whole of Sudan and marginalise the southern Sudanese tribes. Even so, the map again places Ngok Dinka well north of the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga. The map also correctly places the oil fields of Heglig clearly within Ngok Dinka territory, and clearly out to the ABC Experts' 29°32'15" E longitude eastern boundary of the Abyei Area.

602. A second point to note regarding the GoS Reply Map 20 is its location of the Twic (or Twij) Dinka. This tribe was transferred to Kordofan at the same time as the Ngok. Yet based upon its location in GoS Reply Map 20, it is clear that little if any of the Twic territory was ever north of any post-1905 provincial boundary between Kordofan and Bahr el Ghazal.

603. This contradicts the GoS's repeated claims that the provincial boundary between Bahr el Ghazal and Kordofan was clear both before and after the transfer and that the transfer area is contained within those two boundaries (i.e. a thin strip of land between the Kiir/Bahr el Arab and the current Kordofan/Bahr el Ghazal provincial boundary). If this were true, little if any of the Twic territory was ever actually transferred to Kordofan. This can be demonstrated by **SPLM/A Map 60**, which depicts every single cartographic representation of the Kordofan and Bahr el Ghazal “boundary” from 1910 to 1931 and where *not a single version* of the boundary comes even close to the Lol. Yet there is no question whatsoever that, at least for a period, the administration of the Twic was also transferred to Kordofan.<sup>741</sup>

604. GoS Reply Map 21 is a previously undisclosed 1927 “Map Showing Tribal Distribution in Kordofan Province” obtained from the Sudan Survey Department archives. This map is generally accurate in placing the Ngok in the Bahr region centred on the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga, with Abyei at its heart. The Humr, by contrast, are located well above 10°N latitude. The Twic are, again, located below the putative provincial boundary prior to their transfer back to Bahr el Ghazal in the late 1920s. Again, this indicates that none of the Twic areas were ever within Kordofan, though of course they were certainly administered by Kordofan Province for over 20 years.

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<sup>740</sup> GoS Reply Memorial, at paras. 368-380.

<sup>741</sup> SPLM/A Memorial, at paras. 351-353. See also SPLM/A Reply Memorial, at paras. 1307-1333, 1344-1360, 1400-1410; MENAS Expert Report, at paras. 93-163.

605. In sum, the Government almost completely ignores the cartographic evidence – dismissing it as “misleading.” When the Government does address this evidence, it selectively focuses on only a few post-1905 sketch maps (which are themselves selectively presented, with important sections not being disclosed).

606. The Government’s claim that a negative inference about the Ngok Dinka territory should be drawn because some Condominium maps did not record the presence of Ngok Dinka villages is nonsense. In fact, the Condominium administrators did not explore or map the “vast expanse” of the Abyei Area and, on the maps that they made, they often did not report local inhabitants. Particularly where the Government has not disclosed important sections of relevant maps, there are no grounds for drawing negative inferences of the sort suggested by the Government.

607. When the full cartographic record is considered, it shows clearly that a very large number of Ngok Dinka villages and *dugdugs* were observed and specifically located throughout the Bahr region, extending north to the *goz*, and that the Ngok Dinka territory was considered to extend throughout this same area. This can be seen from the numerous Ngok settlements shown on **Map 61**, submitted with SPLM/A’s Reply Memorial. It bears repetition that the maps referred to by the Government were prepared on the basis of dry season observations, which necessarily occurred when far fewer Ngok Dinka (and more Misseriya) were located in the areas surveyed. Despite that, the cartographic record provides extensive and consistent evidence that the Ngok Dinka were located throughout the Bahr region.

d) The SPLM/A “Ngok Dinka Chiefdoms 1905” Maps Accurately Reflect Contemporaneous Maps

608. The GoS Reply Memorial endeavors to counter the SPLM/A maps showing Ngok presence based on witness interviews with elders and chiefs from the community.<sup>742</sup> This work was supplemented in the SPLM/A Reply Memorial with the Community Mapping Report and the Ngok Presence Map (**Map 62**), both of which provide more comprehensive detail as to the presence of Ngok in or around 1905. Much of this detail is further corroborated by the GoS witnesses.

609. In an attempt to disprove this evidence, the GoS has inaccurately overlaid labels from pre-existing maps onto the Ngok Dinka Chiefdoms maps. This exercise is misleading for several reasons:

- a. the GoS’s cartographer appears to have elected to base the overlays on the latitudinal and longitudinal co-ordinates of the historic maps, which were grossly inaccurate, leading to a skewed result;
- b. the GoS’s cartographer has failed to align the tribal labels with the only geographic features present in the area – the river system (which, despite its vagueness and uncertainty, at least provided some form of bearing); and
- c. the GoS’s cartographer has been selective in its sources (which are already extremely limited and in any event based on dry season observations).

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<sup>742</sup> GoS Reply Memorial, at paras. 374-377.

The GoS's selective overlays, based on vague and often inaccurate labelling from some (but by no means all) of the available maps, do nothing to disprove Ngok presence in the areas identified by the Ngok community members.

8. The Government Almost Entirely Ignores the Environmental and Cultural Evidence

610. The SPLM/A Memorial detailed a range of environmental, climatic and other geographic evidence concerning the Bahr region and surrounding areas.<sup>743</sup> With minor exceptions, both the Government's Memorial and Reply Memorial almost completely ignore this evidence. Even where the Government's Memorial may have addressed some of those issues, in its Reply Memorial the GoS almost invariably abandons its earlier position (including on matters such as the direction of seasonal grazing patterns, the character of the Kiir/Bahr el Arab as a "physical barrier" and the character of the Ngol/Ragaba ez Zarga as a "seasonal creek").

611. The environmental and cultural facts provide an important and reliable body of evidence, which enables the Tribunal to test the parties' respective claims. Evidence regarding soil, climate, vegetation, cattle, crops, and the like is immutable and capable of verification; the same is generally true with regard to generally observable agricultural, housing, and similar practices of the Ngok Dinka and the Misseriya. When, as has occurred, the Government's purported claims repeatedly contradict the verifiable objective physical facts, the Tribunal is fully entitled both to reject those claims and to draw inferences regarding the overall credibility of the Government's claims.

612. As summarized in the SPLM/A Reply Memorial, the Government has ignored a substantial body of environmental, climatic and cultural evidence, including:

- a. the soil and climatic conditions of the Bahr region and the *goz*;<sup>744</sup>
- b. the adaptation of the Ngok Dinka agro-pastoral way of life to the soil and climate of the Bahr;<sup>745</sup>
- c. the Ngok sorghum is well-suited to the Bahr region, and parts of the *goz*, because it is "drought resistant"<sup>746</sup> – a distinct advantage given the region's climatic conditions;<sup>747</sup>
- d. the Ngok Dinka cattle were well-suited physically to the conditions and diseases of the region, particularly during the rainy season;<sup>748</sup>

<sup>743</sup> SPLM/A Memorial, at paras. 47, 69-105.

<sup>744</sup> See SPLM/A Memorial, at paras. 176-185.

<sup>745</sup> SPLM/A Memorial at paras. 89-105, 168-216, 1005-1014; SPLM/A Reply Memorial, at paras. 1115, 1312-1320; MENAS Expert Report, at para. 154 (and see generally at paras. 126-163).

<sup>746</sup> See S. Beswick, *Sudan's Blood Memory: The Legacy of War, Ethnicity, and Slavery in Early South Sudan* 92 (2004), **Exhibit-FE 12/18**; SPLM/A Memorial, at paras. 100-105, 1008-1009.

<sup>747</sup> See SPLM/A Memorial, at paras. 100-105; D. Cole & R. Huntington, *Between a Swamp and a Hard Place* 97 (1997) ("the Sorghum plant can survive periods of drought and heat that are fatal to other crops such as maize."), **Exhibit-FE 8/14**. See also MENAS Expert Report, at paras. 126-163 (in particular para. 152) confirming that both the soils of the Bahr region and parts of the *goz* (except in the dry season) are well vegetated including with pastures and amenable to crops. Furthermore, the cartographic evidence confirms the existence of perennial wells in the *goz*, which would support Ngok settlements even in dry season (when the cattle were further south): **Map 93** (Dar El Humr: Sheet 65 K, Survey Office, 1936 (rev. 1951 by Army Map Service)).

- e. the Ngok Dinka animal husbandry practices (e.g., constructing substantial cattle byres (*luaks* or *dugdugs*)) were adapted to protecting their livestock from the region's climate;<sup>749</sup>
- f. the soil in the area of Muglad is a non-cracking red clay intersected by numerous sand ridges (described as the "Baggara Repeating Pattern"),<sup>750</sup> ill-suited for agriculture;<sup>751</sup>
- g. the Misseriya engaged in little agriculture (thus having no reason to avail themselves of the fertile soil of the Bahr region),<sup>752</sup> with their only crop being millet, which was best grown in the sandier, drier soil near Muglad, rather than in the damper conditions of the Bahr region;<sup>753</sup>
- h. 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 facility for moving in the mud that Dinka cattle possess";<sup>754</sup> and
- i. the nomadic Misseriya herders and their lifestyle were best (and only) suited to the dry, sandy regions to the north of the *goz*.<sup>755</sup>

613. The Government's Reply Memorial devotes only passing attention to any of these objective facts. In his supplementary witness statement, Professor Cunnison critiques what he terms the SPLM/A submission that "because [the Ngok and Misseriya] cattle were physically different, their owners lived in entirely different areas and never mixed," concluding that it is "wide of the mark."<sup>756</sup> Professor Cunnison misinterprets the SPLM/A position.

- a. The SPLM/A did not suggest, as Professor Cunnison states, that the Misseriya and Ngok cattle "never mixed." That is a strawman, which the SPLM/A would not and did not suggest. In fact, as detailed in the SPLM/A submissions, it is accepted that the Misseriya come into the Bahr to graze with their cattle, which is the home of Ngok Dinka and their Dinka cattle.
- b. The SPLM/A did not suggest, as Professor Cunnison states, that "Dinka cattle are *ideally suited for all areas* whereas the Humr cattle cannot survive south of the *GoZ*."<sup>757</sup> That is another strawman, which the SPLM/A did not suggest.

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<sup>748</sup> See SPLM/A Memorial, at paras. 196-205.

<sup>749</sup> See SPLM/A Memorial, at paras. 196-205.

<sup>750</sup> See I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 16 n. 6 (1966), **Exhibit-FE 4/16**.

<sup>751</sup> See SPLM/A Memorial, at paras. 242, 1011; I. Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 10 (1960) ("nature of the [Misseriya's] land itself ... favours cattle rather than grain."), **Exhibit-FE 4/8**.

<sup>752</sup> See SPLM/A Memorial, at para. 234. See also Cunnison, *The Social Role of Cattle*, 1(1) Sudan J. Veterinary Science and Animal Husbandry 8, 9 (1960), **Exhibit-FE 4/8**; I. Cunnison, "Some Social Aspects of Nomadism in a Baggara Tribe" in *The Effect of Nomadism on the Economic and Social Development of the People of the Sudan*, Proceedings of the Tenth Annual Conference 11th-12th January 1962, at p. 109, **Exhibit-FE 4/11**.

<sup>753</sup> See SPLM/A Memorial, at paras. 233-237; I. Cunnison, *Baggara Arabs— Power and the Lineage in a Sudanese Nomad Tribe* 16, 23 (1966) (bulrush millet, which is grown by the Misseriya "almost to the exclusion of other crops, does best on sand"), **Exhibit-FE 4/16**.

<sup>754</sup> See I. Cunnison, "Humr and their Land," 35(2) SNR 50, 54 (1954), **Exhibit-FE 4/5**.

<sup>755</sup> See SPLM/A Memorial, at paras. 233-237.

<sup>756</sup> Witness Statement of Ian Cunnison, at p. 3, ¶6.

<sup>757</sup> Witness Statement of Ian Cunnison, at p. 2, ¶5.

614. What the SPLM/A did argue – and what neither the Government nor Professor Cunnison seek to rebut – is that the Dinka cattle are well-suited to their home in the damper conditions of the Bahr, while the Misseriya cattle are ill-suited for those conditions and are better suited to the more arid conditions to the north of the *goz*. Although not challenged by the Government, it bears emphasis that the fact that Dinka cattle are best suited to the Bahr region is well-settled and not subject to doubt.

615. Thus, Professor Barbour (upon whom GoS relies in its first Memorial) confirms this in his text on the regional geography of Sudan as follows:

*“So different are the physical requirements that the Baqqara cattle are quite distinct from those of the Dinka, and there is no incentive to trade them. The long-horned Nilotic cattle can tolerate flies but would not do well in the wooded country of the Arabs. The Arab beasts, on the other hand, find the flies and muddy soil almost intolerable, and are prized above all for speed of movement through the bush and for keeping up with the herd rather than wandering off on their own, where they may be lost or pulled down by a lion.”*<sup>758</sup>

616. Barbour also notes that:

*“[t]he period spent by the Bahr is hard, for the grasses provide poor fodder [for the Misseriya cattle], and as the months go by it becomes increasingly hard to find grazing within easy reach of water....With the coming of the rains the Arabs at once leave the wintering area, which soon become flooded, and move slowly back towards their home dars, while the cattle enjoy the fresh growth of grasses.”*<sup>759</sup>

A number of other authorities express the same position.<sup>760</sup>

617. The Government also attempts to portray that the Homr dry season camps were occupied for longer periods of time than the SPLM/A submissions described (lasting from January to April each year). The SPLM/A position was based on Cunnison’s published works, written shortly after he lived with the Misseriya, which described how the Misseriya dry season camps were occupied in the period from January to April.<sup>761</sup>

618. In this arbitration, Cunnison describes that the Homr “spent a substantial part of the year from early January to late May, in the region of the Bahr”,<sup>762</sup> instead of explaining that the Misseriya actually leave their dry season camps and head back to the Muglad when the rains come in April, as he does in his previously published work. In keeping with this attempt artificially to extend the Misseriya seasonal grazing in the Bahr region, three GoS witnesses claim that the Misseriya spend eight months of each year south of the Bahr el

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<sup>758</sup> K.M. Barbour, *The Republic of the Sudan – A Regional Geography* 166 (1961) (cited in Macdonald Report, at para. 3.27). K.M. Barbour was Professor of Geography at the University of Ibadan, Nigeria.

<sup>759</sup> K.M. Barbour, *The Republic of the Sudan – A regional Geography* 166 (1961) (cited in Macdonald Expert Report, at para. 3.27).

<sup>760</sup> See SPLM/A Memorial, at paras. 196-205.

<sup>761</sup> I. Cunnison, *Baggara Arabs - Power and Lineage in a Sudanese Nomad Tribe* 19-21 (1966), **Exhibit-FE 4/16**.

<sup>762</sup> Witness Statement of Ian Cunnison, at ¶5.

Arab.<sup>763</sup> This claim is clearly inconsistent with the facts, and with the other GoS witnesses who describe the total period of Misseriya seasonal grazing as lasting for substantially less time.<sup>764</sup>

619. There is no basis for the Government's artificial efforts to extend the perception of the length of time spent in the dry season camps. Professor Cunnison described the length of time that the Misseriya spent in their dry season camps contemporaneously, before the current dispute arose, as extending from January to April. The Government's recent efforts to extend this are transparently motivated by litigation tactics and seek to twist the facts. Cunnison notes in his previously published work that "in the Bahr lands [] rains fall early- in April-and at once attracts numerous insects; and the land has clay underfoot, which makes going difficult after the rains have started."<sup>765</sup> This confirms that the Misseriya could not easily remain in the Bahr after April even if they wanted to stay longer (or arrive before January).

620. The Government's Reply Memorial also either expressly or impliedly abandons virtually all of the other (ill-founded) claims that it made regarding the environmental and cultural evidence. Thus:

- a. The Government's Memorial claimed that the Kiir/Bahr el Arab was a "physical barrier" between the Ngok Dinka (and other Dinka tribes) and the Baggara.<sup>766</sup> In contrast, the Government's Reply Memorial abandons that proposition, which is never mentioned or sought to be defended.
- b. The Government's Memorial initially claimed that "in the wet season [Sultan Rob and the Ngok Dinka] went *south* to the River Lol, not *north*."<sup>767</sup> The Government's Reply Memorial now acknowledges that the Ngok Dinka, like other tribes in the area, went south in the dry season, not the wet season.<sup>768</sup>
- c. The Government's Memorial described "Ngok Dinkas" as "*a subsection of the Western Dinkas*."<sup>769</sup> That characterization and the sources that were used in connection with it were plainly wrong, as demonstrated in the SPLM/A Reply Memorial.<sup>770</sup> The mis-characterization is not repeated in the Government's Reply Memorial.
- d. The Government's Memorial claimed that "[t]he Ngok inhabited a relatively small group of Dinka villages."<sup>771</sup> That argument is nowhere mentioned in the

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<sup>763</sup> Witness Statement of Deng Balaiel Bahar Hamadean, at ¶6 ("*The eight months which the Messeriya spend south of the Bahr el Arab every year* is a period they spend on their land..."); Witness Statement of Al-Herika Osman Omer Mohamed, at ¶7 ("*We stay eight months of the year south of the Bahr el Arab...*"); Witness Statement of Abd Elgaleel Bakkar Ismail Elsakin, at ¶9 ("The Messeriya spend (8) months annually south of Bahr el Arab.").

<sup>764</sup> Witness Statement of Ian Cunnison, at ¶5 ("the Humr spent a substantial part of the year, from early January to late May, in the region of the Bahr"); Witness Statement of Salman Suliman el-Safi, at ¶5-7, which describes the Messeriya leaving Muglad in October and returning with the "first rains", which usually occur in April.

<sup>765</sup> I. Cunnison, *Baggara Arabs - Power and Lineage in a Sudanese Nomad Tribe* 19-21 (1966), **Exhibit-FE 4/16**.

<sup>766</sup> GoS Memorial, at para. 291.

<sup>767</sup> GoS Memorial, at para. 359 (emphasis added).

<sup>768</sup> GoS Reply Memorial, at para. 324 (citing R. Davies, *The Camel's Back* 130 (1957) in which Davies acknowledged that the Dinka moved "South into Bahr el Ghazal Province [in the dry season]").

<sup>769</sup> GoS Memorial, at para. 336.

<sup>770</sup> SPLM/A Reply Memorial, at paras. 1334-1343.

<sup>771</sup> GoS Memorial, at para. 337.

Government's Reply Memorial, no doubt because the Government's own evidence now identifies a substantial number of Ngok Dinka villages.

e. The Government's Memorial asserted that the "Ngok Dinka were a relatively small group," estimating that in 1905 they "might" have "numbered less than 5,000 in total."<sup>772</sup> The SPLM/A Reply Memorial and Professor Daly's Second Expert Report demonstrated that this was an entirely unsubstantiated claim and that the true figures for the Ngok Dinka population in 1905 were substantially larger.<sup>773</sup> The Government's Reply Memorial did not address the issue.

621. The Government's failure to address the environmental and cultural evidence is significant because the complementary relationships between the Ngok and the Misseriya and their respective environments corroborate their respective locations. Taken together, these factors – which are based on concrete and tangible physical facts or general cultural observations made long before the present dispute arose – firmly place the nomadic Misseriya in their headquarters in the arid region north of the *goz* and the Ngok permanent settlements predominantly in the wetter Bahr region south of the *goz*.

622. The Government's continued failure to address the environmental and cultural evidence is also of importance given the Government's approach to other evidence. As discussed elsewhere, the Government insists that oral witness evidence is unreliable (particularly if uncorroborated), that 19<sup>th</sup> century cartographic evidence is "misleading," and that post-1905 documentary evidence is largely or entirely irrelevant. None of the Government's positions makes sense; although the evidence must be considered with care, each of these sources of evidence provides valuable material, particularly when considered in conjunction with other categories of evidence.

623. In reality, the Government's position appears to be that the only evidence that is of any value is its own distorted reading of the Condominium documentary record – which it interprets as providing negative evidence proving that the Ngok Dinka were not located throughout the Bahr region. That approach to the Condominium documents is untenable – because the documentation is subject to obvious limitations that prevent the drawing of any such adverse inferences.

624. In truth, the Government's refusal to take into account most of the evidentiary record is motivated by an effort to ignore the real geographic locations, circumstances and cultures of both the Ngok Dinka and the Misseriya. Rather, the Government's position seeks artificially to truncate the evidentiary record, limiting it to a necessarily incomplete set of facts, in order to limit the extent of the Ngok Dinka territory.

625. It was precisely to avoid that result that the parties agreed upon the ABC Experts – in Sudanese history, anthropology, ethnography, politics, culture and population movements – to define the Abyei Area. The ABC Experts did so in a thorough and highly skilled manner and the Government's effort to replace that decision with an entirely artificial and contrived colonial boundary should be rejected out of hand.

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<sup>772</sup> GoS Memorial, at para. 339.

<sup>773</sup> SPLM/A Reply Memorial, at paras. 1368-1375.



9. The Government Makes No Claim that Any People Other than the Ngok Dinka Were Settled South of 10°35'N Latitude

626. It is notable that the Government's submissions in this arbitration (some 360 pages in total) never claim that anyone *other than* the Ngok Dinka had any permanent settlements between the Kiir/Bahr el Arab and 10°35'N latitude. Nor does a single document submitted by the GoS indicate the permanent presence of any people *other than* the Ngok Dinka in this region.

627. To the contrary, the GoS clearly presents the full extent of use of the area by other peoples at GoS Map 17. Map 17 is entitled "Homr *Dry Season Camps*, 1908." Eight dry season "camps" are marked on the map at Dawas, Goli, Abu Azala, Abu Eruf, Demsoi, Fagai, Mellum and Hasoba. Whatever the exact length of time spent in these dry season camps, it is obvious that they were not permanent settlements; indeed, as discussed above, the nomadic Misseriyas' only "homes" were in the region of Muglad.<sup>774</sup>

628. It is significant that the Government's case is effectively that *nobody* lived in either all or most of the Bahr region. Yet it is indisputable that this was a highly fertile territory, which supported both agriculture, cattle and wildlife.<sup>775</sup> Given that, it is hardly conceivable that this substantial tract of attractive land – with arid regions to the north, west and east – would have inexplicably remained uninhabited. On the contrary, it would have been inhabited by peoples with exactly the agro-pastoral life-style of the Ngok Dinka.

629. It is also significant that the Government's case also effectively would be that there was a 150 mile wide strip of uninhabited land between the Ngok Dinka and the Misseriya – with the Ngok Dinka confined "predominantly" beneath the Kiir/Bahr el Arab and the Misseriya based in Muglad and Babanusa. Again, that is an entirely implausible and improbable view of the world. In fact, as the Government's own evidence<sup>776</sup> and the Abyei Protocol<sup>777</sup> itself make clear, the Misseriya and Ngok Dinka interacted closely, in customarily defined and long-established ways, within the Abyei Area.

630. The Government's most recent suggestion that the Bahr region and Abyei Area was almost completely empty of Ngok Dinka is irreconcilable with the fact – accepted by both parties – that the Abyei Area was a territory where the Ngok Dinka and Misseriya met and mingled during the dry season. Indeed, with this perspective it becomes clearer why the Government initially sought to suggest that the Ngok Dinka migrated north in the dry season – in order to place them together with the Misseriya. That claim has been abandoned by the Government, however, leaving it with only the equally implausible claim that the Bahr was really entirely empty, save for the dry season camps of the Misseriya.

10. The Bahr el Arab Was Not, as a Matter of "General Repute" or Otherwise, the Dividing Line Between Black and Arab Tribes

631. The Government's Reply Memorial repeatedly claims that, "*as a matter of general repute [sic], the Bahr el Arab was well known prior to the [1905] transfer as the dividing*

<sup>774</sup> See above, at paras. 393, 440, 537.

<sup>775</sup> SPLM/A Memorial, at paras. 97-99, 178; SPLM/A Reply Memorial, at paras. 1307-1320.

<sup>776</sup> GoS Memorial, at paras. 387, 392, 396.

<sup>777</sup> Abyei Protocol, Art. 1.1.3, **Appendix C to SPLM/A Memorial**.

*line between Arab tribes to the north and Negroid tribes*, including the Dinka, to the south.”<sup>778</sup> This claim is both wrong and irrelevant.

632. The Government’s proposition is not correct as a factual matter – which is presumably the reason for the qualification that it was a “matter of general repute.” In fact, many black tribes (in addition to the obvious example of the Ngok Dinka), lived well to the north of the Kiir/Bahr el Arab. These included the Nuba, the Rueng Dinka and the Shilluk. Conversely, some Sudanese Arabs live to the south of the Kiir/Bahr el Arab.

633. Further, although the Ngok Dinka are part of the Dinka people, they are distinct in important respects from other Dinka tribes and “Negroid tribes.” That their geographical location, straddling the Kiir/Bahr el Arab as a bridge – rather than as a dividing line – is one such defining characteristic. This has been recognized by commentators, including Civil Secretary James Robertson. Robertson aptly described “Chief Kwal Arob of the Ngok Dinka [as living] in a buffer area between the Arabs and the great mass of the Dinka to the south.”<sup>779</sup>

634. In any case, whether or not it is a matter of general repute that the Kiir/Bahr el Arab was the dividing line between black and Arab tribes is irrelevant. The issue here is where the Ngok Dinka were actually located – not what “general” beliefs existed regarding some broad cultural boundary between black and Arab tribes.

*D. The Government’s Self-Serving Claims Regarding Oral Evidence Are Based on “Facile Assumptions” Regarding the Probative Value of Oral Tradition and Ignore the Factual Record*

635. The SPLM/A Memorial attached 26 witness statements, which corroborated and elaborated on the live oral testimony of nearly 70 witnesses during the ABC proceedings. As the SPLM/A Memorial explained, “[t]his witness testimony, from numerous different independent sources, containing extensive and authentic detail, confirms the extent of the Ngok Dinka occupation of the Abyei Area.”<sup>780</sup>

636. In contrast, the Government’s Memorial attached no witness evidence in support of its case (notwithstanding the Tribunal’s direction that both parties submit their full cases together with their first Memorial on December 17, 2008), other than one (three page) statement from Professor Cunnison. Instead, the Government has now belatedly submitted a number of witness statements together with its Reply Memorial, while also leveling a variety of complaints against the SPLM/A evidence.

637. The GoS’s main attack on the SPLM/A and witness evidence in its Reply Memorial argues that “oral tradition taken by itself has very limited value,”<sup>781</sup> that “[the] so-called evidence of oral tradition submitted by the SPLM/A is inherently flawed ...”<sup>782</sup> and that “their value is fundamentally vitiated by the fact that they were specially prepared for this litigation.”<sup>783</sup> As a result, the GoS concludes that “the so-called ‘evidence of oral traditions’

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<sup>778</sup> GoS Reply Memorial, at para. 522(i). See also GoS Reply Memorial, at paras. 401, 405, 427.

<sup>779</sup> J. Robertson, *Transition in Africa: From Direct Rule to Independence* 50 (1954), **Exhibit-FE 5/10**.

<sup>780</sup> SPLM/A Memorial, at para. 46.

<sup>781</sup> GoS Reply Memorial, at para. 35.

<sup>782</sup> GoS Reply Memorial, at para. 41.

<sup>783</sup> GoS Reply Memorial, at para. 41. The Government concludes generally that “evidence of oral tradition will only be useful – and can only have any probative value – if it confirms or corroborates the contemporary written record.” GoS Reply Memorial, at para. 45.

produced by the SPLM/A is useless.”<sup>784</sup> The Government also makes five specific complaints regarding the SPLM/A witness statements: (a) “[they] refer to past events to which the witnesses cannot personally testify;”<sup>785</sup> (b) “[they] concern time periods which have no bearing on the year 1905;”<sup>786</sup> (c) “[they] are vague as to the specific territory to which they refer;”<sup>787</sup> (d) [they] are not corroborated by contemporaneous evidence;”<sup>788</sup> and (e) “[they] are provided by interested parties.”<sup>789</sup>

638. For the reasons set forth below, the Government’s various criticisms of witness evidence and ‘oral traditions’ are specious. They contradict both the law and common sense, and confirm the Government’s reluctance for this Tribunal to consider the real facts surrounding the Abyei Area (which expose the baseless character of the Government’s factual claims).

1. The Government’s Reliance on Out Dated Historical Methodology to Criticize the Use of Oral Evidence is Groundless and Would Improperly Limit the Tribunal’s Fact Finding Capabilities

639. The sweeping statements made by the Government concerning the value of oral evidence ignore a substantial body of authority endorsing the use of oral ‘histories’ and ‘traditions’ in disputes such as the present one. These authorities include those relied on by the GoS (which are selectively presented and seriously distorted). The Government’s position not only ignores these authorities but would also seriously compromise this Tribunal’s own fact-finding authority.

640. In general, the GoS’s position with regard to oral evidence betrays (to quote one of the Government’s own authorities) a “facile assumption[] based on Eurocentric traditions of gathering and passing on historical facts and traditions.”<sup>790</sup> Contrary to the Government’s unsubstantiated assumptions, oral traditions are sometimes the best (and only) means of recording historical facts and a categorical rejection of those traditions and of oral evidence interferes with the accuracy of the fact-finding process.

641. Moreover, the Government’s sweeping criticisms of oral evidence contradict the Tribunal’s evidentiary powers, which grant it broad discretion to consider the weight and credibility of all evidence submitted by the parties. Thus, as Article 25(6) of the PCA Rules provides, “[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.”<sup>791</sup> The Government’s categorical claims that oral evidence and traditions must be wholly disregarded contradicts and would improperly constrain the Tribunal’s evidentiary authority.

642. The Government’s categorical claims about oral evidence and traditions are also wrong. The primary authority cited for the Government’s sweeping criticisms of oral evidence is the 1961 edition of a work by Mr. Jan Vansina, an historian.<sup>792</sup> What the Government fails to say is that the edition of this author’s work relied on by the Government

<sup>784</sup> GoS Reply Memorial, at para. 46.

<sup>785</sup> GoS Reply Memorial, at paras. 48-53.

<sup>786</sup> GoS Reply Memorial, at paras. 54-56.

<sup>787</sup> GoS Reply Memorial, at paras. 57-59.

<sup>788</sup> GoS Reply Memorial, at paras. 60-62.

<sup>789</sup> GoS Reply Memorial, at paras. 63-65.

<sup>790</sup> *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911, ¶34 (Supreme Court of Canada) (2001), **Exhibit-LE 40/4** (referred to in GoS Reply Memorial, at paras. 43-44).

<sup>791</sup> PCA Rules, Art. 25(6), **Exhibit-LE 29/15**.

<sup>792</sup> See GoS Reply Memorial, at paras. 35-41.

has been replaced in its entirety by a new and very different edition. As the author himself explains in the Preface to the 2006 reprint of the 1961 edition:

“[A]s a result of a plethora of subsequent research by many scholars in fields ranging from folklore and performance studies to social anthropology, sociology, and history, **many specifics in this book [the 1961 edition] have been shown to be inadequate renderings or oversimplifications of the phenomenon we call oral tradition. Hence I did replace [the book] in 1985 by *Oral Traditions as History* (University of Wisconsin Press, 1985), a work that should itself now be complemented by the results of more recent research.**”<sup>793</sup>

643. The 1985 edition that “**replaced**” the text relied on by the Government makes no reference to any of the matters quoted by the Government in its Reply Memorial, in particular to the “comparative method.”<sup>794</sup> Indeed, Mr. Vansina concludes his 1985 treatise with a Chapter entitled “***The Uniqueness of Oral Tradition***” in which he states (and it is worth quoting in full):

“In applying the rules of evidence to oral traditions we have constantly questioned the reliability of the information they yield. Superficially, this leads to gloomy conclusions because cases of unreliability are piled one onto the other. One should remember however, that not all traditions automatically are unreliable, even though all have limitations. And one should temper this critical approach with a realization of what oral traditions can contribute. The genres of oral tradition in oral societies are as diverse as those of documents in a literate one. Their contents range over all aspects of human activity from demographic data of various sorts to data about art. Their range is wider than that of documents in most literate societies and includes the evidence which oral history there unearths. For the near past, there are also great quantities of oral tradition, so great that they seem to be limitless. The number tapers off very quickly further than a generation before the eldest living members of the community. The time depth may be shallow, but there is great wealth of data for it. Even earlier, going backwards to a century, the amount of data remains substantial, and testifies to human endeavors in most fields. It is only for remote times that the stream of tradition becomes a trickle. Then just a few topics remain themes for oral performances. ***The quantity and diversity of oral tradition should not be underestimated, nor disdained because most of this traditional wine is young. One cannot emphasize enough, however, that such sources are irreplaceable, not only because information would otherwise be lost, but because they are sources “from the inside.” In oral and part-oral societies, oral tradition gives intimate accounts of populations, or layers of population, that are otherwise apprehended only from outside points of view. Writings by foreigners or by outsiders have their own biases. They select their own topics of interest, which they follow in attributing various***

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<sup>793</sup> See J. Vansina (translated from the French), *Oral Tradition: A Study in Historical Methodology* Preface (x) (1961, reprinted 2006), **Exhibit-LE 40/5**.

<sup>794</sup> GoS Reply Memorial, at paras. 35, 36-38. That is not to say that the author considers the “comparative method” no longer of any value. However, the author relied on by the Government says in his replacement work on this subject that “[t]he limitations of oral tradition must be fully appreciated so that it will not come as a disappointment that long periods of research yield a reconstruction that is still not very detailed. What one does reconstruct from oral sources may well be of a lower order of reliability, when there are no independent sources to cross-check, and when structuring or chronological problems complicate the issues. This means that particular research questions remain unsettled for much longer periods of time than when a reconstruction rests on massive and internally independent written evidence. It will take longer to achieve results that are reliable because they are confirmed by other sources. ***This is no reason to neglect oral traditions, or to denigrate them.***” See J. Vansina, *Oral Tradition As History* 199-200 (1985), **Exhibit-LE 40/6** (emphasis added).

*activities and qualities to the populations they describe, and their interpretations are shaped through their biases.*”<sup>795</sup>

It hardly requires further discussion to demonstrate that the Government’s selective reliance on an out-dated work, replaced by its own author’s later publications, provides no basis for rejecting valuable evidence.

644. Nevertheless, the Government’s reliance on these sources in legal proceedings and in isolation from the overwhelming weight of legal authority on this issue is inapposite and misleading. As will be seen from the *legal* authorities on this subject, reviewed in detail below (which the Government’s authorities do nothing to alter), oral tradition plays a “*crucial role*”<sup>796</sup> in courts and tribunals when considering tribal and other indigenous peoples’ claims to land and other rights. As noted in a leading authority:

*“the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.”*<sup>797</sup>

645. In adopting its categorical rejection of oral evidence and traditions, the GoS ignores the varied, but no less probative, manner in which tribal people throughout the world have passed on their history from generation to generation. Thus, the Government rests its assertions on the value of oral tradition on inapposite (and outdated) authorities that do not concern the use of and reliance on oral tradition of tribal and other indigenous peoples in legal proceedings such as the present one.

## 2. The Government Ignores and Distorts the Use of Oral Traditions and Evidence in National Court Proceedings

646. The Government also ignores and distorts the use of oral traditions and other oral evidence in comparable circumstances in national courts. In these settings, oral traditions are specifically endorsed as valuable and credible evidence.

647. Thus, in one of the landmark decisions on the importance of oral traditions as evidence, the Supreme Court of Canada, in relying extensively on oral tradition and histories to establish the traditional rights of native inhabitants to sell fish, held that:

*“A court should approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions and customs engaged in. **The courts must not undervalue the evidence presented by aboriginal claimants simply***

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<sup>795</sup> J. Vansina, *Oral Tradition As History* 197 (1985), **Exhibit-LE 40/6**. Parenthetically, it is also worth observing that in a summary of this text, it is noted that “[t]his new book does not bother, as the old one did, to argue with now obscure historians about the validity of using oral evidence.” See J. Vansina, *Oral Tradition As History* Cover page comment of “Terence Ranger, Professor of Modern History, University of Manchester” (1985), **Exhibit-LE 40/6**.

<sup>796</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶84 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7**.

<sup>797</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶87 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7**.

*because that evidence does not conform precisely with the evidentiary standards applied in other contexts.*<sup>798</sup>

648. In a similar case, the Supreme Court of Canada, applying this reasoning, acknowledged the “*crucial role [of oral histories] in the litigation of aboriginal rights.*”<sup>799</sup> The Court reversed a lower court decision which refused to give any evidential weight to oral history concerning the boundaries of certain ancestral homelands on the grounds (paralleling those advanced here by the GoS) that it was hearsay; instead, the Supreme Court ordered a new trial in which the oral history had to be considered by the trial judge as evidence of those boundaries.<sup>800</sup> The Supreme Court expressed grave concern that unless such evidence was considered, “a society with such an oral tradition would never be able to establish a historical claim through the use of oral history in court.”<sup>801</sup>

649. The Supreme Court of Canada went on to hold that a court charged with establishing tribal rights must:

“adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. *In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.* Given that the aboriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, *those histories play a crucial role in the litigation of aboriginal rights.*”<sup>802</sup>

650. In the same decision, the Supreme Court declared that:

“[n]otwithstanding the challenges created by the use of oral histories as proof of historical facts, *the laws of evidence must be adapted in order that this type of*

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<sup>798</sup> *R. v. Van der Peet* S.C.R. 507, 510 (Supreme Court of Canada) (1996), **Exhibit-LE 40/8**. In the same case, the court regarded as “conclusive” the largely oral evidence establishing that the fishery had been used “over many centuries” not just for food and ceremonial purposes but for other needs as well. See *R. v. Van der Peet* S.C.R. 507, 519 (Supreme Court of Canada) (1996), **Exhibit-LE 40/8** (emphasis added).

<sup>799</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶84 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7** (emphasis added).

<sup>800</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶¶107-108 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7**.

<sup>801</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶106 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7** (emphasis added). The Court criticized the lower court judge for ignoring the “fundamental principle” contained in *Van der Peet* that “the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.” *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶¶105-106 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7**. The Court said: “Although he framed his ruling on weight in terms of the specific oral histories before him, in my respectful opinion, the trial judge in reality based his decision on some general concerns with the use of oral histories as evidence in aboriginal rights cases. In summary, the trial judge gave no independent weight to these special oral histories because they did not accurately convey historical truth, because knowledge about those oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed. However, as I mentioned earlier, these are features, to a greater or lesser extent, of all oral histories, not just the adaawk and kungax. *The implication of the trial judge’s reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in Van der Peet that trial courts interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims.*” See *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶98 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7** (emphasis added).

<sup>802</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶84 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7** (emphasis added).

*evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples. ...*<sup>803</sup>

651. The Inter-American Court on Human Rights has followed the Canadian Supreme Court's lead, regularly admitting into evidence and relying on the oral traditions of tribal peoples. In one of the leading decisions of the Inter-American Court, *The Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua*, the Awas Tingni relied almost exclusively on oral tradition to support its claims to traditional use and occupation of its lands (consisting of verbal history as well as community map evidence developed by the community itself with the help of an anthropologist, Dr. Theodore Macdonald).<sup>804</sup>

652. In its judgment, the Court noted that the report of Dr. Macdonald had been subjected to criticism because it "favored oral sources and did not compare them to archaeological sources" and because it "was inconclusive regarding the ancestral nature of occupation of the area claimed."<sup>805</sup> Nevertheless, the Court admitted Dr. Macdonald's disputed report and maps into evidence.<sup>806</sup> In addition, it is clear that the Court, while not specifically discussing the evidentiary weight to be attached to the oral evidence, found it to be conclusively persuasive. In upholding the Awas Tingni's claims,<sup>807</sup> the Court specifically stated that "[t]he only evidence that can be used to determine the existence of the Community before 1990 is oral tradition."<sup>808</sup>

653. It is also noteworthy that the Inter-American Court rejected Nicaragua's argument that the "Awas Tingni could not claim an ancestral entitlement to land because the existence of the Community's village at its present location dates back only to the 1940s; the area claimed by the Community is too large in proportion to the Community's membership; and,

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<sup>803</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶87 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7**. The Federal Court of Australia has adopted the view expressed in this case. See *Ben Ward v. Western Australia* [1998] FCA 1478, at p. 36 (Judgment of 24 November 2008) (Federal Court of Australia) ("In a proceeding in which native title is in issue any rules of evidence applied to the proceeding must be cognisant of the evidentiary difficulties faced by Aboriginal people in presenting such claims for adjudication and the evidence adduced must be interpreted in the same spirit, consistent with the due exercise of the judicial power vested in the Court under the Constitution. (See: *Delgamuukw* per Lamer CJ at 230.) ... ***Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localized in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice.*** (See: *Delgamuukw* per Lamer CJ at 238-239)", **Exhibit-LE 41/1** (emphasis added).

<sup>804</sup> See Anaya & Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 Ariz. J. Int'l & Comp. L. 1, 5 (2002), **Exhibit-LE 41/2**; *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, Inter-Am.Ct.H.R. Ser. C No. 76, at p. 15 under Part B, Heading (c) "Testimony of Theodore Macdonald Jr., anthropologist," **Exhibit-LE 41/3**.

<sup>805</sup> *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, Inter-Am.Ct.H.R. Ser. C No. 76, at p. 36 **Exhibit-LE 41/3**.

<sup>806</sup> *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, Inter-Am.Ct.H.R. Ser. C No. 76, at pp. 37-38, ¶93 **Exhibit-LE 41/3**.

<sup>807</sup> *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, Inter-Am.Ct.H.R. Ser. C No. 76, at p. 59, ¶153 *et seq.* and Part B (affirming Awas Tingni's rights to lands they "currently inhabit" and in "Oral and expert evidence", describing Awas Tingni's historical use and occupancy of the claimed area), **Exhibit-LE 41/3**.

<sup>808</sup> *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, Inter-Am.Ct.H.R. Ser. C No. 76, at p. 17, **Exhibit-LE 41/3**.

neighboring indigenous communities have rights to at least parts of the same area”<sup>809</sup> in deciding in favor of the Awas Tingni.<sup>810</sup> As one commentator notes:

“It was never in dispute that the people of Awas Tingni moved their principal village to its present location in the 1940s. However, as the evidence presented by the Commission demonstrated, *the Community moved from a location a short distance away within a contiguous territory that includes both the older and newer settlements and that corresponds with a pattern of land use and occupancy that dates back generations.*”<sup>811</sup>

654. In other national courts where various claims of native peoples have been considered, courts have consistently placed significant weight on the value of oral tradition in determining in favor of their claims.<sup>812</sup> Needless to say, these authorities provide much more relevant, direct attestation to the credibility and value of oral traditions and oral evidence than the outdated historical materials cited (selectively) by the Government. The failure to acknowledge or disclose these advances in law and practice is a regrettable attempt by the

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<sup>809</sup> Anaya & Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 Ariz. J. Int'l & Comp. L. 1, 9, 10 (2002) (The author notes that the Government did “not present any specific proof of any land entitlement on the part of neighboring communities ...; although it was undisputed that those communities do assert claims, on the basis of traditional use patterns, to parts of the same land claimed by Awas Tingni.”), **Exhibit-LE 41/2**; see also *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, Inter-Am.Ct.H.R. Ser. C No. 76, at pp. 56-57, ¶141(d) and (g), **Exhibit-LE 41/3**.

<sup>810</sup> *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, Inter-Am.Ct.H.R. Ser. C No. 76, at p. 59, ¶153, **Exhibit-LE 41/3**.

<sup>811</sup> Anaya & Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 Ariz. J. Int'l & Comp. L. 1, 9 (2002), **Exhibit-LE 41/2** (emphasis added).

<sup>812</sup> See, e.g., *Aurelio Cal on behalf of the Maya Village of Santa Cruz v. A.G. Belize* Claim No. 171 of 2007 Consolidated Claims, ¶62 (Supreme Court of Belize) (2007) (“Moreover, from the facts in this case, I am satisfied that extensive documentary evidence, expert reports *and Maya oral tradition*, establish that the Maya communities presently in Southern Belize exist in areas that had formed part of the ancestral and historic territory of the Maya people since time immemorial, and certainly since prior to Spanish and later British assertions of sovereignty”), **Exhibit-LE 41/4** (emphasis added); *Alexcor Ltd v Richtersveld Community* [2003] 12 B.C.L.R. 1301, ¶¶52-53 (Constitutional Court of South Africa) (2003) (noting the requirement that courts take into account “indigenous law” and noting that “[i]n applying indigenous law, it is important to bear in mind that, unlike common law, *indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation.* It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community.”), **Exhibit-LE 41/5** (emphasis added); *In The Matter Of The Boundaries Of Pulehunui*, 4 Haw. 239, 1 (Supreme Court of the Kingdom of Hawai'i) (October 1879) (quoting from the Court's syllabus: “A survey made ex parte and not supplemented by evidence is of no more value as evidence than the opinion of the surveyor as to the boundaries of a land. *In a case of this character, the testimony of Kamaainas who were born and brought up on the land in question, and who were able to describe and name the localities along the boundary given by them, is to be highly regarded.*”) 8 (rejecting modern map and survey evidence and relying entirely on witness testimony in determining an ancient boundary, the Court held: “It thus appearing that the decision of the case must depend on the testimony submitted at the first trial, we make what further examination of it is necessary, briefly, for we have already indicated in our preliminary observations the controlling principles in such cases. Looking at the testimony of Homai, Kalama, Imihia and Kekoa, we find that they are all of the class of men called kamaaina born and having spent all their lives on Pulehunui or the next lands, *who, therefore, have a reason to profess a knowledge of the ancient, traditional lines of boundary.*”), 9 (“we may say that, taking all things together, *[the witnesses'] means of knowledge, their consistency with each other, and the intrinsic character of their statements, we are compelled to adopt the line made by the petitioner's witnesses.* We should disregard the most convincing testimony to take the other view. The great weight of the testimony is on the side of the petitioner. Even the appellant's witnesses are more consistent with that boundary than with the cut off line.”), **Exhibit-LE 41/6** (emphasis added); *Ben Ward v. Western Australia* [1998] FCA 1478, at pp. 48 *et seq.* (Judgment of 24 November 2008) (Federal Court of Australia) 57-58 (“describing as “impressive” the “primary” oral evidence received in respect of the applicants' claims, and stating (in finding in favour, for the most part, of the claims made): “Having due regard to the difficulties they faced, and interpreting the evidence with consciousness of the special nature of Aboriginal claims, I found the ‘primary’ witnesses ... to be convincing in their description of connection to land and acknowledgement of traditional practices. ... Evidence of an organized community which observed traditional practices, laws or customs was most convincing.”), **Exhibit-LE 41/1**.



Government to bring the Tribunal back to a time where states maintained control over coveted tribal lands precisely by denying the existence and validity of the customary laws and oral traditions from which their aboriginal rights to land arose.

3. The Government's Four Objections to the Ngok Dinka Witness Statements Are Unsustainable

655. The GoS Reply Memorial also attempts to attack the specific oral evidence provided by the Ngok Dinka community members. The Government argues that there are five reasons why no weight whatsoever should be given to the witness statements of this particular group of witnesses, above and beyond its global critique of all oral evidence. None of these five "reasons" provides any basis to disregard the testimony of the peoples who are the subject of the Abyei Protocol and the definition of whose lands is the sole purpose of these (and the ABC) proceedings.

- a) The Government's Objections to the Ngok Dinka Witness Statements on the Ground that They Refer to Past Events to Which the Witnesses Cannot Personally Testify Are Baseless

656. The Government argues that, "[g]enerally speaking, hearsay evidence should be excluded and witnesses should testify only about matters within their knowledge."<sup>813</sup> The Government reasons that because the SPLM/A witnesses "recall a distant past of which they only have a very indirect knowledge,"<sup>814</sup> this vitiates any probative value of the witness testimony. The Government's argument is culturally blinkered and ignores the character of the tribal histories, as well as established international practice.

657. First, and contrary to the Government's claims, a leading author on evidence before international tribunals observes that, "[g]enerally speaking, there are no rules in international judicial procedure against the admission of hearsay evidence, that is, evidence not based on personal observation."<sup>815</sup> The same author notes that "questions raised concerning hearsay evidence before international tribunals have been directed, in the main, to its value rather than to its admission."<sup>816</sup>

658. More specifically in the context of hearsay evidence involving tribes whose culture is based on oral tradition, a leading author notes:

"Indigenous peoples possess unique knowledge about the lands and resources that they have traditionally occupied or used, and to which they accordingly have rights under their own legal systems, as well as under domestic and international law. ... An increasing number of state legal systems now recognize indigenous peoples' oral history and their own documentation and mapping of their lands as evidence in legal proceedings determining land rights."<sup>817</sup> ... ***"Indigenous peoples' own knowledge will, in most instances, provide the most reliable proof of the existence of property rights entitled to protection under a state's legal system. ... Neither the international system, nor individual states should deny an indigenous groups' claimed property rights in land by excluding or ignoring evidence derived from the***

<sup>813</sup> GoS Reply Memorial, at para. 52.

<sup>814</sup> GoS Reply Memorial, at para. 50.

<sup>815</sup> D. Sandifer, *Evidence Before International Tribunals* 368 (Revised Edition 1975), **Exhibit-LE 41/7**.

<sup>816</sup> D. Sandifer, *Evidence Before International Tribunals* 369 (Revised Edition 1975), **Exhibit-LE 41/7**.

<sup>817</sup> Anaya & William Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System* 14 Harv. Hum. Rts. J. 33, 46 (2001), **Exhibit-LE 41/8**.

***culture and traditions of the indigenous group or community itself. To do so would be to perpetuate a long history of discrimination against indigenous peoples with regard to their modalities of possession and use of lands and natural resources.***<sup>818</sup>

659. Similarly, in the context of native title claims in Australia, it has been noted that:

“Courts hearing applications under the [Native Title Act of Australia] will not be bound by the rules of evidence. Therefore, video evidence, group evidence and evidence of oral tradition not normally permissible by reason of the rule against hearsay, along with other unconventional forms of evidence characteristic of land claim hearings, may be entertained by the courts.”<sup>819</sup>

Contrary to the Government’s claims, international and national tribunals have consistently, and rightly, rejected arguments that oral traditions and tribal histories should be ignored. On the contrary, specifically recognizing the unique value of such evidence, and the general paucity of other forms of evidence in many such cases, international and national tribunals have insisted upon the admissibility of oral traditions and tribal histories as a vitally important source of proof.

660. Second, the Government cites a scattered assortment of authorities that purportedly show that international tribunals will disregard evidence if it is given in relation to events that took place before the time of the witness in question.<sup>820</sup> Neither of the decisions relied on by the GoS for this proposition deals with the question of oral tradition or tribal history and neither is therefore relevant to the issues in dispute. Likewise, the one article referred to by the Government<sup>821</sup> ignores the body of both domestic and international case law on the admissibility of such evidence (discussed above). That body of case law consistently holds that considerable weight is to be attached to oral tradition as a valuable form of evidence.<sup>822</sup>

661. Finally, as noted above, oral tradition is widely recognized as playing a “***crucial role***” in claims regarding the rights and property of tribal and other indigenous peoples.<sup>823</sup> As already noted above, both domestic and international courts presented with questions about the use of oral tradition consistently hold that:

“[n]otwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this ***type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with which largely consists of historical documents.***”<sup>824</sup>

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<sup>818</sup> Anaya & William Jr., *The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System* 14 Harv. Hum. Rts. J. 33, 47 (2001), **Exhibit-LE 41/8** (emphasis added).

<sup>819</sup> Fitzgerald, *Proving Native Title: A Critical Guide* [1995] Ab. Law Bul. 35, 7 (1995), **Exhibit-LE 41/9**.

<sup>820</sup> GoS Reply Memorial, at paras. 50 (quoting “Dubai-Sharjah Border Arbitration, 91 *I.L.R.* 543, at p. 590.”) and 51 (quoting “Kamto, M., “Les Moyens de preuve devant la Cour internationale de justice à la lumière de quelques affaires récentes portées devant elle” (2006) 49 *German Yearbook of International Law*, p. 283.” referring to the decision in “Frontier Dispute (Benin-Niger), *I.C.J. Reports 2005*, p. 90, at para. 80.”).

<sup>821</sup> GoS Reply Memorial, at para. 51 (quoting “Kamto, M., “Les Moyens de preuve devant la Cour internationale de justice à la lumière de quelques affaires récentes portées devant elle” (2006) 49 *German Yearbook of International Law*, p. 283”).

<sup>822</sup> See above at paras. 646-654.

<sup>823</sup> See above at paras. 644, 646-654.

<sup>824</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶87 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7**.

662. It is clear that oral tradition, and the temporal distance of the witness to the relevant events, presents unique problems in the assessment of evidence. As one of the Government's own authorities notes, "the value of oral tradition, ... could present unique challenges to making sense of what went before."<sup>825</sup> In addition, however, the author concludes (in passages not referred to or exhibited by the Government) that the passage of time does not vitiate the quality of the evidence:

"Oral history in numerous Aboriginal groups is conveyed through interwoven layers of culture that entwine to sustain national memories over the lifetime of many generations"<sup>826</sup> and

*"oral traditions can remain quite consistent through generations of time and thus be reliable for providing a good explanation of past events."*<sup>827</sup>

This view is entirely consistent with the body of growing case law in this area, which consistently calls for the recognition of the history of tribal and other indigenous peoples recorded by way of oral tradition.<sup>828</sup>

- b) The Government's Objections to the Ngok Dinka Witness Statements on the Ground that They Concern Later Time Periods Is Groundless

663. The GoS argues that "[i]n past sovereignty or boundary disputes where State parties have relied on the oral traditions of local populations in support of their claims and allegations, when oral tradition was considered and assessed by the Court of arbitrators, no weight was given to the allegations regarding a different period than that relevant to the dispute."<sup>829</sup> In three paragraphs, the Government attempts to argue that the SPLM/A witness evidence is "useless" because it refers to a time period later than 1905.<sup>830</sup> This argument is frivolous and has no place in these proceedings.

664. The Government's claims have been addressed in paragraphs 558 to 569 of the SPLM/A Reply Memorial. There, the SPLM/A made clear that reference to post-1905 events was relevant both "because of the "continuity" in Ngok Dinka settlements during much of the 20<sup>th</sup> century"<sup>831</sup> and because post-1905 matters were specifically raised by the Government itself during the proceedings before the ABC.<sup>832</sup>

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<sup>825</sup> Borrows, *Listening for Change: the Courts and Oral Tradition* 39 Osgoode Hall Law Journal 1, 5 (2001), **Exhibit-LE 41/10**.

<sup>826</sup> Borrows, *Listening for Change: the Courts and Oral Tradition* 39 Osgoode Hall Law Journal 1, 8 (2001), **Exhibit-LE 41/10**.

<sup>827</sup> Borrows, *Listening for Change: the Courts and Oral Tradition* 39 Osgoode Hall Law Journal 1, 10 (2001), **Exhibit-LE 41/10**.

<sup>828</sup> See also for examples of cases in which oral evidence has been relied on, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7**; *Aurelio Cal on behalf of the Maya Village of Santa Cruz v. A.G. Belize* Claim No. 171 of 2007 Consolidated Claims, (Supreme Court of Belize) (2007), **Exhibit-LE 41/4**; *Alexcor Ltd v Richtersveld Community* [2003] 12 B.C.L.R. 1301, ¶¶52-53 (Constitutional Court of South Africa) (2003), **Exhibit-LE 41/5**; *In The Matter Of The Boundaries Of Pulehunui*, 4 Haw. 239, 1 (Supreme Court of the Kingdom of Hawai'i) (October 1879), **Exhibit-LE 41/6**; *R. v. Van der Peet* S.C.R. 507, 519 (Supreme Court of Canada) (1996), **Exhibit-LE 40/8**; *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of 31 August 2001, Inter-Am.Ct.H.R. Ser. C No. 76, at p. 36 **Exhibit-LE 41/3**.

<sup>829</sup> GoS Reply Memorial, at para. 55.

<sup>830</sup> GoS Reply Memorial, at paras. 54-56.

<sup>831</sup> SPLM/A Reply Memorial, at para. 558.

<sup>832</sup> SPLM/A Reply Memorial, at para. 565.

665. The Government ignores the fact that, while the decisive time period here was 1905 (and the immediately surrounding years), there is also substantial evidence that the locations of the Ngok Dinka and the Misseriya did not significantly alter during the decades after 1905. That principle of “historical continuity” is recognized by both the ABC Experts (who included leading historical and ethnographic authorities on Sudan and Africa),<sup>833</sup> by Professor Cunnison,<sup>834</sup> former District Commissioner Tibbs,<sup>835</sup> and by a number of other authorities.<sup>836</sup> Indeed, the Government’s Reply Memorial does not appear to dispute the principle, relying extensively on post-1905 materials.<sup>837</sup> It is for this reason, now recognized by the Government as it was recognized by the ABC themselves, that both parties, as well as the ABC Experts, refer to events *post-dating* 1905 as evidence of matters that took place *in* 1905.<sup>838</sup> This is perfectly legitimate and sound historical analysis and practice. Indeed, it is the kind of documentary or testimonial cross-referencing that the Government elsewhere criticizes the Ngok Dinka witness statements for supposedly lacking.<sup>839</sup>

666. Of course, considering evidence that either *pre-dates* or *post-dates* the “critical date” is not prohibited. As the Government’s own authority on this point explains:<sup>840</sup>

“Events occurring before the critical date have substantive value. ... Events occurring after the critical date have only an evidentiary and probative value. ... *Their admissibility is dependent on whether they are in continuation of, or may effectively throw light on, the substantive events anterior to the critical date. Hence subsequent facts are admissible ... but only indirectly and to corroborate and explain the probative events occurring before the critical date.*”<sup>841</sup>

<sup>833</sup> ABC Report, Part I, at p. 43 (citing Cunnison, Appendix 4.3, pp. 160-162; Tibbs, Appendix 4.3, pp. 158-160), **Appendix B to SPLM/A Memorial**.

<sup>834</sup> SPLM/A Reply Memorial, at para. 1074; I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 26 (1966) (“[t]he way in which the tribal sections move seems not to have varied much since the Reoccupation.”), **Exhibit-FE 4/16**.

<sup>835</sup> Witness Statement of G. Michael Tibbs, p. 6, ¶27. (“In making this statement I should note that I believe the descriptions I give of the Humr and Ngok Dinka areas within the province to have existed for some considerable time prior to my arrival in Kordofan, with the obvious exception of the increased Humr cultivation of cotton particularly at Nyama and Subu.”).

<sup>836</sup> See e.g., Anaya & Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 Ariz. J. Int’l & Comp. L. 1, 9 (2002) (“It was never in dispute that the people of Awas Tingni moved their principal village to its present location in the 1940s. However, as the evidence presented by the Commission demonstrated, *the Community moved from a location a short distance away within a contiguous territory that includes both the older and newer settlements and that corresponds with a pattern of land use and occupancy that dates back generations.*”), **Exhibit-LE 41/2** (emphasis added); Goldie, *The Critical Date*, 12 Int’l & Comp. L.Q. 1251, 1254 (1963) (“Events occurring before the critical date have substantive value. ... Events occurring after the critical date have only an evidentiary and probative value. ... Their admissibility is dependent on whether they are *in continuation of, or may effectively throw light on, the substantive events anterior to the critical date. Hence subsequent facts are admissible ... but only indirectly and to corroborate and explain the probative events occurring before the critical date.*”), **Exhibit-LE 42/1** (emphasis added) (relied on by the GoS).

<sup>837</sup> GoS Reply Memorial, at paras. 239-247, 282-325, 371-373, 377-377; see above at paras. 478-545.

<sup>838</sup> SPLM/A Reply Memorial, at para. 558-564.

<sup>839</sup> GoS Reply Memorial, at paras. 41, 45-46.

<sup>840</sup> See GoS Reply Memorial, at para. 100.

<sup>841</sup> Goldie, *The Critical Date*, 12 Int’l & Comp. L.Q. 1251, 1254 (1963), **Exhibit-LE 42/1** (emphasis added).

667. That position is supported by a wealth of case law and commentary.<sup>842</sup> It also disposes of the Government's erroneous assertion that "[i]n past sovereignty or boundary disputes where State parties have relied on the oral traditions of local populations in support of their claims and allegations, when oral tradition was considered and assessed by the Court or arbitrators, *no weight was given to allegations regarding a different period than that relevant to the dispute.*"<sup>843</sup> As the Government's own authority states, oral evidence of matters occurring *after* the "critical date" can and should be used to "*corroborate and explain* the probative events occurring before the critical date." Indeed, this is precisely what the ABC Experts did.<sup>844</sup>

668. Consequently, to claim now that "no weight can be attributed to witness statements when they refer to past events to which the witnesses cannot personally testify," given that no such objection was made at the time that the Abyei Protocol and associated agreements were negotiated, nor during the entire process of taking witness evidence before the ABC, is utter nonsense.

669. Finally, the Government itself has cited and relied upon events occurring after 1905 as evidence of the location of the Ngok Dinka and Misseriya in 1905 in these proceedings. This is evident from paragraphs 385 to 396 of the GoS Memorial, which contain a lengthy, if

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<sup>842</sup> See, e.g., *Case Concerning the Frontier Dispute (Benin v. Niger)*, [2005] I.C.J. Rep. 90, 109 (I.C.J.) ("The Chamber cannot exclude *a priori* the possibility that maps, research or other documents subsequent to [the critical] date may be relevant in order to establish, in application of the *uti possidetis juris* principle, the situation that existed at the time. ... **The Chamber notes that both Parties have ... rel[ie]d on acts whereby their authorities allegedly exercised sovereignty over the disputed territories after [the critical date]. ... Such an approach should not necessarily be excluded.**") **Exhibit-LE 42/3** (emphasis added); *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, [1992] I.C.J. Rep. 350, 399 (I.C.J.) ("What the Chamber has to do in respect of the land frontier is to arrive at a conclusion as to the position of the 1821 *uti possidetis juris* boundary; to this end it cannot but take into account ... the colonial *effectivités* as reflected in the documentary evidence of the [pre-critical date] period submitted by the Parties. **The Chamber may have regard also ... to documentary evidence of post-[critical date] effectivités when it considers that they afford indications in respect of the 1821 *uti possidetis juris* boundary ...**") **Exhibit-LE 42/4** (emphasis added); *Separate Opinion of Judge Basdevant in Minquiers and Ecrehos (France v. United Kingdom)*, [1953] I.C.J. Rep. 47, 76-83 (I.C.J.) (considering events up to 1950 for the *ex post facto* evidence they afforded regarding the position of the parties vis-à-vis the disputed territory at the critical date of 1360) 78-79 (referring to the Treaty of Troyes of 1420), 79 (referring to the Fishery Convention of 1839), 81 (referring to two events in 1869 and 1929), 82 (concluding that "[t]here are numerous facts, the existence of which has not been challenged ... which show that the Jersey authorities have for a long time, on repeated occasions and in a consistent manner, concerned themselves with what was happening on the Ecrehos and Minquiers and have acted accordingly."), 83 ("From the facts thus alleged and, in particular, from the action of the Jersey authorities ... **it is possible to deduce some ex post facto confirmation of the reasonableness of the hypothesis previously stated, according to which the King of England ... was in a position to exercise power over the Ecrehos and Minquiers and that he held these islets within the meaning of the Treaty [of 1360].**") **Exhibit-LE 43/1** (emphasis added); *Arbitral Award of 4 April 1928, The Island of Palmas Case (United States v. Netherlands)* II U.N.R.I.A.A., 829, 866 (1928) ("The events falling between the [critical date] and the rise of the present dispute ..., cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the Philippines by Spain took place. **They are however indirectly of a certain interest, owing to the light they might throw on the period immediately preceding.**") **Exhibit-LE 30/2**; Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law. Part II*, 32 Brit. Y.B. Int'l L. 20, 43 (1955-56) ("The subsequent acts of the parties, or the post-critical date events, may be taken into account – not in order to change or affect the legal situation as it stood at that date but only as evidence of what that situation in fact then was. ..."), **Exhibit-LE 42/2** (emphasis added).

<sup>843</sup> GoS Reply Memorial, at para. 55.

<sup>844</sup> The ABC Experts did not, as the Government asserts, ignore the stipulated date of 1905. Instead, the ABC Experts merely stated that because of the "continuity" in Ngok Dinka settlements during much of the 20<sup>th</sup> century ("between 1905 to 1965"), they would also have regard to post-1905 materials to shed light on the extent of Ngok Dinka territory in 1905. The ABC Experts very diligently followed this approach in its analysis, looking primarily to evidence from 1905 and subsidiarily to post-1905 evidence. This is detailed in full in paragraphs 548 to 559 of the SPLM/A Reply Memorial and is evident from a reading of the ABC Report itself.

inaccurate, treatment of post-1905 literature and documents, as well as the witness statement of Professor Cunnison.<sup>845</sup>

- c) The Government's Objections to the Ngok Dinka Witness Statements on the Ground that They Concern Time Periods Which Have No Bearing on the Year 1905 is Wrong as a Matter of Fact

670. As noted above, the GoS argues that the SPLM/A witness evidence is “useless” because it refers to a time period later than 1905.<sup>846</sup> This argument is also wrong as a matter of fact. A reading of the Ngok Dinka witness statements clearly shows their relevance to circumstances in 1905.

671. In particular, Ngok Dinka Chiefs and elders testified as to occupation and use of the Abyei Area by their fathers, grandfathers and great-grandfathers – before and around 1905. The Chiefs and elders recount the areas occupied and used by the Ngok during the lifetime of Paramount Chief Arop Biong (Sultan Rob), who died in 1906.<sup>847</sup> The fact that Arop Biong's death occurred in 1906, and was a memorable date in Ngok Dinka history, provides a highly probative anchor for testimony regarding circumstances in 1905. Thus the Ngok evidence is not drawn from ancient history – it comes from first hand accounts passed down through one, maybe two, generations and is highly probative.

672. Testimony regarding the areas occupied and used by the Ngok Dinka during the times of their fathers, grandfathers and great-grandfathers includes:

- a. Deng Chier Agoth, Abyior an elder (born in about 1930), states, after reciting areas that the Abyior would take their cattle to graze during the rainy season, that “[t]his was the same for my father and grandfather.”<sup>848</sup> In describing the permanent settlements of the Abyior, Deng Chier Agoth states that “during the time of my father and grandfather the Abyior lands extended towards what is now the Darfur border, where Abyior would sometimes fight with the Reizegat.”<sup>849</sup>

- b. As Malual Alei Deng, an elder of the Mareng Chiefdom (born in about 1940), recounts, “[t]he lands of the Mareng Chiefdom have traditionally been centred on the place called Nyama, in the north, and further south of Nyama, toward Abyei Town. I lived in Nyama and so did Mareng from my father's and grandfather's times.”<sup>850</sup> Malual Alei Deng also recalls what was told to him by his father: “[m]y father would tell me stories of my grandfather's time with the Arop Biong. I recall that he said my grandfather played a role in talks between Arop Biong and the Misseriya leader, Azoza,”<sup>851</sup> and that “[w]hat I know of our traditional lands I learned from my elders, especially my father, who learned it from my grandfather. My grandfather, Deng Luol, used to be a translator for the Ngok Dinka Paramount Chief Arop Biong. He and a man Dau Kiir from the Anyiel section shared this responsibility. When my

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<sup>845</sup> See GoS Memorial, at paras. 385-396. Among other things, the Government argues that the location of the Ngok Dinka and the Misseriya in 1905 “is powerfully illuminated by material from the preceding and immediately following years.” GoS Memorial, at para. 398.

<sup>846</sup> GoS Reply Memorial, at paras. 54-56, 333.

<sup>847</sup> Sudan Intelligence Report, No. 142, dated May 1906, p. 2, **Exhibit-FE 17/24**.

<sup>848</sup> Witness Statement of Deng Chier Agoth (Abyior elder), at p. 2, ¶9.

<sup>849</sup> Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16.

<sup>850</sup> Witness Statement of Malual Alei Deng (Mareng elder), at p. 2, ¶7.

<sup>851</sup> Witness Statement of Malual Alei Deng (Mareng elder), at p. 2, ¶6.

good father was young my grandfather was abducted and grew up with the Arabs. This was either prior to or during the Mahdiyya. He even took a wife up there and had three children. My grandfather then returned to the Abyei are and became a translator for Arop Biong whenever the Paramount Chief wanted to engage with the Arabs, send a Ngok Dinka delegation to talk to them, or receive them in our lands.”<sup>852</sup>

c. The Chief of the Achueng Chiefdom, Ajak Malual Beliu (who was born in the mid-1930s),<sup>853</sup> recalls the birth places of his father and grandfather, the lineage of the Achueng Chiefs and then, prior to noting the villages occupied by the Achueng, states that “[t]he following are some of the Achueng permanent settlements that I know of and have been told by my father and grandfather....”<sup>854</sup>

d. Similarly, the Chief of the Bongo, Nyol Pagout Deng Ayei (born in 1949), states in relation to the area of the Bongo Chiefdom lands in 1905 that “[t]his is the information about the time of my father, grandfather and great-grandfather. It has been taught to me by my elders. Of course there was no map. In my father’s and grandfather’s time there were three main areas of the Bongo; the Ngol area and the upper Ngol, what would be called Gok land and Abyei.”<sup>855</sup>

e. As recounted by Wieu Dau Nguth, an elder of the Mareng Chiefdom (born in 1958): “I learned areas of the Mareng chiefdom from my father, and his father told him. We did not have documents, so the oral history that has passed down from father to son is very important. For the Ngok, when you are young you learn the settlements of your chiefdom place by place in this way.”<sup>856</sup> In recounting the Mareng’s permanent settlements he states that “Mareng’s permanent settlements during my grandfather’s villages were Nyama, Kaba ....”<sup>857</sup>

f. The Executive Chief of the Achaak, Ring Makuac Dhel Yak (born in 1940s), records his evidence that “[t]wo days’ walk to the north and northwest would take you to the permanent settlements of the Ngok Dinka Alei Chiefdom. To the west, my *grandfather* would see the villages of the Bongo Chiefdom. In the southwest, the Achaak lands would meet those of the Manyar Chiefdom. Further below us, we would reach the Diil Chiefdom, whose communities were in that area closer to the River Kiir. If my grandfather walked to the northeast of Miding [Arabic: Heglig], he only found Achaak villages – there were no other Ngok Dinka living in that area.”<sup>858</sup> As to the lands of the Achaak, Ring Makuac Dhel Yak states “[t]here were many traditional Ngok settlements throughout our Achaak lands. Our main settlements include Miding [Arabic: Heglig] and 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.”<sup>859</sup> As Ring Makuac Dhel Yak records, he was probably born some time around 1946,<sup>860</sup> thus his grandfather was certainly alive prior to 1905.

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<sup>852</sup> Witness Statement of Malual Alei Deng (Mareng elder), at p. 2, ¶5.

<sup>853</sup> Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶4.

<sup>854</sup> Witness Statement of Ajak Malual Beliu (Chief of Achueng), at p. 2, ¶¶7 to 10.

<sup>855</sup> Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 2, ¶¶8 and 9.

<sup>856</sup> Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶5.

<sup>857</sup> Witness Statement of Wieu Dau Nguth (Mareng elder), at p. 2, ¶6.

<sup>858</sup> Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶8.

<sup>859</sup> Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶9.

<sup>860</sup> See Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶3.

673. Similarly, the Ngok witnesses recount the areas occupied and used by the Ngok during the lifetime of Paramount Chief Arop Biong (Sultan Rob). By way of example:

a. An elder of the Abyior, born in 1914 or 1915, Alor Kuol Arop is Sultan Rob's grandson. He records that he was born in Abyei Town, and recalls that his father was Paramount Chief Kuol Arop, the Paramount Chief of the nine Ngok Dinka from 1906 to 1945 and that his grandfather was the Paramount Chief Arop Biong.<sup>861</sup> Locating the Abyior at Abyei Town, Alor Kuol Arop states that “[w]e would graze to Nyama (which was a permanent Ngok settlement of the Mareng, Manyuar, Achaak and Bongo), and then further northwest to Wun Deng Awak, and then to Meiram... The Abyior of my father's age and my grandfather's age would also use this grazing route and meet the same settlements of the Ngok Dinka.”<sup>862</sup>

b. Ajak Malual Belieu (Chief of Achueng) states that “[d]uring the time of Ngok Dinka Paramount Chiefs Arop Biong and Kuol Arop, and until our displacement from our lands in the 1960s, the Achueng people were the southernmost of the nine Ngok Dinka chiefdoms. 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 from north of the River Kiir, in an area southwest of Abyei town, up to Abyei town and north to Alal and to Bakar.”<sup>863</sup>

c. As noted above, Malual Alei Deng recounts that his grandfather was a translator for Arop Biong, and recalls the settlements of the Mareng during that time.

674. Rather than recounting events from a bygone era, the Ngok Dinka witness statements provide an account of events within the lifetimes of their fathers and grandfathers (and in some cases, not far removed from their own lifetimes – as a number of the Ngok elders were born in the decade or so following the 1905 transfer). Contrary to the Government's anxiety to belittle it (and unlike the Government's own witness evidence), this evidence has a high degree of probative value. It is consistent and detailed evidence of the areas occupied and used by the nine Ngok Dinka Chiefdoms in 1905.

d) The Government's Objection to the Ngok Dinka Witness Statements on the Ground that They Are Not Corroborated by Contemporaneous Evidence Does Not Take into Account the Full Evidential Record or the Objective Limits to Available Evidence

675. The GoS claims that “[t]he truth of a statement ... – uncorroborated by documentary sources – is essentially unverifiable,”<sup>864</sup> and that “[i]f oral evidence is contradicted by contemporary documents it cannot have any probative weight.”<sup>865</sup> That argument is not only wrong, but is contradicted by the very authorities on which the Government relies.

676. First, the Government has not presented any contemporary evidence that contradicts the oral testimonies of the Ngok Dinka witnesses. All the Government can point to are a small number of documents recording short dry season treks undertaken by British

<sup>861</sup> See Witness Statement of Alor Kuol Arop (Abyior elder), at p. 2, ¶¶3-4.

<sup>862</sup> Witness Statement of Alor Kuol Arop (Abyior elder), at pp. 2-3, ¶10.

<sup>863</sup> Witness Statement of Ajak Malual Belieu (Chief of Achueng), at p. 2, ¶7.

<sup>864</sup> GoS Reply Memorial, at para. 333.

<sup>865</sup> GoS Reply Memorial, at para. 62.



Condominium visitors to the Abyei Area. The limitations of the contemporary documentary record are discussed at length in the SPLM/A Memorial,<sup>866</sup> SPLM/A Reply Memorial<sup>867</sup> and above at paragraphs 431-437. As Professor Daly explains, “[b]y 1905 no British official is recorded as having done more than trek through parts of the Abyei region.”<sup>868</sup> The Government’s attempts to hold up these limited documents as negative evidence of Ngok occupation and use of the Abyei Area, however superficially attractive, are misleading and arise from a fundamental mistreatment of the historical record.

677. The post-1905 position is no different. The Government only cites a small number of documents in support of its contention, saying the best are a few pages recording Sudan Survey Department treks. All these do is blandly list some of the places in the Abyei Area that were of topographical interest to the Sudan Survey Department. Those sites of interest, of course, were almost invariably limited to dry season water sources that might be of use to the nomadic Baggara Arab inhabitants of Kordofan, who resided north of the Abyei Area, but traveled south to find water and pastures in the Bahr region during the dry season.<sup>869</sup> None of this evidence contradicts the Ngok witness evidence.

678. Conversely, the limited contemporary evidence that does exist unequivocally places the Ngok north of the Kiir/Bahr el Arab and above the Ngol/Ragaba ez Zarga, with the Ngok wet season areas of occupation and grazing pastures extending much further north again. The records of Mahon,<sup>870</sup> Wilkinson,<sup>871</sup> Percival<sup>872</sup> and Boulnois<sup>873</sup> corroborate the Ngok witness evidence of their occupation and use of areas north of the Kiir/Bahr el Arab and above the Ngol/Ragaba ez Zarga at the time of the 1905 transfer. Similarly, the post-1905 documentary evidence does not contradict, but rather corroborates, the Ngok witness evidence.<sup>874</sup> The cartographic evidence also supports the SPLM/A claim, rather than contradicts it,<sup>875</sup> as does the environmental and cultural evidence.<sup>876</sup>

679. Further, there are obvious explanations for the absence of corroboration in contemporaneous documents of the Ngok Dinka wet season land usage in the north of the Abyei Area. As discussed above, that is because Condominium officials did not visit the Abyei Area during the rainy season in or around 1905.<sup>877</sup> As a consequence, it is not surprising that there is no written contemporaneous record of Ngok Dinka land occupancy and usage during that period.

680. Moreover, the Government’s position ignores the body of domestic and international law which accords special and sensitive treatment to the oral tradition of tribes and other indigenous peoples in considering their claims. To repeat, “the laws of evidence must be adapted in order that this type of evidence can be accommodated and *placed on an equal footing with the types of historical evidence that courts are familiar with which largely*

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<sup>866</sup> See SPLM/A Memorial, at paras. 908-912.

<sup>867</sup> See SPLM/A Reply Memorial, at paras. 919-932.

<sup>868</sup> Daly Supplementary Expert Report, at p. 3.

<sup>869</sup> See below, paras. 738-742.

<sup>870</sup> See SPLM/A Reply Memorial, at paras. 940-942, 943-952, 975-982.

<sup>871</sup> See SPLM/A Reply Memorial, at paras. 953-972.

<sup>872</sup> See SPLM/A Reply Memorial, at paras. 983-1011, 1014-1022.

<sup>873</sup> See SPLM/A Reply Memorial, at paras. 1012-1013.

<sup>874</sup> See SPLM/A Reply Memorial, at paras. 1029-1193. See below, paras. 478-545.

<sup>875</sup> See SPLM/A Reply Memorial, at paras. 1197-1273.

<sup>876</sup> See SPLM/A Memorial, at paras. 176-189; 197; 233-248; SPLM/A Reply Memorial, paras. 1307-1320; MENAS Expert Report, at paras. 93-163.

<sup>877</sup> See e.g., Witness Statement of G. Michael Tibbs, at p. 2, ¶¶10-11.

*consists of historical documents.*<sup>878</sup> For the Government to suggest that oral evidence “cannot have any probative weight” unless it is supported by documentary evidence is therefore wrong and illustrative of the GoS’s “facile assumptions” regarding the value of oral tradition. This is particularly so when it does not provide any evidence to contradict the oral testimonies.

681. Second, the Government relies on two cases to support its arguments. These decisions again have nothing to do with oral tradition or histories.

682. One of the Government’s authorities concerns statements made by U.S. officials and the weight to be attached to those statements by the I.C.J. The fact that the Court expressed an opinion – in a particular case as to particular witnesses’ testimony – does nothing to further the Government’s claim that Ngok Dinka oral tradition should be afforded no probative value.<sup>879</sup> It should also be noted that this I.C.J. decision relied on by the GoS has rightly been subjected to significant criticism.<sup>880</sup>

683. Third, the Government’s own authorities contradict the notion that oral tradition only carries weight where it is corroborated by documentary evidence. In *Milirrump v. Nabalco* (relied on by the Government),<sup>881</sup> the Supreme Court of Canada, while declining to find in favor of the native claimants, nevertheless rejected an argument that the oral history of the claiming natives was not sufficient to establish title, and that only documentary proof of title would suffice. The Court said:

“This argument also I found unconvincing. It seems to me to amount to saying that if there is property in land, there must be either a written or pictorial means of discovering who is the owner of any particular piece of land (the function carried out by title-deeds or registers of title) or, if that is not possible among primitive people, then there must be a sufficient number of witnesses who can produce a register of title out of their memories; that is that an oral register of title must be repeated in full detail by each witness. ***In my opinion, the fallacy in this argument is the assumption that there cannot be rights of property without records or registers of title. Even if some witnesses said “I do not know whose land this is” (and hardly any did so), I would not put much weight on that fact in comparison with the high degree of consistency with which the attribution of each area of land was made by those who spoke of it.***<sup>882</sup>

<sup>878</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, ¶187 (Supreme Court of Canada) (1997), **Exhibit-LE 40/7** (emphasis added); see also Valencia-Ospina, *Evidence before the International Court of Justice*, 1 Int’l Law Forum 202, 204 (1999) (noting that “there is no true hierarchy of different forms of evidence before the [ICJ].”), **Exhibit-LE 43/2**.

<sup>879</sup> See GoS Reply Memorial, at para. 60 (quoting “*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, para. 68”). Indeed, another of the GoS’s authorities expressly notes that “the existence of explicitly subjective elements in oral history can, at times, present greater opportunities for understanding historical events than the recitation of bare facts. It can reveal the intellectual, social, spiritual, and emotional cognition of the event for the group in question.” See Borrows, *Listening for Change: the Courts and Oral Tradition* 39 Osgoode Hall Law Journal 1, 11 (2001), **Exhibit-LE 41/10** (emphasis added).

<sup>880</sup> See e.g., Schwebel, *Three Cases of Fact-Finding by the International Court of Justice* in S. Schwebel, *Justice in International Law* 125, 134 *et seq.* (reprinted 2008) (“In my view there is, in any consideration of the Court’s processes of fact-finding, ground for profound concern that, in a case as important and as delicate as that of the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court failed to use its fact-finding capacities to the full. Moreover, it made a critical factual holding contrary to the weight of evidence before it and in doing so failed to apply the very evidentiary criterion it had laid down ...”), **Exhibit-LE 43/3**.

<sup>881</sup> See GoS Reply Memorial, at para. 44.

<sup>882</sup> *Milirrump and Others v. Nabalco Pty. Ltd. And the Commonwealth of Australia* [1971] 17 F.L.R. 141, 272 (Supreme Court of the Northern Territory) (1971), **Exhibit-LE 43/4**.

684. Similarly, in a passage not exhibited by the Government in one of the other authorities it cites, the following warning is apposite: “Sweeping generalizations about oral and written histories must be closely scrutinized ....”<sup>883</sup> The same leading author goes on to note that “it is not always the case that oral sources are corrected by written sources. *At times, oral tradition may prompt significant revisions to the written record that have falsely misconstrued a past occurrence.*”<sup>884</sup>

- e) The Government’s Objections to the Ngok Dinka Witness Statements on the Ground that They are Vague as to the Specific Territory to Which They Refer Have No Basis

685. The Government’s Reply Memorial claims that “[v]ague or generalised testimony is entitled to very limited or no probative value.”<sup>885</sup> The Government complains that the Ngok Dinka witnesses refer to “vague and generic terms such as ‘Abyei area,’ ‘our lands’, without further definition or clarification.”<sup>886</sup>

686. The Government’s argument is confined to three unsubstantiated paragraphs supported by a single quote from an unrepresentative authority.<sup>887</sup> In particular, the Government relies, by purported analogy, on an Iran-U.S. Claims Tribunal award to support its argument that because the Ngok Dinka witnesses supposedly do not refer to specific territories, their evidence is “useless.” That argument again contradicts the well-settled body of authority giving weight to oral tradition (discussed above).<sup>888</sup>

687. In addition, the Government’s argument is factually wrong. As a review of the Ngok Dinka witness testimony shows, that testimony is detailed, descriptive and accurately locates Ngok Dinka villages as they were occupied and used in 1905.

688. The Government appears to demand that Ngok Dinka witnesses provide accurate cartographic coordinates for all of the settlements mentioned in their evidence. This, of course, would be very difficult, since the Ngok Dinka have been largely displaced from their traditional lands since the 1960s. Indeed, it would be difficult for any population, including in very developed societies.

689. Nonetheless, the geographical precision that the Government requests is provided by the Community Mapping Project, which provided a thorough and precise map of Ngok Dinka settlements within a representative area. **SPLM/A Map 62** takes that information and supplements it with evidence of known Ngok Dinka settlements from historical maps, producing a detailed and precise location of Ngok Dinka settlements.

690. **Maps 62 and 63** corroborate and provide specific coordinates for many of the locations identified in the Ngok witness statements that are outside of the Community Mapping Project. Thus, the location of Nyama is referred to by a number of Ngok witnesses from the northernmost chiefdoms. The witnesses clearly and consistently refer to the

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<sup>883</sup> Borrows, *Listening for Change: the Courts and Oral Tradition* 39 Osgoode Hall Law Journal 1, 15 (2001), **Exhibit-LE 41/10**.

<sup>884</sup> Borrows, *Listening for Change: the Courts and Oral Tradition* 39 Osgoode Hall Law Journal 1, 19 (2001), **Exhibit-LE 41/10** (emphasis added).

<sup>885</sup> GoS Reply Memorial, at para. 59.

<sup>886</sup> GoS Reply Memorial, at para. 57.

<sup>887</sup> GoS Reply Memorial, at para. 59 (quoting “Arthur Young & Company, Iran-U.S. C.T.R. Vol. 17, p. 257.”).

<sup>888</sup> See above at paras. 635-662.

abundance of fish in the area, despite its location well north of the Ngol/Ragaba ez Zarga, including:

- a. Peter Nyuat Agok Bol (Alei elder and sub-chief), at p. 2, ¶8 (“... the Alei moved to Thur ... and also to Nyama. ... The name ‘Nyam’ literally meaning fish gills in Dinka”); Nyol Pagout Deng Ayei (Bongo elder), and at p.2 ¶11 (“When my great grandfather was alive Bongo would be settled in the north at Nyama (Nyama is a Dinka name as means gills of the fish);”
- b. Paramount Chief Kuol Deng Kuol Arop at p. 4, ¶18 (“I remember a story about Nyama being named after the *nyam* or fish gills, because many Ngok would go to that place to fish. They would dry the body of the fish, but eat the gills of the fish and sometimes the rest of the head.”).

This is consistent with the earliest record of the location on maps in the 1:250,000 Map Series of water holes at a location identified by the British as ‘Nyam Wells’ in the dry season (which no doubt flood to streams in the rainy season when the Ngok cattle camps return to the area for grazing).<sup>889</sup>

691. The northern Ngok Dinka settlements around Nyama and Thur [Arabic: Turda] are located on the 1:250,000.00 Series Maps (**Map 63**). See also **Map 62** (Ngok Presence 1905). A number of the Ngok testimonies confirm that Nyama was a permanent Ngok settlement in 1905,<sup>890</sup> as was Thur [Arabic: Turda],<sup>891</sup> Bakar<sup>892</sup> and Thuba,<sup>893</sup> which are all in the central northern region of the Abyei Area.

692. The location and importance of Tebeldiya and the 80 mile stretch of *goz* in the northwest of the Abyei Area from Tebeldiya to Antilla is referred to by a number of Ngok

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<sup>889</sup> See **Map 90** (Lake Keilak: Sheet 65-H, Survey office Khartoum, 1925).

<sup>890</sup> See **Map 62** (Ngok Presence 1905); **Map 15** (Achaak Chiefdom, 1905); Witness Statement of Mijak Kuot Kur (Achaak elder) 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.”); **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.”); **Map 21** (Manyuar Chiefdom, 1905); Witness Statement of Malual Alei Deng (Mareng elder), at p. 2, ¶8.

<sup>891</sup> See **Map 62** (Ngok Presence 1905); **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 elder and sub-chief), at p. 2, ¶¶8-10; Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 11, ¶54.

<sup>892</sup> See **Map 62** (Ngok Presence 1905); 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 ¶9 (“Bakar was the biggest Achueng settlement in the north...”); Witness Statement of Jok Deng Kek (Achueng elder), at p. 2, ¶9; Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶6.

<sup>893</sup> See **Map 62** (Ngok Presence 1905); **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].”); **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.”), ¶7 (“Manyuar were traditionally in Thuba, but there were Mareng there too.”) ¶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.”) ¶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.”).

witnesses from those Chiefdoms that had rainy season cattle camps in the north west of the Abyei region. These include:

- a. Deng Chier Agoth (Abyior elder) at p. 2, ¶9 (“In the rainy season, we would take our cattle to graze in less swampy areas towards the north west of Abyei town. I would go with the cattle to Akot Tok, Mijok Alor, Thigei, Rumthil and up to the town called Dhony Dhoul (near Tebeldiya), where I remember seeing Ngok Dinka settlements. Alor Kuol Chol, 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];”
- b. Kuol Alor Makuac Biong (Chief of Abyior) at p. 3, ¶¶15-16 (“Only the young Abyior men would go with the cattle and the rest of the community would remain at our permanent settlements. In the rainy season, the young Abyior men would drive the cattle up as far as a settlement called Dhony Dhoul, near Tebeldiya. This is roughly 50 miles from the Misseriya centre of Deinga [Arabic: Muglad]. If any dispute between the Abyior and the Misseriya had arisen during the previous migration in the dry season, which in more recent years was when the Misseriya would bring their cattle down to graze in the Abyei area, they would be resolved in Chuei Being, near Tebeldiya. ... Tebeldiya is a place marked by a tebeldiya tree.”);
- c. Malok Mien Ayeik (Anyiel elder) at p. 2, ¶7 (“In the rainy season the Anyiel cattle herders would take the cattle to graze in the north and northwest of the Abyei area. We grazed at Wun Deng Awak, Dhony Dhoul and Meiram.”);
- d. Nyol Pagout Deng Ayei (Chief of Bongo) at p. 3, ¶¶14-15 (“The Ngok lands went as far north as Tebeldiya. There was no settlement there that I know of. Traditionally we considered it the border between the Ngok and the Misseriya. The British put a post here as the 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.”); and
- e. 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 [Arabic: Goz] area towards Dhony Dhoul (near Tebeldiya), where we would meet with Bongo, Achueng, Anyiel and Abyior.”).

693. All of this evidence is consistent with former Dar Misseriya District Commissioner Mr. Tibbs’s recollection of the use of the area. Mr. Tibbs states:

“Abyei was the centre of the Ngok, as Muglad was the headquarters of the Misseria. South of Muglad there was the stretch of land called the *goz*, where I do not recall seeing any tribe permanently settled. Tebeldiya, where there was a rest house, was within what I would say is the *goz* which continued down to about Antilla but it was around Antilla that the countryside changed and one would meet the ragabas (what were really streams in the dry season). I always considered the area south from Antilla, on our direct road route from Muglad to Abyei, to be within Ngok territory. From that road, *as soon as we reached Antilla I would see Ngok luaks* (which were permanent round cattle byres for Ngok cattle herds, otherwise referred to as “dug

dugs”) and *typical Ngok villages dotted about*. A typical Ngok village, as indicated above, consists of 2 or 3 luaks, the unique Dinka construction that house both people and animals with small tukuls as grain stores, dotted around with areas of permanent cultivation.”<sup>894</sup>

694. Similarly, the Ngok testimony accurately describes the geographic location of other northwestern settlements within the Abyei Area, such as Wun Deng Awak<sup>895</sup> and Awol Baiet [Arabic: Zerafat].<sup>896</sup> These locations are all identified on **Map 62** (Ngok Presence 1905). Wun Deng Awak is said to be near Umm Sakina in the Ngok testimony,<sup>897</sup> which is located clearly (though not in exactly the same place) on the cartographic evidence (**Map 63** (Abyei Area, 1:250,000.00 Series Maps)). Similarly, Zerafat is located on **Map 63**.

695. West from Abyei town important Ngok settlements at places such as Kol Adet<sup>898</sup> are represented on **Map 63**. Kol Routh, said by the Ngok to be near Grinti,<sup>899</sup> is very clearly represented on the cartographic evidence and again this can be seen on **Map 63**.

696. In the central Abyei Area, the Government cannot seriously claim that the Ngok witness testimony is general and vague. For example, settlements such as Noong [Arabic: Na’am]<sup>900</sup> are well known and located on official maps (**Map 63**), if not on sketches that the Government has put before the Tribunal (Dupuis, 1921, GoS Reply Map 39b). Mabek, which the Ngok witnesses clearly identify as near to Abu Azala,<sup>901</sup> is again clearly located on the cartographic evidence (**Map 63**), on maps referred to by the Government, for example GoS Reply Map 27 (*Ghabat el Arab*: Sheet 65-L, 1914), and in the Community Mapping Report (Mabek Ngol). The Community Mapping Report deals extensively with Ngok settlements in this area.

697. Ngok settlements in the east of the Abyei Area, such as Baar, are well known and able to be located on the (albeit limited) cartographic representations of Ngok Dinka occupation in

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<sup>894</sup> Witness Statement of G.Michael Tibbs, p. 4, ¶22. A photo of the Tebediya rest house, clearly recollected by multiple witnesses, is at SPLM/A **Figure 25, Appendix H to SPLM/A Memorial**. Strikingly, the overlay of the ABC Boundaries onto the Tibbs’s ‘Dar Misseriya’ sketch Map, produced as the GoS Map 23, places Antilla at the beginning of the area that the ABC Experts found to be territory over which the Ngok has primary rights, and Tebediya roughly in the centre of what the ABC Experts describes as the shared area.

<sup>895</sup> See **Map 62** (Ngok Presence 1905); **Map 14** (Abyior Chiefdom, 1905); Witness Statement of Kuol Deng Kuol Arop (Paramount Chief), at p. 8, ¶38 (“Abyior... extends north to Wun Deng Awak.”); Witness Statement of Kuol Alor Makuac Biong (Chief of Abyior), at p. 3, ¶12 (“The Abyior lands... extend up as far as Wun Deng Awak [Arabic: Umm Sakina] in the northwest”); Witness Statement of Alor Kuol Arop (Abyior elder), at pp. 2-3, ¶¶10-11; Witness Statement of Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶13 (“A known permanent village of the Abyior was Wun Deng Awak.”).

<sup>896</sup> See **Map 62** (Ngok Presence 1905); Witness Statement of Deng Chier Agoth (Abyior elder), at p. 3, ¶16.

<sup>897</sup> See **Map 62** (Ngok Presence 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”).

<sup>898</sup> See **Map 63** (Abyei Area, 1:250,000 Series Maps); **Map 62** (Ngok Presence 1905); Witness Statement of Ajak Malual Beliu (Chief of Achueng), p. 2, ¶¶3- 4 (“I was born sometime around the mid-1930’s... My father was buried in Kol-Adet (in Dinka *Kol* means pool and *Adet* describes the vegetation that commonly grows around the rivers, so Kol-Adet is a common name for places throughout the Ngok lands)).

<sup>899</sup> See **Map 62** (Ngok Presence 1905); **Map 14** (Abyior Chiefdom, 1905); Witness Statement Deng Chier Agoth (Abyior elder), at pp. 3-4, ¶¶11, 21. (Note that Witness Statement misspells Kol Aruth as Kol Roth.)

<sup>900</sup> See **Map 62** (Ngok Presence 1905); **Map 14** (Abyior Chiefdom, 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 Chiefdom include the now quite large towns of Abyei and Noong”).

<sup>901</sup> See **Map 62** (Ngok Presence 1905); **Map 19** (Bongo Chiefdom, 1905); **Map 11** (Sudan: Oil Sector); Witness Statement of Mijak Biong Jienny (Bongo elder and sub-chief), at p. 2, ¶¶3,7; 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.

the Abyei Area.<sup>902</sup> Baar is clearly depicted on GoS Reply Map 30 (1922), **Map 63** (Abyei Area, 1:250,000.00 Series Map), on **Map 62** (Ngok Presence 1905) and in the Community Mapping Report. The Ngok settlement of Pawol (in the area of Fauwel)<sup>903</sup> is easily located on almost all sketch and other maps from Wilkinson's trek onwards.<sup>904</sup> Similarly, Ajaj,<sup>905</sup> Niag<sup>906</sup> and Miding [Arabic: Heglig]<sup>907</sup> are equally well known areas.

698. These examples demonstrate show the specificity and certainty of the Ngok witness testimonies as to the location of the areas of the Ngok. It is true that they use the Ngok Dinka names for these villages (though in some cases assist by pointing out the Arabic names often equated with their places). If the case is that the Government does not recognize the Ngok Dinka names, then that perhaps speaks for itself.

699. The elders of the nine Ngok Dinka Chiefdoms are not familiar with maps (which are invariably in English and Arabic) and do not equate geographic distances with the locations of their villages. Rather, the witness statements make constant reference to settlements being at locations relative to the Kiir/Bahr el Arab and Ngol/Ragaba ez Zarga rivers, or by reference relative to other Ngok Dinka settlements or better known settlement areas, such as Lake Keilak.<sup>908</sup>

700. Looked at together, the villages identified in the Ngok witness testimonies and the geographic descriptions of those villages are remarkably consistent not only when reviewed

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<sup>902</sup> See **Map 62** (Ngok Presence 1905); **Map 20** (Diil Chiefdom, 1905); Witness Statement of Mijok Bol Atem (Diil elder), at p. 2, ¶9; Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶10.

<sup>903</sup> See **Map 62** (Ngok Presence 1905). See also e.g., Witness Statement of Ring Makuac Dhel Yak (Executive Chief of Achaak), at p. 2, ¶9.

<sup>904</sup> See **Map 63** (Abyei Area, 1 to 250,000.00 Series Maps); **Map 62** (Ngok Presence 1905).

<sup>905</sup> See **Map 62** (Ngok Presence 1905); **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 elder), 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.").

<sup>906</sup> See **Map 62** (Ngok Presence 1905); **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.").

<sup>907</sup> The Heglig oil field is located on **Map 11** (Sudan: Oil Sector). See also **Map 62** (Ngok Presence 1905); **Map 63** (Mosaic of 1:250,000 Map Series); **Map 15** (Achaak Chiefdom, 1905); see also 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 elder), 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 at Nyol Pagout Deng Ayei (Chief of Bongo), at p. 3, ¶13.

<sup>908</sup> See e.g., Witness Statement of Mijok Bol Atem (Diil elder), at p. 3, ¶11 ("Our grazing lands were further away from the Diil settlements. 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, Athwom-Nyalic, Toong Kiil and **Keilak**.") (Emphasis added); Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 3, ¶11 ("During the Mahdiyya the Achaak expanded to Keilak, Nyadak Ayueng and as far east as Miding [Arabic: Heglig]. This was many generations ago.").

against all of the other independently prepared Ngok testimonies but when compared to the cartographic (and indeed environmental) evidence. The Community Mapping Report provides further corroboration of this evidence within the Study Area of that report.

701. Against this background, it is impossible to accept the Government's claim that the Ngok Dinka witness testimony is vague and does not refer to specific territories. Particularly considering the upheavals of recent decades, the evidence provided by the Ngok Dinka is remarkably detailed and specific. Moreover, the specific locations identified by the Ngok Dinka witnesses are corroborated both by the Community Mapping Project and by historical maps and documentation.

f) The Government's Objections to the Ngok Dinka Witness Statements on the Ground That They Are Provided by Interested Parties is Groundless

702. Finally, the Government claims that "when a relationship exists between a witness and a party on whose behalf the witness testifies, that must be taken into account in assessing the value of the testimony."<sup>909</sup> Obviously, potential grounds for questioning witnesses' credibility may, and should, be taken into account. That general observation does not provide grounds for discounting (much less excluding) the Ngok Dinka witness evidence.

703. As has already been noted, and as the GoS implicitly concedes, it is for the Tribunal to determine the weight to be attached to any particular piece of evidence.<sup>910</sup> As a leading author on the subject of international arbitration notes:

"Another cultural division arises between lawyers from jurisdictions where a party cannot be a 'witness' as such. This stems from the rules of court in some civil law countries under which a person (or officers or employees in the case of corporate entities) cannot be treated a [sic] witnesses in their own cause. ... *As in the case of many other rules of national court procedure, this rule does not apply in international arbitrations.*"<sup>911</sup>

704. Indeed, if it were the case that potential witnesses having a relationship with one of the parties in the dispute could not give evidence, there would be virtually no witnesses in many proceedings. Here, where the witnesses come from a wide range of locations and backgrounds, there is less reason than in most cases to query their credibility. Indeed, as the Government's submission of Ngok Dinka witness statements shows, tribal affiliations provide no guarantee as to a witness's views.

4. The GoS's Three Allegations of 'Demonstrably Untrue' Statements by Ngok Witnesses Distort what the Witnesses Said and the Actual Statements Are Not Contradicted by Any Other Evidence

705. The Government's Reply Memorial identifies three allegedly "untrue" statements by Ngok Dinka witnesses, and concludes from this that the Ngok witness testimony is

<sup>909</sup> GoS Reply Memorial, at para. 63.

<sup>910</sup> PCA Rules, Art. 25(6), **Exhibit-LE 29/15**.

<sup>911</sup> A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* ¶6-87 (2004), **Exhibit-LE 43/5** (emphasis added); *see also* Veeder, *Evidence: The Practitioner in International Commercial Arbitration* 1 Int'l Law Forum 228, 229 (1999) (noting in relation to this, and other points that "[t]here is no room [in international arbitration] for purely historical or parochial traditions in its procedures."), **Exhibit-LE 43/6**.



unreliable. That argument has no factual basis. In fact, the purported inaccuracies are nothing of the sort and, even if there were misstatements in some witness statements on particular issues, that does nothing to affect the (overwhelming bulk of the) remaining witness evidence.

a) The Ngok Evidence of First Contact With the Misseriya is Wholly Consistent With the Record

706. The Government's Reply Memorial claims the Ngok witness statements falsely record that the first contact between the Humr/Misseriya and the Ngok "was a relatively recent event."<sup>912</sup> There is no basis for that claim.

707. It is *not* correct that the SPLM/A witnesses are claiming that the Misseriya did not have contact with the Ngok until the mid-20<sup>th</sup> century (1950s or 1960s). It *is* correct that the SPLM/A witnesses have provided their own personal recollection of when they first saw the Misseriya near their individual Chiefdom lands (and what they recall from their fathers' and grandfathers' account of the same). Naturally, these included accounts of trading and grazing. Moreover, it is not at all surprising that some Ngok Dinka would not have seen Misseriya until the 1950s or 1960s.

708. Even so, the SPLM/A Witnesses repeatedly describe much earlier contact between the Misseriya and the Ngok Dinka.<sup>913</sup> There is nothing in the SPLM/A witness evidence that is inconsistent with the documentary record that suggests Misseriya first came into contact with the Ngok in the late 18<sup>th</sup> century.

709. The Misseriya entered the Abyei region for dry season grazing, but tended to remain north of the Ngol/Ragaba ez Zarga (as illustrated in GoS Map 17 of the Homr Dry Season Camps in 1908).<sup>914</sup> To reach those sites, the Misseriya generally followed a relatively defined route in the Bahr region.

710. Given this, Ngok Dinka who lived below the Ngol/Ragaba ez Zarga (and who went further south during the dry season grazing period) were particularly unlikely to observe or come into contact with Misseriya who came south to the Bahr with their cattle in the dry season. Even Ngok Dinka individuals living further north would be unlikely to have personally encountered Misseriya cattle herders if they participated in seasonal grazing trips to the south or were located away from Misseriya migration paths. In a very large rural region, with no modern transport, it is not at all unusual that some individual Ngok Dinka would not have encountered Misseriya cattle herders.

711. The increased visibility of the Misseriya in the 1950s and 1960s is associated with the introduction of the government sponsored cotton schemes in the Bahr.<sup>915</sup> This type of cultivation had the related effect of more Misseriya coming south and spending longer in the Bahr than they traditionally would have done, as well as going further south than they had in 1905.

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<sup>912</sup> GoS Reply Memorial, at para. 337.

<sup>913</sup> For example, Witness Statement of Paramount Chief Kuol Deng Kuol Arop, p. 7, ¶ 34; Witness Statement of Adol Kuot Malual, p. 2, ¶ 9; Witness Statement of Malual Alei Deng, p.2, ¶ 6; Witness Statement of Peter Nyuat Agok Bol, p.2, ¶¶ 5-6.

<sup>914</sup> See also Sudan Intelligence Report, No. 162, January 1908, Appendix G, p. 55-56, **Exhibit-FE 17/30**.

<sup>915</sup> During the middle of the 20th century the Government instituted several large-scale agricultural projects in Lakes Keilak and Abyad; the Firshai and near Abyei. See SPLM/A Reply at para. 1079 (citing I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe 23* (1966), **Exhibit-FE 4/16**).

712. Of the SPLM/A Ngok Dinka witness statements, 17 of the 26, either make no reference to the first contact with the Misseriya or describe some contact by the late nineteenth century (which is not even described as first contact with the Ngok in general). The overwhelming majority of SPLM/A witnesses make no comment whatsoever about “first contact with the Misseriya,” primarily because the purpose of their statements was to describe their own land occupation and usage, which can hardly be the basis for the GoS’s sweeping conclusion.

713. Considering the four (out of 26) Ngok selected by the GoS for criticism, it is false to say that these four witnesses’ statements suggest that the first contact between the Humr and the Misseriya “was a relatively recent event.”<sup>916</sup>

a. Alor Kuol Arop of the Abyior Chiefdom, the oldest Ngok witness, says in his Witness Statement that: “The Misseriya *only came later during the time of Biong Alor* ...” As is clear from the table at paragraph 137 of the SPLM/A Memorial, Biong Alor was the Ngok Paramount Chief from the late 18<sup>th</sup> century. This is not inconsistent with the GoS position and is by no means “relatively recent.”

b. Mijak Kuot Kur of the Achaak, says in his Witness Statement (remarkably, the GoS quote is not from his Witness Statement) that: “I remember that when I was still small, I used to see the Misseriya come with millet and later axes and other tools used for farming. ... This was during the early 1960s.” Exactly how the witness was supposed to have seen Misseriya before he was “very small” is not explained by the Government.

c. Akonon Ajuong Deng Tiel, says in his Witness Statement that the Misseriya did not start traveling into “Anyiel lands” prior to the 1950s. Bearing in mind that the Anyiel settlements are entirely south of the Ngol/Ragaba ez Zarga, as depicted in **Map 18**, there is no reason to doubt the accuracy of this testimony. Akonon Ajuong Deng Tiel does not, as the GoS accuses, suggest that the first contact between the Misseriya and the Ngok was in the 1950s. Rather, he observes that the Misseriya did not start traveling *to Anyiel lands*, which were south of the Ngol/Ragaba ez Zarga, until that time.

d. Peter Nyuat Agok Bol says in his Witness Statement that as early as the Mahdiyya – in the late 19<sup>th</sup> century – “there was conflict between the Alei and the Misseriya [in Thur].” This is not inconsistent with his statement that in the early 1950s, when he was a young man, there were only Ngok living in “Nyama and Pawol, Dakjur and the Ngol area.”

714. The GoS’s accusation that these witness statements suggest the first Misseriya/Ngok contact “was a relatively recent event” is wrong. It is a hugely inaccurate generalization that does not bear up to analysis. The GoS fail to acknowledge that other SPLM/A Witnesses recalled that Misseriya seasonal grazing was longstanding on their lands. Arop Deng Kuol Arop recounted how his grandfather, Kuol Arop, described how Misseriya would come to graze and hunt in Abyior lands, dating back at least into the 19<sup>th</sup> century.<sup>917</sup> There is no reason to doubt that particular members of the Ngok community would have had different experiences with the Misseriya, depending on their residences, their age and other factors.

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<sup>916</sup> GoS Memorial, at para 337.

<sup>917</sup> Witness Statement of Arop Deng Kuol Arop, p. 4, ¶23.

b) The Ngok Evidence of the Alei Chiefdom Migration is Not a “Northerly Extension” and is Consistent With the Record

715. The Government’s Reply Memorial claims that “[w]hether or not the Alei Dinkas may have occupied areas as far north as Muglad (El Oddaya is much further north than this – being just north of 12°N), the indications are that they were pushed back by the Baggara in the late 18<sup>th</sup> century.”<sup>918</sup> That is entirely consistent with the SPLM/A position and the evidentiary record. The very witness statement critiqued by the GoS describes how “[b]efore the British came to Sudan, the Alei Chiefdom...were settled at a place we call Maker [Arabic: El Oddaya]...Over time the Alei moved further south to Thur [Arabic: Turda].”<sup>919</sup>

716. The GoS then alleges that “[f]ollowing further conflicts in the 19<sup>th</sup> century, the *Ngok* retreated to the Bahr el Arab.”<sup>920</sup> The GoS proceeds, on that basis, to criticize the reliability of two Ngok witnesses for not reflecting this historical account.

717. As discussed in detail above, the Government’s historical account that the Ngok revealed to the Kiir/Bahr el Arab is inaccurate; in fact, contrary to the Government’s position, the Ngok Dinka were not driven that far south at all.<sup>921</sup> Criticizing Ngok witnesses for accurately recounting oral traditions is hardly serious. In any case, the Government chose to criticize an account of the history of the *Alei* Chiefdom, which remained in the north of the region around Thur [Arabic: Turda], by Alei elders.<sup>922</sup>

718. In their witness testimony, members of the Alei Chiefdom describe their own oral traditions which recount the Alei Chiefdom’s migration route from El Oddaya to Muglad, then southwards and settling around Turda and Nyama (with some Alei then spreading further south to areas above the Ngol/Ragaba ez Zarga).<sup>923</sup> 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 region, above the Ngol/Ragaba ez Zarga and close to Turda and Nyama.<sup>924</sup> Indeed, Misseriya oral traditions confirm the Ngok Dinka descriptions of the Alei migration and first contact between the Alei and Misseriya in the area of Thur [Arabic: Turda].<sup>925</sup>

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<sup>918</sup> GoS Reply Memorial, at para. 339.

<sup>919</sup> GoS Reply Memorial, at para. 338 (citing Witness Statement of Belbel Chol Akuei Deng (Alei Chief), ¶9).

<sup>920</sup> GoS Reply Memorial, at para. 339 (emphasis added).

<sup>921</sup> See above at paras. 351.

<sup>922</sup> 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.

<sup>923</sup> See 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].”); see also SPLM/A Memorial, at para. 888.

<sup>924</sup> See F. Deng, *War of Visions: Conflict of Identities in the Sudan 253-254* (1995), **Exhibit-FE 8/13**.

<sup>925</sup> See 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).

719. Certainly, nothing in the uncontradicted accounts of the Ngok Dinka about the migration of the Alei suggests that the Ngok witness evidence is unreliable. On the contrary, the absence of any evidence contradicting the Ngok testimony – compounded by the fact that the Government has misinterpreted the documentary record – allows a reasonable inference that the Alei migration and settlement is exactly as described by the Ngok witness statements.

c) The Ngok Dinka Witness Evidence Concerning the Maintenance of the Road to Tebeldiya is Not Contradicted By Any Other Evidence

720. The Government’s Reply Memorial also criticizes the Ngok Dinka witness evidence on the grounds that “all the written and map evidence” contradicts the Ngok testimony of a border at Tebeldiya.<sup>926</sup> In fact, the materials cited by the Government have nothing at all to do with the Tebeldiya road.

721. The GoS claims that Cunnison refutes the Ngok testimony, but then cites only to a sketch map he produced (to indicate the routes of omodiyas for seasonal grazing).<sup>927</sup> That map does not purport to address the importance of the Tebeldiya road or the Ngok Dinka and Misseriya’s view of the road. The GoS also refers to three passages extracted from commentators to argue that a description of the migration of the Ngok Paramount Chief towards Abyei town is somehow connected to the road to Tebeldiya. Out of a long list of purported sources, there is not a single one that even refers to the Tebeldiya road or a “border at Tebeldiya.”<sup>928</sup>

722. In fact, the 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 and the Misseriya responsible for maintenance further to the north, has not been contradicted by the GoS.<sup>929</sup> Although the testimony relates to events occurring during the mid-20<sup>th</sup> century, it reinforces the Ngok, Misseriya and governing authorities’ understandings of the pre-existing Ngok locations and

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<sup>926</sup> See GoS Reply Memorial, at para. 354(b).

<sup>927</sup> See GoS Reply Memorial, at para. 322.

<sup>928</sup> GoS Reply Memorial, at para. 354(b).

<sup>929</sup> See Witness Statement of Malok Mien Ayiek (Anyiel elder), at p. 2, ¶8 (“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.”); Witness Statement of Mijak Kuot Kur (Achaak elder), at p. 3, ¶12 (“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 [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.”); Witness Statement of Nyol Pagout Deng (Chief of Bongo), at p. 3, ¶¶14, 15 (“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.”). See also SPLM/A Memorial, at paras. 1082-1084.

territory and there is no reason to conclude that materially different circumstances existed at the beginning of the 20<sup>th</sup> century (for the reasons explained above<sup>930</sup>).

723. Certainly, nothing in the uncontradicted accounts of the Ngok Dinka about arrangements for upkeep of the road suggests that the Ngok witness evidence is unreliable. On the contrary, the absence of any evidence contradicting the Ngok testimony – where the Government has access to archival records addressing administrative matters such as road maintenance – allows a reasonable inference that the upkeep is exactly as described by the Ngok witness statements.

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724. In sum, the Government’s attempts to belittle the importance of and weight to be attributed to oral tradition and to witness testimony are baseless. In particular, the authorities relied on by the Government simply do not support its culturally blinkered and “facile” view, cited above, that the oral tradition relied on by the SPLM/A in these proceedings is “useless” and can only be relied on where it corroborates other, more important documentary evidence.<sup>931</sup> In this regard, the Government ignores the main thrust of even its own authorities which consistently acknowledge that “[o]ral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective.”<sup>932</sup>

725. Similarly, careful attention to the details of the parties’ respective witness evidence demonstrates that the Ngok Dinka witnesses have provided frank, unvarnished testimony as to their historical knowledge of their *own* lands, while, as discussed below, the Government’s witnesses have provided little more than lawyers’ briefs disguised as evidence, full of exaggerations, misrepresentations and propositions that are not within the witnesses’ knowledge and experience. While the statements are riddled with these fatal flaws, three of the most striking examples are illustrated below.

##### 5. The Government’s Witnesses Are Unreliable

726. The Government chose not to submit witness evidence in support of its Memorial. Nonetheless, proceeding at a time at which the SPLM/A could no longer submit rebuttal evidence, the Government chose to produce 25 fact witness statements. These statements are unreliable in important respects and appear to have been adduced more to throw confusion onto the role and reliability of witness testimony than to prove facts. In any event, the testimony of the Government’s new fact witnesses is unreliable and incredible.

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<sup>930</sup> See above, at paras. 670-674.

<sup>931</sup> See above, at para. 635-654.

<sup>932</sup> *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911, ¶34 (Supreme Court of Canada) (2001), **Exhibit-LE 40/4** (referred to in GoS Reply Memorial, at paras. 43-44. In the same passage, the Court goes on to say that “[t]hus, Delgamuukw cautions against facilely rejecting oral histories simply because they do not convey “historical” truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.” See *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911, ¶34 (Supreme Court of Canada) (2001), **Exhibit-LE 40/4**.

a) The GoS's Witness Statements Are Contradicted by the GoS's Own Pleadings

727. The Government's witness testimony contains a number of relatively uniform assertions, each of which contradicts essentially indisputable or undisputed facts in issue. The existence of these sorts of uniform inaccuracies is a persuasive indicator that the testimony is not authentic or reliable.

728. As discussed above, there is a considerable body of contemporaneous documentary evidence that demonstrates the existence of Ngok Dinka settlements to the *north* of the Kiir/Bahr el Arab prior to 1905.<sup>933</sup> Even the Government's Reply Memorial concedes both this and the fact that Arop Biong (Sultan Rob) was living in the settlement of Burakol, north of the Kiir, in 1904 (within a mile or so of current Abyei town).<sup>934</sup> Nothing in the documentary record, or the Government submissions, suggests that the lands to the south of the Kiir/Bahr el Arab were Messeriya territory.

729. Despite this, many GoS witnesses recite that the Ngok Dinka migrated to and settled in the area *south* of the Kiir/Bahr el Arab, and that such lands to the south belonged to the Messeriya.<sup>935</sup> In particular, seven GoS witnesses attest to this inaccuracy – a remarkable coincidence that happened to match the factual case previously just put in the Government's Memorial, but not mentioned in its Reply Memorial. Thus, the GoS witnesses repeatedly describe the location of the Ngok Dinka *south* of the Bahr el Arab, *in the purported lands of the Messeriya*. A few striking examples are set out below:

- a. "Grandfather of Dinka Mareg tribe (Ngok) being Kujur, i.e. priest, Mendang, *migrated to south Bahr el Arab* and found Messeriya tribes...."<sup>936</sup>
- b. "Then [the Ngok Dinka] arrived in Twij Dinka areas *before entering Messeriya lands, south of the Bahr el Arab*."<sup>937</sup>
- c. "This forced [the Ngok] to migrate again to the *Messeriya lands south of the Bahr el Arab*."<sup>938</sup>
- d. "[The Ngok] found the Messeriya spiritual leader ... already established to the south of the River Bahr-el-Arab... [he] allowed the Ngok to live in the area."<sup>939</sup>

<sup>933</sup> See SPLM/A Memorial, at paras. 908-1084; SPLM/A Reply Memorial, at paras. 891-1066.

<sup>934</sup> See above at paras. 346.

<sup>935</sup> See Witness Statement of Hamadi Ad'dood Ismael Hammad, at p. 2, ¶8 ("Grandfather of Dinka Mareg tribe (Ngok) being *Kujur, i.e. priest, Mendang, migrated to south Bahr el Arab* and found Messeriya tribes in Abu Nafisa area. *Kujur* Mendang asked for a land from Messeriya to settle. They allowed him to stay in Ahabat el Arab, south of Nafisa."); Witness Statement of Ejail Jodtalla Abdel-Hamied, at p. 2, ¶9 ("Then [*the Ngok Dinka*] arrived in Twij Dinka areas before entering Messeriya lands, *south of the Bahr el Arab*."); Witness Statement of Abd Elgaleel Bakkar Ismail Elsakin, at p. 3, ¶8 ("*This forced [the Ngok] to migrate again to the Messeriya lands south of the Bahr el Arab*"); Witness Statement of Ali Nimir Ali Al-Jula, at p. 3, ¶8 ("*Nazir Ali Al-Jula assigned the area between Abu Nafisa and Anyal area south of Bahr el Arab for the settlement of Dinka Ngok*"); Witness Statement of Majid Yak Kur, at p. 1, ¶4 ("[The Ngok] found the Messeriya spiritual leader Ali Abu Gurun already established to the *south of the River Bahr-el-Arab... Ali Abu Gurun allowed the Ngok to live in the area*"); Witness Statement of Majak Matet Ayom, at p. 1, ¶5 ("Allel is known as the chiefdom [of the Ngok] that went far to the north and east but returned *south of the River Kir* by the end of the Turkish rule"); Witness Statement of Deng Balaiel Bahar Hamadean, at p. 2, ¶9 ("*Dinka Mareg (Ngok) crossed the [Bahr el Arab] river northwards only after they were allowed to do so* when they made all the above mentioned alliances with the Messeriya"); Witness Statement of Bashtana Mohammed Salem Sulaiman, at p. 2, ¶6 ("[the *Ngok*] requested *Nazir Ali Julla to allow them to cross the Bahr el Arab northward*").

<sup>936</sup> Witness Statement of Hamadi Ad'dood Ismael Hammad, at p. 2, ¶8.

<sup>937</sup> Witness Statement of Ejail Jodtalla Abdel-Hamied, at p. 2, ¶9.

<sup>938</sup> Witness Statement of Abd Elgaleel Bakkar Ismail Elsakin, at p. 3, ¶8.

730. The evidentiary record is clear: the Misseriya were based in the Muglad and Babanusa and only came south to graze. There is no record of their presence at all south of the Kiir/Bahr el Arab, let alone that the lands in that region were regarded as Misseriya territory. The testimony to that effect, uniformly provided by a number of Misseriya witnesses, is deeply unreliable.

b) The GoS Witnesses Draw Sweeping, Unsupported Conclusions Which Seek to Exclude the Ngok Dinka from Much of the Abyei Area

731. The ABC concluded that there was a longstanding presence of Ngok Dinka settlements in the Abyei Area. This is supported by a number of commentators, including the GoS's own witness, Professor Cunnison.<sup>940</sup>

732. Despite this, the GoS's fact witnesses make overly broad remarks about the dearth of Ngok settlements in the Abyei Area. In particular, the Ngok Dinka recruited by the GoS to give evidence on its behalf deny Ngok Dinka occupancy and use across much of the entire Abyei Area. One example asserts that "[m]ost of the area that the SPLM/A are claiming has *never been part of the Ngok Dinka settlements or grazing*. The area from Higlieig to Kailak to Nyama till [sic] Meiram has never been a Ngok Dinka area neither has the Goz."<sup>941</sup>

733. The GoS witness in question describes himself as a "Ngok Dinka" and member of the "Anyiel chiefdom," which is one of the southernmost chiefdoms. The Anyiel Chiefdom is based around Abyei town, where the witness resides.<sup>942</sup> Yet, that GoS witness states unequivocally that the northern part of the *entire* Abyei Area has no Ngok settlements and in fact has never had Ngok settlements. By contrast, the SPLM/A witnesses restricted themselves to evidence about their own Chiefdoms' lands or in a few cases about close neighbors.

734. Another GoS witness, who is not even Ngok Dinka, asserts that the Ngok Dinka "do not move from [their small settlements] to areas north of Abyei [town]."<sup>943</sup> It is not clear on what basis this individual is capable of reaching such a broad conclusion, having grown up in Al Fula (north of Muglad), been educated in Khartoum and having only spent an extremely short period "as administration officer at Muglad and Abyei."<sup>944</sup>

735. Other GoS witnesses simply suggest that the Ngok have and have had no lands at all and "the whole land, it is a Messiriya land."<sup>945</sup> One such witness describes the borders as being on the west "with the Rezeigat, north border with Hamar, south with Twij, Hijair, Nuer and Nuba in the north-east."<sup>946</sup> By this account, the Ngok do not exist in the Abyei Area at all. This is not an isolated remark. Its sentiment is echoed by another GoS witness who states that "the [Abyei] area is a Messiria are [sic] all through the past history."<sup>947</sup>

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<sup>939</sup> Witness Statement of Majid Yak Kur, at p. 1, ¶4.

<sup>940</sup> See I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 19 (1966), ("Much of the Bahr has permanent Dinka settlements.") **Exhibit-FE 4/16**. See also SPLM/A Memorial, at para. 956.

<sup>941</sup> Witness Statement of Zakaria Atem Diyin Thibeik Deng Kiir, at p. 4, ¶27.

<sup>942</sup> See Witness Statement of Zakaria Atem Diyin Thibeik Deng Kiir, at pp. 1, 4, ¶¶1-2, 27.

<sup>943</sup> Witness Statement of Herika Iz-Aldin Humeda Khamis, at p. 7, ¶24.

<sup>944</sup> Witness Statement of Herika Iz-Aldin Humeda Khamis, at p. 2, ¶2.

<sup>945</sup> Witness Statement of Bashtana Mohammed Salem Sulaiman, at pp. 3-4, ¶23

<sup>946</sup> Witness Statement of Bashtana Mohammed Salem Sulaiman, at pp. 3-4, ¶23

<sup>947</sup> Witness Statement of Ismail Hamdean Humaidan, at p. 3, ¶10.

736. The Ngok witnesses, on the other hand, restricted their statements to those matters within their knowledge or as handed to them directly by their forefathers. They described their own lives and lands and how those interfaced with the Misseriya. They did not purport to describe the areas the Misseriya did or did not occupy, for example in the Babanusa.

737. The Government's witness evidence falls by the Government's own arguments. The GoS witnesses attest to matters about which they have no knowledge and which find no support in the Government's own pleadings, the documentary record or other witness testimony. As such, the value of the GoS witness evidence is "fundamentally vitiate[d]."

c) The GoS Witnesses Exaggerate Seasonal Grazing Periods  
Convey a False Sense of Attachment to the Land

738. The GoS witnesses repeatedly overstate the period of grazing in the Bahr region. The period for grazing in the Bahr region is an objective term that is determined by season and does not leave much to the discretion of the herdsmen. Professor Cunnison, the GoS's expert on grazing patterns, states clearly in his seminal text: "Most people are ready to move [south to the Bahr region] by the end of December, but those who cultivate more intensively may not be ready to move until mid-January"<sup>948</sup> and "in the Bahr...rains fall early – in April- and at once attracts numerous insects; and the land has clay underfoot, which makes the going difficult after the rains have started."<sup>949</sup> According to the Government's own expert, the Misseriya grazed no more than four months in the Bahr region camps.

739. Despite the well known seasonal patterns, one key GoS witness suggests that "the Messeriya still reside in the Bahr for about eight months a year."<sup>950</sup> Another GoS witness states how "the Messeriya spend *eight continuous months south of the Bahr el Arab*."<sup>951</sup> Yet another GoS witness states that the Misseriya "stay for 9 months in the Bahr el Arab where water and grass are available. In July they move to the Goz Area."<sup>952</sup>

740. This misrepresentation is compounded by statements that are clearly wrong, and which suggest that even in the best case scenario, the witness simply does not have knowledge of the subject matter in question. In the worst case scenario, it suggests a zealous partisan fueled by enthusiasm for making the GoS's case at any cost – even the truth.

741. The Government's witness evidence is again vulnerable to exactly the same criticisms that the Government levels at the SPLM/A witness evidence. That is not because that evidence is, by its oral nature, "inherently flawed." As detailed more fully above, oral evidence in claims such as the present one is entitled to substantial deference in respect for its unique and probative value. It is because, viewed with even a modicum of objectivity, the Government's witness evidence (as illustrated in the few examples given above) is directly and categorically contradicted by the documentary and other oral and witness evidence detailed in the SPLM/A pleadings, as well as by the evidence of the Government's lead witness, Professor Cunnison.

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<sup>948</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 23 (1966), **Exhibit-FE 4/16**.

<sup>949</sup> I. Cunnison, *Baggara Arabs – Power and the Lineage in a Sudanese Nomad Tribe* 19 (1966), **Exhibit-FE 4/16**.

<sup>950</sup> Witness Statement of Mukhtar Babu Nimir, p. 2, ¶2.

<sup>951</sup> Witness Statement of Deng Balaiel Bahar Hamadean, p. 1, ¶3.

<sup>952</sup> Witness Statement of Bashtana Mohammed Salem Sulaiman, p. 2, ¶9.



742. In these circumstances, and quite apart from the body of national and international case law which the Government chooses – selectively and misleadingly – to ignore on this subject, it is completely untenable for the Government to complain about the content and veracity of the SPLM/A witness evidence. To the contrary, the SPLM/A witness evidence is limited to matters directly within the knowledge of those witnesses and is, as demonstrated above, fully consistent with and corroborated by the documentary and other oral and witness evidence. As such, it is entitled to significant weight in these proceedings. It is the Government’s own, self-serving witness evidence that is, to use the Government’s own words, “inherently flawed” and “useless.”

*E. The Boundary Between Kordofan and Bahr el Ghazal Was Indefinite and Indeterminate in 1905*

743. As with the Government’s previous submissions, its Reply Memorial claims that there was a clear, determinate provincial boundary in 1905 between Kordofan and Bahr el Ghazal, located on the Kiir/Bahr el Arab. The Government also continues to argue (as discussed in Part III E.3. below) that this purported provincial boundary is decisive to any definition of the Abyei Area because, in its view, only territory south of the putative Kiir/Bahr el Arab boundary could have been transferred to Kordofan in 1905.

744. The Government’s claims regarding the purported Kordofan/Bahr el Ghazal boundary are irrelevant to both the Tribunal’s decision and the definition of the Abyei Area. As discussed in detail below (in Part III E.3.), the Kordofan/Bahr el Ghazal boundary in 1905 has no bearing on the area of the nine Ngok Dinka Chiefdoms or the definition of the Abyei Area. On the contrary, as the ABC Experts correctly interpreted Article 1.1.2 of the Abyei Protocol, the only relevant issue in defining the Abyei Area is the extent of the territory of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan in 1905 – an issue that does not depend at all on the location of the Kordofan/Bahr el Ghazal provincial boundary.

745. Even if it were relevant (which it is not), the Government’s characterization of the Kordofan/Bahr el Ghazal boundary is irreconcilable with the historical record. The Government acknowledges – as it must – the grave uncertainties surrounding the identity and location of the “Bahr el Arab” and other rivers of the Bahr region. Despite this, the Government ignores the consequences of this uncertainty for the Kordofan/Bahr el Ghazal boundary. As discussed in the SPLM/A’s Reply Memorial, this uncertainty contributed to the Kordofan/Bahr el Ghazal boundary being left indefinite and indeterminate in 1905.<sup>953</sup> That is demonstrated by the contemporaneous documents and cartographic evidence, as well as by the post-1905 treatment of the provincial boundary by Condominium officials.

746. The Government’s Reply Memorial claims that Wilkinson made what was supposedly an isolated “error” in 1902, confusing the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga, but that “this error was recognized and rectified by 1905.”<sup>954</sup> The Government goes on to claim that the Bahr el Arab “was an established provincial boundary” by 1905,<sup>955</sup> rejecting suggestions that the supposed boundary was either “provisional” or “approximate.”<sup>956</sup>

747. The historical record flatly contradicts the Government’s claims regarding the Kordofan/Bahr el Ghazal boundary. In fact, the Anglo-Egyptian confusion over the “Bahr el

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<sup>953</sup> SPLM/A Reply Memorial, at paras. 1438-1465.

<sup>954</sup> GoS Reply Memorial, at para. 387.

<sup>955</sup> GoS Reply Memorial, at para. 449.

<sup>956</sup> GoS Reply Memorial, at paras. 428-429.

Arab” was not confined to Wilkinson or one or two other officials and it was not “rectified by 1905.” Rather, as the ABC Experts correctly found, the evidence leaves no doubt but that a large number of Condominium officials (including Mahon, Percival, Wilkinson, Boulnois, Lloyd and O’Connell) all referred to the Ngol/Ragaba ez Zarga as the “Bahr el Arab.” Equally, the evidence makes it clear that the confusion over the “Bahr el Arab” continued until at least 1907.

748. Given that confusion, it is impossible to accept the Government’s claims regarding the putative Kordofan/Bahr el Ghazal boundary at the time of the 1905 transfer of the Ngok Dinka. In fact, prior to 1905, there simply was no definite or determinate provincial boundary. Indeed, as also discussed below, that continued to be the case for a number of years following 1905.

749. The Government’s Reply Memorial errs just as seriously in its characterizations of the 1905 transfer of the Ngok Dinka. The Government claims that “the present dispute concerns *the transfer of a specific area* at a specific time,”<sup>957</sup> not a transfer of Ngok Dinka peoples.

750. In fact, the documentary record makes it unmistakably clear that the 1905 transfer was a transfer of the Ngok Dinka (and Twic Dinka) tribes. Although that transfer entailed the transfer of the territories that the Ngok inhabited, those territories were undetermined at the time; it was the transfer of the Ngok Dinka that defined what territory was affected, and not the transfer of territory that defined what tribal peoples were affected. That is exactly what the 1905 transfer decision and other instruments record, it is precisely what the Condominium’s purposes required and it is precisely what the Government has previously acknowledged.

1. The Government’s Suggestion that “Initial Uncertainty” Over the Identity and Location of the “Bahr el Arab” Was Rectified by 1905 is Manifestly Wrong

751. The Government’s Reply Memorial claims that an “error” was made as to the identity of the “Bahr el Arab” by Wilkinson in 1902, confusing the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga. It goes on to claim that this impliedly isolated error “was recognized and rectified by 1905.”<sup>958</sup> According to the Government, “[d]espite the fact that there was *some initial uncertainty* about the identity of the river [the “Bahr el Arab”], *this was cleared up by early 1905.*”<sup>959</sup>

752. Although essential to the Government’s case, this story is demonstrably false from start to finish. In fact, the confusion about the “Bahr el Arab” was not some isolated error by “Wilkinson,” but was a widely-shared view of multiple Condominium officials and reports. Equally, this confusion was not “recognized and rectified” by 1905, but plainly persisted widely until at least 1907 – two years after the transfer of the Ngok Dinka. These conclusions are inescapable from the documentary record.

a) The Government’s Suggestion that the Confusion About the “Bahr el Arab” Was Not Widely Shared by Anglo-Egyptian Officials Is Demonstrably Wrong

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<sup>957</sup> GoS Reply Memorial, at para. 88.

<sup>958</sup> GoS Reply Memorial, at para. 387.

<sup>959</sup> GoS Reply Memorial, at para. 425.

753. First, it is indisputable that confusion over the identity and location of the “Bahr el Arab” was not confined to Wilkinson (as the Government and Macdonald suggest). On the contrary, this confusion was widely shared by multiple Condominium officials.

754. The ABC Experts, who identified the confusion over the rivers of the Bahr region in their Report, concluded that a number of Anglo-Egyptian officials confused the “Bahr el Arab” and the Ngol/Ragaba ez Zarga:

*“Wilkinson was not alone in erroneously demarcating geographical features in the Sudan. ... Other reports make it clear that administrative officials mistook the Ragaba ez-Zarga/Ngol for the Bahr el-Arab, and thought the Kir was a different river.”*<sup>960</sup>

755. The ABC Experts were precisely right in reaching this conclusion. As discussed in the SPLM/A Reply Memorial, the confusion was shared by Percival, Mahon, Boulnois, Lloyd and O’Connell – whose descriptions of the region clearly proceeded on the premise that the Ngol/Ragaba ez Zarga was the watercourse that Wilkinson had described as the “Bahr el Arab.”<sup>961</sup> Thus:

a. The confusion regarding the “Bahr el Arab” had been shared by the two men (Wilkinson, Percival) who had conducted the most recent treks to the Ngol/Ragaba ez Zarga and the Kiir/Bahr el Arab – both of whom identified the Ngol/Ragaba ez Zarga as the “Bahr el Arab.”<sup>962</sup>

b. The Governor of Bahr el Ghazal (Boulnois) understood the Ngol/Ragaba ez Zarga to be the Bahr el Arab and so informed Governor General Wingate.<sup>963</sup>

c. In the 1906 Annual Report for Kordofan Province (which is not referred to by the Government), J.R. O’Connell describes Hasoba as being located on the “Bahr el Arab,”<sup>964</sup> although Hasoba is indisputably located on the Ngol/Ragaba ez Zarga, not the Kiir/Bahr el Arab.<sup>965</sup>

d. Lloyd, who would go on to succeed O’Connell as Governor of Kordofan, also identified the Ngol/Ragaba ez Zarga as the Bahr el Arab.<sup>966</sup> Indeed, he did so in **1907** – two years after the Government claims that “Wilkinson’s error” had been rectified.

e. The Governor of Kordofan, Mahon, had in 1903 referred to the Ngol/Ragaba ez Zarga as the “Bahr El Homr,” confirming the confused nomenclature over the rivers in the Bahr.<sup>967</sup>

756. Nor is this widely shared confusion at all surprising. On the contrary, given the small size of the Condominium administration, it would have been odd if other Anglo-Egyptian administrators had not shared such an error.

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<sup>960</sup> ABC Report, Part I, at pp. 17-18, **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>961</sup> See SPLM/A Reply Memorial, at paras. 941, 986, 1013.

<sup>962</sup> See above at paras. 442-446, 451-468; SPLM/A Reply Memorial, at paras. 955 and 987.

<sup>963</sup> SPLM/A Reply Memorial, at paras. 1012-1013.

<sup>964</sup> Annual Report on the Sudan, 1906, Province of Kordofan, at p. 689, **Exhibit-FE 2/19**.

<sup>965</sup> See **Map 38** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907); **Map 44** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910); **Map 46** (*Hasoba: Sheet 65-L*, Survey Office, Khartoum, 1910).

<sup>966</sup> SPLM/A Reply Memorial, at paras. 1038-1041.

<sup>967</sup> SPLM/A Reply Memorial, at paras. 943-952, 975-982.

757. What is surprising, however, is that the Macdonald Reports attempt to characterize the confusion regarding the “Bahr el Arab” as some idiosyncratic mistake by Wilkinson. Thus, the Second Macdonald Report declares: “there was *one instance of mistaken identity* which affected the depiction of the river on one map. *In 1902, Wilkinson mistakenly reported that he had met the Bahr el Arab ...*”<sup>968</sup> Macdonald concludes that the Condominium officials “had not frequently been mistaken” as to the location and identity of the “Bahr el Arab.”<sup>969</sup>

758. Macdonald’s conclusions are directly contradicted by the MENAS Expert Report and by the historical record. The MENAS Expert Report concludes:

“In our view it is absolutely understandable and explicable that Condominium officials – observing at ground levels – would confuse the Ngol/Ragaba ez Zarga and Bahr el Arab. Of course, it is patently obvious as a matter of historical record that the officials did so. ... The rivers are and were similar, and this is only highlighted by the *confusion of the Condominium officials* of the time.”<sup>970</sup>

“To conclude, by 1905, in our opinion, the Condominium administrators possessed and maintained very limited practical knowledge and conflicting understandings of the rivers in the Bahr region. Specifically, confusion with regard to the meaning of “Bahr el Arab” evidently prevailed at the time of the transfer of the Ngok Dinka to Kordofan, with that name being used variously for the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga. There are also indications that the term referred more generally to the entire Bahr river basin region, rather than to a specific waterway.”<sup>971</sup>

759. In any case, neither Macdonald Report considers the Percival trek notes (from December 1904 and March 1905), Boulnois’s advice to Governor General Wingate, or O’Connell’s understanding of the Ngol/Ragaba ez Zarga as the Bahr el Arab in 1906. The First Macdonald Report looks briefly at Lloyd’s mistake of calling the Ngol/Ragaba ez Zarga the “Bahr el Arab” but inexplicably dismisses the importance of it. Had Macdonald considered these reports with care (or at all), he could not have made the unsustainable claim that “there was one case of mistaken identity” – a false statement that distorts the indisputable reality that a large number of Condominium officials shared the confusion over the “Bahr el Arab.”

- b) The Government’s Claim that Anglo-Egyptian Confusion over the “Bahr el Arab” Was Short-Lived and Rectified by 1905 Is Demonstrably Wrong

760. The Government’s Reply Memorial also pretends that the confusion over the “Bahr el Arab” was a “short-lived” mistake that was rectified by 1905.<sup>972</sup> That claim is also manifestly wrong.

761. As the ABC Experts correctly concluded, the confusion about the “Bahr el Arab” persisted among Anglo-Egyptian officials from prior to 1905 through to at least 1907 or 1908:

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<sup>968</sup> Second Macdonald Report, at para. 13(2).

<sup>969</sup> Second Macdonald Report, at para. 13(2).

<sup>970</sup> MENAS Expert Report, at para. 125.

<sup>971</sup> MENAS Expert Report, at para. 50; *see also* SPLM/A Reply Memorial, at paras. 1449-1450.

<sup>972</sup> GoS Reply Memorial, at para. 425. *See also* GoS Memorial, at para. 318.

“1905-06 surveys correctly identified the Kir as the Bahr el-Arab and the Ragaba ez-Zarga/Ngol for what it actually was (and labeled it the ‘Bahr el-Humr’). *It was not until 1908, however, that the local administrators in Khartoum consistently described the Ragaba ez Zarga as the ‘Bahr el-Humr’ in their official reports.*”<sup>973</sup>

Professor Daly reached precisely the same conclusion in his expert historical evidence, as did the MENAS Expert Report.<sup>974</sup> Indeed, although the Government’s Reply Memorial studiously avoids mentioning the fact, its Memorial and the sources it cites repeatedly acknowledge the extent of the “*uncertainty*” regarding the Kiir/Bahr el Arab’s course,<sup>975</sup> emphasizing that the location and course of the Bahr el Arab was “*ill-defined*,”<sup>976</sup> “*vaguely-defined*,”<sup>977</sup> “*uncertain*,”<sup>978</sup> and “*bewildering*.”<sup>979</sup>

762. The historical record confirms that these conclusions are exactly right. As noted above, Lloyd observed in 1907 that the “southern boundary [of Dar Homr] is *between the Bahr el Arab and the river Kir*, the latter being *occupied by the Dinkas under Sultan Rob*.”<sup>980</sup> As the MENAS Expert Report confirms, Lloyd was plainly still referring to the Ngol/Ragaba ez Zarga as the “Bahr el Arab” in 1907.<sup>981</sup>

763. Similarly, as also noted above, the 1906 Annual Report for Kordofan describes Hasoba as being located on the “Bahr el Arab.”<sup>982</sup> Again, that plainly refers to the Ngol/Ragaba ez Zarga as the “Bahr el Arab,” because Hasoba is indisputably located on the Ngol/Ragaba ez Zarga, not the Kiir/Bahr el Arab.<sup>983</sup>

764. The continuing geographical confusion of the Condominium officials is confirmed by the map evidence. The Sudan Intelligence Office’s official map of Sudan, produced in May 1904, incorrectly labeled what was the Ngol/Ragaba ez Zarga as the “Bahr el Arab.”<sup>984</sup> This May 1904 map was included in Gleichen’s 1905 *The Anglo-Egyptian Sudan Handbook*.<sup>985</sup>

765. In response to all this, the Government airily asserts that any “initial uncertainty” about the “Bahr el Arab” was “cleared up by early 1905 as a result primarily of Bayldon’s voyage.”<sup>986</sup> The Reply Memorial is to the same effect.<sup>987</sup> Not surprisingly, the Government’s Reply Memorial cites no authority for this assertion – nor does it attempt to explain any of the continuing references (by Lloyd, O’Connell and Condominium maps and records) to the Ngol/Ragaba ez Zarga as the “Bahr el Arab.”

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<sup>973</sup> ABC Report, Part I, at p. 18, **Appendix B to SPLM/A Memorial** (emphasis added). See also ABC Report, Part I, at pp. 38-39, **Appendix B to SPLM/A Memorial**.

<sup>974</sup> Daly Supplemental Expert Report, at p. 54; MENAS Expert Report, paras. 43-50.

<sup>975</sup> GoS Memorial, at para. 290.

<sup>976</sup> GoS Memorial, at para. 293 (quoting *Report of the Egyptian Province of the Sudan, Red Sea and Equator* 91 (1884), **Exhibit-FE 17/5**).

<sup>977</sup> GoS Memorial, at para. 294 (quoting E. Gleichen, *Handbook of the Sudan* 110 (1898), **Exhibit-FE 1/6**).

<sup>978</sup> GoS Memorial, at para. 309.

<sup>979</sup> GoS Memorial, at para. 320 (quoting Garstin, *Fifty Years of Nile Exploration, and Some of its Results*, *The Geographical Journal*, 33 (1909), at p. 142, **Exhibit-FE 18/1**).

<sup>980</sup> SPLM/A Reply Memorial, at para. 1037; Lloyd, *Some Notes on Dar Homr*, *The Geographical Journal*, 29 (January to June 1907), at p. 649, **Exhibit-FE 3/4** (emphasis added).

<sup>981</sup> MENAS Expert Report, at paras. 48-49.

<sup>982</sup> Annual Report on the Sudan, 1906, Province of Kordofan, at p. 689, **Exhibit-FE 2/19**.

<sup>983</sup> See **Map 38** (*Kordofan: Map of Dar Homr*, Watkiss Lloyd, 1907); **Map 44** (*The Sudan Province of Kordofan*, Watkiss Lloyd, 1910); **Map 46** (*Hasoba: Sheet 65-L*, Survey Office, Khartoum, 1910).

<sup>984</sup> See SPLM/A Reply Memorial, at para. 1212; **Map 36** (*The Anglo-Egyptian Sudan*, Intelligence Office Khartoum, 1904) **Exhibit-FE 2/14**.

<sup>985</sup> See SPLM/A Reply Memorial, at para. 1211.

<sup>986</sup> GoS Memorial, at para. 425.

<sup>987</sup> In its Reply Memorial The Government asserts that “[t]he identity of the Bahr el Arab was thus known by March 1905 at the latest.” GoS Reply Memorial, at para. 414.

766. The Government's Reply Memorial elsewhere refers to a report by Bayldon in late March 1905, which identified the "Bahr el Arab" as the Kiir/Bahr el Arab and referred to "what we now know as the Ragaba ez Zarga" as the "Bahr el Homr."<sup>988</sup> (The Government correctly abandons the false claim in its Memorial that Bayldon's "correction" of Wilkinson's error occurred in "*February 1905*"<sup>989</sup> – and thus at least theoretically prior to the 1905 transfer of the Ngok Dinka.) Bayldon's report is undeniably dated **20 March 1905**, and his views about the "Bahr el Arab," were therefore not available at the time the transfer of the Ngok Dinka occurred.

767. In any event, the Government also fails to mention the reaction to Bayldon's report in an **April 1906** memorandum on the Bahr el Arab by Captain Lyons, the Director-General of the Survey Department of the Egyptian Government.<sup>990</sup> Lyons reports on Bayldon's explorations, noting that they "*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 [Ngol/Ragaba ez Zarga], while the more southern river rising in the Dar Fertit hills to the west of Liffi is the Bahr el Arab or Kir."<sup>991</sup>

768. Lyons' equivocation (as head of the Survey Department) makes it clear that – again contrary to the Government's story – the Condominium officials' geographic confusion was still in full force in 1906. Moreover, even in 1906, Lyons' geographic description is still confused – it is the Kiir/Bahr el Arab, not the Bahr el Homr (i.e. Ngol/Ragaba ez Zarga), that rises to the south of Hofrat en Nahas.<sup>992</sup> Parenthetically, Lyons goes on to identify, in part, how the geographical confusion arose, stating that "[b]oth of these rivers, the Bakr (sic) El Homr and the Bahr El Arab, must closely resemble each other in the regimen."<sup>993</sup>

769. Therefore, in April 1906, more than a year after the transfer of the Ngok, the Survey Department was confused as to the course of the Ngol/Ragaba ez Zarga and Kiir/Bahr el Arab. This confirms the Condominium administrators' limited understanding of the rivers, and graphically illustrates how either the Kiir/Bahr el Arab or the Ngol/Ragaba ez Zarga might have been considered a boundary between Kordofan and Bahr el Ghazal. Moreover, as discussed in the SPLM/A Reply Memorial, other understandings of the term "Bahr el Arab" also existed, including Cunnison's later interpretation of the term as including all of the Bahr rivers<sup>994</sup> – a view paralleling earlier references in Gleichen's 1898 *Handbook* to the Kordofan/Bahr el Ghazal boundary.<sup>995</sup>

770. In sum, the Government's claims that there was only an isolated mistake about the "Bahr el Arab" by Wilkinson, which was quickly "rectified," is completely wrong. Equally wrong is the Government's claim that "there was no ambiguity by 1905 as to the real identity of the Bahr el Arab."<sup>996</sup> Although fundamental to the Government's entire case, this is simply not what the historical record shows.

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<sup>988</sup> First Macdonald Report, at para. 3.13.

<sup>989</sup> GoS Memorial, at para. 313.

<sup>990</sup> See Sudan Intelligence Report No. 141, dated April 1906, Appendix C, at pp. 6-7, **Exhibit-FE 2/17**.

<sup>991</sup> See Sudan Intelligence Report No. 141, dated April 1906, Appendix C, at p. 6, **Exhibit-FE 2/17**.

<sup>992</sup> *A Handbook of Anglo-Egyptian Sudan* (1922) pp. 92-93, **Exhibit-FE 3/10**.

<sup>993</sup> Sudan Intelligence Report No. 141, dated April 1906, Appendix C, at p. 6, **Exhibit-FE 2/17**. See also the MENAS Expert Report, at para. 50.

<sup>994</sup> See above at paras. 537-538; SPLM/A Reply Memorial, at paras. 1112-1117.

<sup>995</sup> The 1898 edition of Gleichen's *Handbook of the Sudan* referred to the boundaries of the Bahr el Ghazal mudiriah as "vaguely defined" and "enclosing the entire district watered by the southern tributaries of the Bahr el Arab and Bahr el Ghazal Rivers." E. Gleichen, *Handbook of the Sudan* 110 (1898), **Exhibit-FE 1/6**.

<sup>996</sup> GoS Reply Memorial, at para. 454.

771. Rather, it is clear that the ABC Experts were exactly right in their conclusions. Between 1902 and 1907, at the earliest, there was widespread geographic confusion among a large number of Condominium officials about the identity and location of the “Bahr el Arab.”

772. This confusion has vital consequences, which is precisely why the Government has sought so intently to “rectify” the confusion: it means that references to the “Bahr el Arab” as the putative Kordofan/Bahr el Ghazal provincial boundary could not produce a definite or determinate result. Rather, they meant one thing to men like Percival, Wilkinson and Lloyd (the Ngol/Ragaba ez Zarga), another thing to men like Bayldon and Huntley Walsh (the Kiir/Bahr el Arab), yet other things to local residents (who, as described by Cunnison, regarded the Bahr el Arab as a reference to the entire river system<sup>997</sup>) and unidentified things to men like Mahon (whose views were at best unclear).

773. This is precisely the conclusion reached in the MENAS Expert Report, which reasons:

“by 1905, in our opinion, the Condominium administrators possessed and maintained very limited practical knowledge and conflicting understandings of the rivers in the Bahr region. Specifically, *confusion with regard to the meaning of ‘Bahr el Arab’ evidently prevailed at the time of the 1905 transfer of the Ngok Dinka to Kordofan, with that name being used variously for the Kiir/Bahr el Arab and the Ngol/Ragaba ez Zarga. There are also indications that the term referred more generally to the entire Bahr river basin region, rather than to a specific waterway.*”<sup>998</sup>

774. The MENAS Expert Report concludes that:

“This uncertainty rendered, of necessity, the description of any territorial limit between Kordofan and Bahr el Ghazal provinces uncertain and indeterminate.”<sup>999</sup>

775. In these circumstances, references to the “Bahr el Arab” by Condominium officials could not produce any definite or determinate provincial boundary. Further, they most certainly could not produce a boundary that could be used as the basis for defining the area of the nine Ngok Dinka chiefdoms.

c) Macdonald’s Conclusions About the Condominium Officials’ Knowledge of the “Bahr el Arab” are Wrong

776. Despite the foregoing, Macdonald asserts, “[t]he Sudan Government was not ignorant ‘regarding the southern territories and rivers’ and in particular, the Bahr el Arab.”<sup>1000</sup> This is irrelevant and wrong.

777. First, Macdonald’s claims that the Sudan Government was well-informed about the location and course of the Bahr el Arab miss the fundamental point. That point is that the Condominium officials were confused about what river the “Bahr el Arab” was – with, as discussed above, the Kiir/Bahr el Arab, Ngol/Ragaba ez Zarga, Bahr river basin and other possibilities all being available choices. In these circumstances, the fact that some Condominium officials might have known where the Kiir/Bahr el Arab was and what course

<sup>997</sup> See SPLM/A Reply Memorial, at paras. 1112-1117; *see above* at paras. 537-538.

<sup>998</sup> MENAS Expert Report, at para 50.

<sup>999</sup> MENAS Expert Report, at para 51. *See also* MENAS Expert Report, at paras. 62-63, 88.

<sup>1000</sup> Second Macdonald Expert Report, at para. 13.

it took is irrelevant: until there was agreement that the “Bahr el Arab” meant the Kiir/Bahr el Arab, and not another river or river basin or system, this putative knowledge is irrelevant.

778. Second, Macdonald’s claims about Condominium knowledge are also wrong. Macdonald has no particular expertise in the history of Sudan and his views about Sudanese Government knowledge certainly do not enjoy the expertise that either Professor Daly or MENAS provides. As discussed elsewhere, both Professor Daly and MENAS conclude, contrary to Macdonald, that the Sudan Government was uninformed about the course and location of the “Bahr el Arab.”<sup>1001</sup>

779. In the early 20<sup>th</sup> century, a waterway known as the “Bahr el Arab” was identified as a western source of the Nile, but the discovery had no significant effects. The territory was of almost no economic interest to the Sudan Government (or London or Cairo for that matter). For that, and other, reasons the Bahr el Arab remained unexplored. (As discussed above, topographic reports from 1909 continued to emphasize the lack of information about the course of the Kiir/Bahr el Arab.<sup>1002</sup>)

780. The only evidence that Macdonald proffers to support his proposition that the Bahr el Arab was well understood is a map authored by Mardon, which he argues “had produced a shape for the river that was remarkably close to the truth.”<sup>1003</sup> Not only was Mardon not a Sudan Government official, but there is no evidence that he ever visited the Bahr region.

781. The real (and indeed official) Sudan Government position is explained in the 1906 Annual Report:

“At present funds may not be available to do more than attempt to trace the course of the several rivers which seem almost to lose themselves inextricably in the swamp depression bordering the Bahr el Ghazal....”<sup>1004</sup>

782. In truth, the Sudan Government did not know the true course of the Bahr el Arab – even in 1906 – and nor did it have the funds to find out. The “remarkable” likeness of Mardon’s cartography (even if it were true) is wholly irrelevant. In any event, even a cursory glance at the depiction of the Bahr el Arab on maps pre-dating 1905 shows that the cartographers of the era literally had no idea as to which precise waterway (within the Bahr) was the Bahr el Arab and what course it took.<sup>1005</sup> Mardon was no exception.

783. For years after the 1905 transfer, the lack of knowledge regarding the river is glaringly obvious. For example, the 1909 Sudan Annual Report noted that “[m]uch of the course of the Bahr-el-Arab is still unexplored.”<sup>1006</sup> Macdonald’s attempt to attribute to the Sudan Government a thorough understanding of the Bahr el Arab in 1905 flies in the face of the Sudan Government’s own contemporaneous declarations regarding its ignorance of the river’s course.

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<sup>1001</sup> Daly Expert Report, at pp. 32-33; Daly Supplemental Expert Report, at pp. 3, 21-23; MENAS Expert Report, at paras. 17-50.

<sup>1002</sup> See above, at paras. 579-598.

<sup>1003</sup> Macdonald Supplementary Report, at para. 13.

<sup>1004</sup> Annual Report on Sudan, 1906, at p. 17, **Exhibit FE 2/19**.

<sup>1005</sup> **Map 61** – SPLM/A Supplemental Map Atlas; see also SPLM/A Reply Memorial, Appendix B, at para. 4.

<sup>1006</sup> Annual Report on Sudan, 1909, at p. 52, **Exhibit FE 3/6**.



d) Macdonald's Conclusions Regarding the Putative Provincial Boundary between Kordofan and Bahr el Ghazal are Wrong

784. Macdonald also includes in his Supplementary Report an Appendix on "Provincial Boundary Making."<sup>1007</sup> This appendix is based on Macdonald's research in the archives of the Survey Department in Khartoum (to which, as noted above, the SPLM/A has not been permitted access SPLM/A). In fact, even the results of Macdonald's research which are disclosed in these proceedings contradict the Government's case by demonstrating that Sudanese provincial boundaries remained uncertain, approximate and provisional well past 1905.

785. Macdonald asserts that in April 1907, the Intelligence Office circulated to provincial Governors "a map of the *intended boundary depiction* for each province."<sup>1008</sup> The circular stated, "[p]rovince boundaries have however altered from time to time and *I am doubtful if the line shown is the present recognised boundary.*"<sup>1009</sup> This circular shows clearly that, by 1907, the Intelligence Office was "*doubtful*" about the location of provincial boundaries in Sudan.

786. Macdonald also says that "*comments and corrections were invited*"<sup>1010</sup> from provincial Governors on this map of the "*intended boundary depiction* for each province."<sup>1011</sup> Again, this indicates that provincial boundaries remained to be defined, with "comments and corrections" yet to be received, much less implemented.

787. Macdonald also refers to the Survey Department Annual Report of 1912, which stated that a 1:250 000 map marking provincial boundaries would be left for comment in London, with the invitation to "all Governors and others interested" to visit and review the map at their "next leave season."<sup>1012</sup> Again, this revealed a process by which boundaries were being drawn – not one where that had already occurred.

788. Macdonald concludes that "[b]oundaries shown on national mapping [sic] had been checked with Governors before publication and can therefore be taken as having their assent."<sup>1013</sup> Nonetheless, Macdonald's reference to a letter from the Governor of the Fung Province in 1923, where he describes a portion of his province's boundary as "*not very closely defined,*"<sup>1014</sup> demonstrates that even as late as 1923, provincial boundaries continued to be defined. Needless to say, there is no evidence that the Governors of Kordofan and Bahr el Ghazal commented upon the border between them or that this border was ever finalized.

2. The Provincial Boundary Between Kordofan and Bahr el Ghazal Was Indefinite and Indeterminate in 1905

789. The Government's Reply Memorial finds its case on the proposition that there was, in 1905, a clear and definite provincial boundary between Kordofan and Bahr el Ghazal. According to the Government, "the Bahr el Arab was the Provincial Boundary between

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<sup>1007</sup> Second Macdonald Report, at p. 22.

<sup>1008</sup> Second Macdonald Report, at p. 22 (emphasis added).

<sup>1009</sup> Letter from Intelligence Office to Governor Sennar, dated 10 April 1907, Figure 2 to Second Macdonald Report, at p. 10.

<sup>1010</sup> Second Macdonald Report, at p. 22.

<sup>1011</sup> Second Macdonald Report, at p. 22 (emphasis added).

<sup>1012</sup> Second Macdonald Report, at p. 22 (citing to the "Annual Report for 1912").

<sup>1013</sup> Second Macdonald Report, at p. 23.

<sup>1014</sup> Governor Fung to Director of Surveys, dated October 1923, Figure 7 to Second Macdonald Report.

Kordofan and Bahr el Ghazal before the 1905 transfer,”<sup>1015</sup> and the Bahr el Arab “was an established provincial boundary.”<sup>1016</sup> The Government also denies that this putative boundary was either “provisional” or “approximate.”<sup>1017</sup>

790. Preliminarily, it is clear that *any* provincial boundaries that existed in Sudan in 1905 were approximate, uncertain and not delimited. As discussed in the SPLM/A’s Memorial, no Sudanese provincial boundaries were prescribed during the first decade of the Condominium in any constitutional, legislative or executive decree or proclamation and no map of Sudan delimiting boundaries between provinces was issued by the Sudan Government.<sup>1018</sup> The working boundaries that developed between provinces were vague and ad hoc and frequently altered.<sup>1019</sup>

791. Furthermore, these various factors applied with particular force to any putative Kordofan/Bahr el Ghazal boundary. Bahr el Ghazal had only been established as a province in 1902<sup>1020</sup> and no provincial boundary between Kordofan and Bahr el Ghazal was included on an official map prior to 1913 – *eight years* after the transfer of the Ngok Dinka to Kordofan.<sup>1021</sup> Moreover, as discussed in the SPLM/A Reply Memorial, even when a Kordofan/Bahr el Ghazal boundary was depicted between 1914 and the 1930, the boundary was consistently labelled “Approx. Province Bdy.”<sup>1022</sup>

792. The Government cites an assortment of sources (principally, the Annual Reports of Kordofan (1902, 1903, 1904) and Bahr el Ghazal and the Mardon Map) identifying the “Bahr el Arab” as the Kordofan/Bahr el Ghazal boundary.<sup>1023</sup> The Government also claims that “[t]here was no legal requirement for provincial boundaries to be prescribed by legislation or decree ... [n]or was there any requirement that boundary changes be gazetted.”<sup>1024</sup>

793. The Government’s arguments miss the point. The question is not whether the Kordofan/Bahr el Ghazal boundary was legal, but rather whether it had in fact been adopted in any definite or permanent manner by the Condominium officials.

794. Putting aside the inescapable indeterminacy of a reference to the “Bahr el Arab,” the absence of any formal statement, legislative or executive decree, or declaration as to the Kordofan/Bahr el Ghazal boundary provides strong evidence that no definite or permanent boundary had in fact been adopted. Again, that is confirmed by the absence of any official cartographic evidence of a Kordofan/Bahr el Ghazal boundary prior to 1913.<sup>1025</sup> The fact that provincial officials referred to the Bahr el Arab as a provincial boundary in administrative correspondence and reports indicates that this may have (at best) been treated as a working administrative boundary, but does not demonstrate the existence of any definite or permanent boundary or even close to it.

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<sup>1015</sup> GoS Reply Memorial, at p. 170, heading (ii).

<sup>1016</sup> GoS Reply Memorial, at para. 449.

<sup>1017</sup> GoS Reply Memorial, at paras. 428-429.

<sup>1018</sup> See SPLM/A Memorial, at para. 304.

<sup>1019</sup> See Daly Expert Report, at pp. 28-31; Daly Supplemental Expert Report, at p. 17; SPLM/A Memorial, at paras. 301-312.

<sup>1020</sup> See SPLM/A Memorial, at para. 289. See also SPLM/A Memorial, at para. 289.

<sup>1021</sup> That is acknowledged by the GoS Reply Memorial, at para. 492.

<sup>1022</sup> See Map Analysis, **Appendix B to SPLM/A Reply Memorial**. See Map Analysis, at paras. 50, 52, 83, 86, 88, 89, 91, 92, 94, **Appendix B to SPLM/A Reply Memorial**.

<sup>1023</sup> See GoS Reply Memorial, at paras. 436-446.

<sup>1024</sup> See GoS Reply Memorial, at para. 451.

<sup>1025</sup> SPLM/A Reply Memorial, at para. 1461.

795. Despite the foregoing, the Government’s Reply Memorial now claims that the Kordofan/Bahr el Ghazal boundary was neither “approximate” nor “provisional” in 1905.<sup>1026</sup> Even putting aside the geographic confusion surrounding the term “Bahr el Arab,” it would be impossible to accept this view. In fact, it is impossible to consider what was at most a two or three year old provincial boundary, never identified on an official map, and only referred to in passing and tentative terms, as a permanent and definite boundary.

796. The Government also claims that “[t]here is not a single mention” in the contemporaneous documentary record “of any other boundary between the two provinces [Kordofan and Bahr el Ghazal] before the 1905 transfer.”<sup>1027</sup> That is not only beside the point (given the indeterminacy of references to the “Bahr el Arab”), it is also wrong. In fact:

a. During the Turkiyya, the area of Kordofan was described as follows: “**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.”<sup>1028</sup>

b. An 1877 “General Report on the Province of Kordofan,” explained that “[t]he limits of the jurisdiction of the *Mudir* (governor) of Kordofan are **not well defined**,”<sup>1029</sup> and “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.”<sup>1030</sup>

c. Gleichen’s 1898 *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**.”<sup>1031</sup>

d. In 1907 Lloyd stated that the “southern boundary [of Dar Homr] is **between** the Bahr el Arab and the river Kir.”<sup>1032</sup>

The Government’s claim that a few administrative reports between 1902 and 1904 changed these previous boundaries, and adopted a definite and permanent new boundary, would be extremely difficult to accept – even if the putative new boundary were not itself indeterminate.

797. But more importantly, putting aside the provisional and approximate character of any Sudanese boundary at the time, the Government’s claims regarding the Kordofan/Bahr el

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<sup>1026</sup> GoS Reply Memorial, at paras. 428-429.

<sup>1027</sup> GoS Reply Memorial, at para. 447.

<sup>1028</sup> I. Pallme, *Travels in Kordofan* 1 (1844), **Exhibit-FE 1/3** (emphasis added).

<sup>1029</sup> H. Prout, “General Report on the Province of Kordofan”, at p. 1 (1877), **Exhibit-FE 1/4**.

<sup>1030</sup> H. Prout, “General Report on the Province of Kordofan”, at p. 1 (1877), **Exhibit-FE 1/4** (emphasis added).

<sup>1031</sup> 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**. The MENAS Report, para. 50, also suggests that the river system itself may have been thought of as the provincial boundary.

<sup>1032</sup> Lloyd, *Some Notes on Dar Homr*, *Geographic Journal* 29, (January to June 1907), at p. 649, **Exhibit-FE 3/4** (emphasis added).

Ghazal boundary fail because they rest on the assertion that it was the “Bahr el Arab” that was the provincial boundary: “the Bahr el Arab was the Provincial Boundary between Kordofan and Bahr el Ghazal before the 1905 transfer.”<sup>1033</sup>

798. For the reasons already discussed above however, references to the “Bahr el Arab” in 1905 were inescapably indeterminate.<sup>1034</sup> Even putting aside the approximate and provisional character of any Sudanese provincial boundary references at the time, the “Bahr el Arab” simply did not have an agreed or commonly understood meaning in 1905 and could not provide a determinate or definite boundary (this, of course, ignores the documents referred to at paragraph 796 above which are to the contrary). Even still as already discussed, that phrase meant a number of very different things to different Condominium officials, ranging from the Kiir/Bahr el Arab, to the Ngol/Ragaba ez Zarga, to the entire Bahr river system, to mere confusion. Given that, there was and could be no determinate or definite provincial boundary between Kordofan and Bahr el Ghazal.

799. Finally, the Government’s Reply Memorial refers to the decision in *Land, Island and Maritime Frontier Dispute*, which noted that “the Chamber’s task is chiefly to identify the topographical elements used as reference points in these documents, and to locate them on the maps and on the ground in relation to the modern place-names.”<sup>1035</sup> That reasoning provides no assistance here, where the historical record demonstrates that there was no common understanding among Condominium officials as to what they meant when they referred to the “topographical element” with the name of “Bahr el Arab.”

3. The Condominium Officials Transferred the Ngok Dinka People, and Not A Specific Area, to Kordofan in 1905

800. The Government’s Reply Memorial asserts that “there was *an administrative transfer of an area* in 1905 from one province (Bahr el Ghazal) to another (Kordofan).”<sup>1036</sup> It also asserts that “the present dispute concerns *the transfer of a specific area* at a specific time.”<sup>1037</sup> These statements are inaccurate in nuanced, but important, respects.

801. First, contrary to the Government’s claim, it was not “*an area*” or “*a specific area*” that was transferred in 1905 from Bahr el Ghazal to Kordofan. Rather, it was the Ngok Dinka tribe, under Arop Biong (Sultan Rob), that was transferred. The transfer of the Ngok Dinka tribe from one province to another necessarily entailed the transfer of the Ngok Dinka territory, but, importantly, it was the transfer of the tribe that defined the territory that was transferred, not the transfer of the territory that defined the tribes that were transferred.

802. The foregoing distinction is very clear in both the language and administrative purposes of the Condominium records. The reasons for the 1905 transfer are well known and non-controversial.

803. In 1903 and 1905, there were complaints about cattle and slave raids on Ngok Dinka and Twic Dinka,<sup>1038</sup> which led to a decision being made by Condominium officials in March 1905. That decision, reported in Sudan Intelligence Report No. 128, was that “Sultan Rob”

<sup>1033</sup> GoS Reply Memorial, at p. 170, heading (ii).

<sup>1034</sup> See above at paras. 438-468, 631-634.

<sup>1035</sup> GoS Reply Memorial, at para. 455 citing *Frontier Dispute, Judgment I.C.J. Reports 1986*, p. 16, para. 106.

<sup>1036</sup> GoS Reply Memorial, at para. 382.

<sup>1037</sup> GoS Reply Memorial, at para. 88.

<sup>1038</sup> See SPLM/A Memorial, at paras. 347-350; Sudan Intelligence Report No. 110, dated September 1903, at p. 1, **Exhibit-FE 1/24**; Sudan Intelligence Report, No. 127, dated February 1905, at p. 2, **Exhibit-FE 2/6**.

(the Paramount Chief of the Ngok Dinka, Arop Biong)<sup>1039</sup> and his people would be placed under the administration of the province of Kordofan in order to reduce the risks of further raids:

“It has been decided that *Sultan Rob, whose country is on the Kir river*, and Sheikh Rihan of Toj ... *are to belong to Kordofan Province*. These people have, on certain occasions, complained of raids made on them by southern Kordofan Arabs, and it has therefore been considered advisable to *place them under the same Governor as the Arabs of whose conduct they complain*.”<sup>1040</sup>

As noted above, the Government does not dispute that the purpose of the transfer of the Ngok Dinka (and Twic Dinka) was “the necessity of closer supervision.”<sup>1041</sup>

804. Importantly, the Government also does not dispute the fact that the object of the 1905 transfer was the Ngok Dinka (and Twic Dinka), and not a defined area of territory. That is obvious from the description in the Sudan Intelligence Report of the transfer (as quoted above, “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*” and “it has therefore been considered advisable to *place them* under the same Governor as the Arabs of whose conduct they complain”). Significantly, the Government also underscores the importance of the foregoing Condominium report of the 1905 transfer decision, noting that it “was precisely this passage which led to the formulation of the ABC’s mandate.”<sup>1042</sup>

805. But it is also obvious from, and expressly conceded in, the Government’s Memorial:

“it was decided in early 1905 *to transfer the latter groups [the Ngok Dinka and Twic Dinka] to Kordofan...*<sup>1043</sup> [A] decision was promptly made to *transfer both the Ngok and the Twic to Kordofan*.”<sup>1044</sup>

806. There can be no doubt, from either the text of the relevant Condominium description of the transfer decision or from the purposes of the transfer, that what was happening was a transfer of the Ngok Dinka people, in order to protect them. That was how the transfer was described (by both the Condominium officials and the GoS Memorial) and it is what obviously motivated the transfer.

807. Of course, the transfer of the Ngok Dinka (and Twic Dinka) people to Kordofan also necessarily meant that the territory that these people occupied would be transferred. But, importantly, it was the Ngok Dinka and Twic Dinka that were transferred, with that tribal transfer defining what territory would be transferred. It was not a case of the Condominium officials deciding to transfer a tract of land, together with the people that inhabited it, but a case of the Condominium officials deciding to transfer a people, together with the land that they occupied.

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<sup>1039</sup> See above at para. 671.

<sup>1040</sup> Sudan Intelligence Report No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

<sup>1041</sup> GoS Memorial, at para. 357. The Government also states: “The alternation of the Kordofan/Bahr el Ghazal administrative boundary in 1905 was adopted by Sudan officials in order to control administratively the friction that existed between the Arab Baggara tribes to the north and Dinka tribes to the south. This was the whole *raison d’être* of the 1905 transfer. The transfer was that was of a *quintessentially administrative character* and recorded as such in contemporary Government documents.” GoS Reply Memorial, at para. 398 (emphasis added).

<sup>1042</sup> GoS Memorial, at para. 359.

<sup>1043</sup> GoS Memorial, at para. 357 (emphasis added).

<sup>1044</sup> GoS Memorial, at para. 359 (emphasis added).

808. The territorial consequences of the transfer were defined in exactly this manner. The 1905 Kordofan Province Annual Report noted:

**“Province Boundaries – ... *The Dinka Sheikhs, Sultan Rob* and Sultan Rihan Gorkwei *are now included in Kordofan instead of the Bahr El Ghazal.*”**<sup>1045</sup>

809. The territorial effects of the transfer of the Ngok Dinka and Twic Dinka were 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.*”**<sup>1046</sup>

810. Contrary to the claim in the Government’s Reply Memorial, it was not “an area,” together with its people, that was transferred. Rather, it was a people (the Ngok Dinka) that were transferred, together with their territory.

811. The Government’s Reply Memorial also suggests, feebly, that:

“the area transferred from Bahr el Ghazal to Kordofan in 1905 concerned exactly that – an ‘area.’ It did not involve *the transfer of every single individual belonging to the Ngok Dinka chiefdoms no matter where they may have lived* in 1905.”<sup>1047</sup>

812. To be sure, the 1905 transfer did not involve the transfer of “every single individual belonging to the Ngok Dinka chiefdoms,” or the lands owned by those individuals. What the transfer involved was the transfer of those Ngok Dinka who lived under the rule of Sultan Rob in the nine Ngok Dinka chiefdoms in the Abyei Area. As a practical matter, in 1905, this meant essentially all Ngok Dinka, so the Government’s forced analogy is irrelevant; but insofar as Ngok Dinka had moved to Khartoum or Moscow, the Government is correct that the transfer did not affect them.

813. Second, also contrary to the Government’s claim, no “*specific area*”<sup>1048</sup> was transferred in 1905 – in part, again, because it was the administration of the Ngok Dinka people that was transferred. At the time, the Condominium officials had no real idea about what territory the Ngok Dinka occupied and used and, as a result, while they transferred the Ngok Dinka, they were unable for some years to define what that meant in territorial terms (and nor did they need to).

814. Thus, the Condominium administrators took no steps in 1905 (or six years thereafter) to identify the territorial consequences of the transfer that had been made in 1905. The Government’s submissions acknowledge this, noting that “the southern limit of the transferred area remained to be delimited”<sup>1049</sup> and commenting that it was only in 1911/1912 that a “boundary line ... never more than 25 km from the Bahr el Arab and ... generally following the ‘course’ of the river” was noted.<sup>1050</sup>

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<sup>1045</sup> Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, at p.34 of **Exhibit-FE 2/13** (emphasis added).

<sup>1046</sup> Annual Report of the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, at p. 29 of **Exhibit-FE 2/13** (emphasis added).

<sup>1047</sup> GoS Reply Memorial, at para. 91.

<sup>1048</sup> GoS Reply Memorial, at para. 88.

<sup>1049</sup> GoS Reply Memorial, at para. 488.

<sup>1050</sup> GoS Memorial, at para. 379.

815. Moreover, even after 1911/1912, the southern boundary of Kordofan was repeatedly revised, often significantly, in a process that was only completed in 1931.<sup>1051</sup> Had the Anglo-Egyptian administrators transferred some defined “area” from Bahr el Ghazal to Kordofan in 1905, as the Government claims, then the Condominium officials could have drawn the Kordofan/Bahr el Ghazal boundary to reflect that transfer. In fact, however, the Condominium officials had transferred a people and whatever territory they inhabited, with the extent of that territory being unknown, and thus was not a basis for delimiting the Kordofan/Bahr el Ghazal boundary.

816. The Government’s Reply Memorial claims that “[w]hat the SPLM/A Memorial fails to grapple with, however, is why the pre-transfer provincial boundary was consistently referred to as the Bahr el Arab while the post-transfer depiction of that boundary lay significantly further south.”<sup>1052</sup> The Government’s argument assumes its own conclusion, resting on the premise that the Bahr el Arab had a definite and determinate meaning in 1905, and thus that the post-1905 Kordofan/Bahr el Ghazal boundary could lie “significantly further south.” In any event, it is obvious, as discussed above, that the transfer of the Ngok Dinka and Twic Dinka tribes entailed the transfer (still to be defined) of territories that lay south of the Kiir/Bahr el Arab.

817. Third, based on its (mis-)characterization of the 1905 transfer, the Government goes on to argue “it is self-evident that *any areas already situated within Kordofan prior to 1905 could not have been included or intended to have been included, in the transfer.*”<sup>1053</sup> According to the Government’s Reply Memorial, the northern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 “*must be the same as the provincial boundary that existed between Kordofan and Bahr el Ghazal just before the transfer.*”<sup>1054</sup>

818. The Government’s analysis is misconceived. The Government’s analysis begins from the hopelessly flawed premise – addressed in detail above – that there was in fact a definite and determinate boundary between Kordofan and Bahr el Ghazal in 1905. Only if such a boundary existed, could the Government’s claims about the importance of that boundary’s locations have any possibility of being taken seriously. In fact, however, there was no definite or determinate Kordofan/Bahr el Ghazal boundary in 1905, and there is therefore no basis for the Government’s claim that the northern boundary of the Ngok Dinka “must be the same” as that non-existent and indeterminate boundary.

819. Furthermore, even if there had been a determinate provincial boundary, the Government’s analysis again mischaracterizes the nature of the 1905 transfer. The Government’s analysis rests on the premise that it was a “specific area” that was transferred from Bahr el Ghazal to Kordofan and, thus, that this area must not have already been in Kordofan.

820. As discussed above, however, the Government’s analysis ignores the fundamental character of the 1905 transfer, which was to transfer the Ngok Dinka people.<sup>1055</sup> The Condominium officials who decided upon and effected the transfer did not concern

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<sup>1051</sup> This is described in GoS Memorial, at para. 383(6). The extensive revisions to the boundary are depicted at GoS Figure 14; GoS Memorial, at p. 146; and SPLM/A **Map 60**.

<sup>1052</sup> GoS Reply Memorial, at para. 505.

<sup>1053</sup> GoS Reply Memorial, at para. 383 (emphasis added).

<sup>1054</sup> GoS Reply Memorial, at para. 384 (emphasis added).

<sup>1055</sup> See below at paras. 830-842.

themselves with defining what territory was being transferred; rather, they concerned themselves with transferring the Ngok Dinka (and Twic Dinka), wherever the two tribes were located, for the purpose of protecting them. The transfer was of the tribes, rather than of a “specific area,” as claimed by the Government.

821. Finally, the Government’s analysis also ignores the language and purposes of the relevant transfer decision, which must be repeated again. As discussed above, that decision provides:

“It has been decided that *Sultan Rob, whose country is on the Kir river*, and Sheikh Rihan of Toj ... *are to belong to Kordofan Province*. These people have, on certain occasions, complained of raids made on them by southern Kordofan Arabs, and it has therefore been considered advisable to *place them under the same Governor as the Arabs of whose conduct they complain*.”<sup>1056</sup>

822. Similarly, the territorial consequences of the transfer were recorded in the 1905 Kordofan Province Annual Report, which said:

“**Province Boundaries – ... The Dinka Sheikhs, Sultan Rob** and Sultan Rihan Gorkwei *are now included in Kordofan instead of the Bahr El Ghazal*.”<sup>1057</sup>

823. To the same effect, the 1905 Bahr el Ghazal Province Annual Report stated:

“**Province Boundaries – In the north the territories of Sultan Rob** and Sheikh Gokwei have been *taken from this Province and added to Kordofan*.”<sup>1058</sup>

824. Each of these reports treated the Ngok Dinka (and their territory) as having belonged to Bahr el Ghazal – “*are to belong to Kordofan Province*,” “*are now included in Kordofan instead of the Bahr El Ghazal*” and “*have been taken from this Province and added to Kordofan*.” Each of the Sudan Government’s transfer records rested expressly on the premise that “Sultan Rob” and “the territories of Sultan Rob” had previously been located in Bahr el Ghazal, but were then transferred in 1905 to Kordofan.

825. The 1905 Condominium records detailing the decision to transfer the Ngok Dinka, and making that transfer, provide that the decision was to transfer the nine Ngok Dinka Chiefdoms, and their territories, from what the Anglo-Egyptian administrators said they regarded as Bahr el Ghazal to Kordofan. It is these terms of the 1905 Condominium records, and not the Government’s arguments about the location of the more general Kordofan/Bahr el Ghazal boundary, that are decisive.

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

826. As noted above, the Government claims (without attempting to explain) that the Abyei Area must be defined as “the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905”<sup>1059</sup> and in particular that “*the area transferred cannot have*

<sup>1056</sup> Sudan Intelligence Report No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

<sup>1057</sup> Annual Report on the Sudan, 1905, Province of Kordofan, at p. 111, at p. 34 of **Exhibit-FE 2/13** (emphasis added).

<sup>1058</sup> Annual Report on the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, at p. 29 of **Exhibit-FE 2/13** (emphasis added).

<sup>1059</sup> GoS Memorial, at para. 19.



*already been in Kordofan prior to the transfer.*<sup>1060</sup> Likewise, “nothing north of this river [the “Bahr el Arab”] could have been transferred ‘to Kordofan’ in 1905.”<sup>1061</sup> In the Government’s view, the “*areas which were already part of Kordofan in 1905 could not have been transferred to it.*”<sup>1062</sup>

827. As discussed in the SPLM/A Reply Memorial, the ABC Report properly rejected this interpretation on two independent grounds, instead concluding that (a) the Abyei Area was to be defined as “*the area of the nine Ngok Dinka Chiefdoms as it was in 1905*”<sup>1063</sup> or, as alternatively phrased in the Report, “*the territory occupied and used by the nine Ngok Dinka Chiefdoms*”<sup>1064</sup>; and (b) in any event, as discussed above, “*the Ngok people were regarded as part of the Bahr el-Ghazal Province until their transfer in 1905,*”<sup>1065</sup> and “the government’s claim that only the Ngok Dinka territory south of the Bahr el Arab was transferred to Kordofan in 1905 is therefore found to be mistaken.”<sup>1066</sup>

828. Each of these two grounds justifying the ABC Experts’ interpretation is manifestly correct – and both are summarized below. It bears emphasis, however, that both of these issues concern the ABC Experts’ substantive decision or fact-finding, and do not concern a purported excess of mandate. That is discussed in detail above<sup>1067</sup> and is confirmed by the Government’s discussion of these issues (in Chapter 6 of its Memorial and Chapter 5 of its Reply Memorial).

1. The Abyei Area Was the Entire Area of the Nine Ngok Dinka Chiefdoms Which Were Transferred to Kordofan in 1905

829. Article 1.1.2 of the Abyei Protocol defines the Abyei Area as “the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.”<sup>1068</sup> As discussed in the SPLM/A Memorial and Reply Memorial, the natural grammatical meaning of this language encompasses the entire territory of the nine Ngok Dinka Chiefdoms *that were* collectively transferred to Kordofan in 1905.<sup>1069</sup> That meaning is consistent with, and required by, the purposes of the Abyei Protocol, and is confirmed by both the testimony of those involved in drafting the parties’ agreements and with the interpretation of the language that the ABC Experts repeatedly expressed, without objection from the parties, during the ABC proceedings.

a) The Language and Grammatical Structure of the Article 1.1.2 Definition of the Abyei Area

830. The definition of the Abyei Area used in Article 1.1.2 and incorporated into Article 5.1 of the Abyei Protocol – “*the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905*” has a clear and straightforward meaning. As a plain English reading of the term indicates, Article 1.1.2 refers to the collective transfer of the nine Ngok Dinka

<sup>1060</sup> GoS Reply Memorial, at para. 112 (emphasis added).

<sup>1061</sup> GoS Reply Memorial, at para. 114.

<sup>1062</sup> GoS Memorial, at para. 19 (emphasis added).

<sup>1063</sup> ABC Report, Part I, at p. 4, **Appendix B to SPLM/A Memorial**.

<sup>1064</sup> ABC Report, Part I, at p. 18 (Proposition 8), **Appendix B to SPLM/A Memorial** (emphasis added).

<sup>1065</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial** (emphasis added). *See also* SPLM/A Reply Memorial, at paras. 602, 768.

<sup>1066</sup> ABC Report, Part I, at p. 39, **Appendix B to SPLM/A Memorial**. *See also* SPLM/A Reply Memorial, at para. 602.

<sup>1067</sup> *See above* at paras. 81-110. *See also* SPLM/A Reply Memorial, at paras. 223-225, 285-297, 488.

<sup>1068</sup> Abyei Protocol, Art. 1.1.2, **Appendix C to SPLM/A Memorial**.

<sup>1069</sup> SPLM/A Memorial, at paras. 1096-1122; SPLM/A Reply Memorial, at paras. 1502-1514, 1530-1532.

Chiefdoms in their entirety to Kordofan in 1905, and not to the transfer of some sub-part of the area of the Ngok Dinka Chiefdoms. Although this is the ordinary and natural meaning of the English language, it is also what an application of English rules of grammar provides, as the Expert Report of Professor Crystal OBE has explained.<sup>1070</sup>

831. Thus, Article 1.1.2 means “the area of the nine Ngok Dinka chiefdoms *that were* transferred to Kordofan in 1905.” Contrary to the Government’s construction, Article 1.1.2’s language does not mean “*the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905*”<sup>1071</sup> or “that part of the area of the nine Ngok Dinka chiefdoms that was transferred to Kordofan in 1905.” If Article 1.1.2 had been intended to refer to that part of the “area of the nine Ngok Dinka chiefdoms” that was being transferred to Kordofan, then the phrase would have read “*that part of the area* of the nine Ngok Dinka chiefdoms *that was* transferred to Kordofan in 1905.”

832. This conclusion is confirmed by the fact that Article 1.1.2 included the phrase “the area of the *nine* Ngok Dinka chiefdoms,” specifically ensuring that *all* nine Ngok Dinka Chiefdoms were included in the definition of the Abyei Area and that their territory was treated as a single, unitary area. As discussed in the SPLM/A’s Memorial, this result is consistent with, and required by, the unified, cohesive character of the Ngok Dinka and the centralized political and cultural character of the Paramount Chief.<sup>1072</sup>

833. As noted above, the Government’s Reply Memorial claims (without attempting to explain) that the Abyei Area must be defined as “the area of the nine Ngok Dinka chiefdoms which was transferred to Kordofan in 1905”<sup>1073</sup> and in particular that “*the area transferred cannot have already been in Kordofan prior to the transfer.*”<sup>1074</sup>

834. The Government’s Reply Memorial claims that the SPLM/A interpretation of the Abyei Area ignores the preposition “to” in the parties’ definition.<sup>1075</sup> That argument is wholly untenable.

835. As discussed elsewhere, the Abyei Area is defined as follows in the Abyei Protocol: “*The territory is defined as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905.*”<sup>1076</sup> Under the SPLM/A interpretation, Article 1.1.2’s language refers to a transfer of the nine Ngok Dinka chiefdoms from the administration of Bahr el Ghazal to the administration of Kordofan.<sup>1077</sup> This interpretation in no way ignores or denies meaning to the preposition “to”; on the contrary, it involves a transfer of the Ngok Dinka from the administration of Bahr el Ghazal *to* the administration of Kordofan. That gives full effect to the language of Article 1.1.2 and specifically to the word “to.”

836. The essential difference between the Government’s interpretation of Article 1.1.2 and the SPLM/A’s interpretation is that the Government claims that it was an “area” that was transferred and the SPLM/A claims that it was the Ngok Dinka chiefdoms that were transferred. Thus, the Government repeatedly claims that it was “an area that was transferred

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<sup>1070</sup> Crystal Expert Report, at para. 4, **Appendix A to SPLM/A Reply Memorial**.

<sup>1071</sup> GoS Memorial, at para. 19 (emphasis added).

<sup>1072</sup> See SPLM/A Memorial, at paras. 140-155, 1125.

<sup>1073</sup> GoS Memorial, at para. 19.

<sup>1074</sup> GoS Reply Memorial, at para. 112.

<sup>1075</sup> GoS Reply Memorial, at paras. 106, 169-171, 175.

<sup>1076</sup> Abyei Protocol, Art. 1.1.2, **Appendix C to SPLM/A Memorial**.

<sup>1077</sup> See above at paras. 62-65, 363; SPLM/A Memorial, at paras. 56-61, 346-357, 1101-1122; SPLM/A Reply Memorial, at paras. 1510-1514, 1530-1532.

from the Bahr el Ghazal to Kordofan in 1905”<sup>1078</sup> and “*the area transferred cannot have already been in Kordofan prior to the transfer.*”<sup>1079</sup> Likewise, “nothing north of this river [the “Bahr el Arab”] could have been transferred ‘to Kordofan’ in 1905.”<sup>1080</sup>

837. The Government’s interpretation is artificial and untenable. It contradicts the language of Article 1.1.2 (as discussed above)<sup>1081</sup> and the parties’ obvious purposes in agreeing to that language (also as discussed below).<sup>1082</sup>

838. The Government’s interpretation of Article 1.1.2 (as referring to the transfer of a “specific area,” and not the Ngok Dinka Chiefdoms) also contradicts the language and purposes of the 1905 transfer decision of the Condominium officials, reported in Sudan Intelligence Report No. 128. As this report describes, and as discussed above, the 1905 transfer was a transfer of the *Ngok Dinka Chiefdoms*, rather than of a *specific area*.<sup>1083</sup> Notably, the Government itself underscores the importance of the foregoing Sudan Intelligence Report No. 128, regarding the 1905 transfer decision, noting that it “*was precisely this passage which led to the formulation of the ABC’s mandate.*”<sup>1084</sup>

839. Thus, Article 1.1.2 of the Abyei Protocol refers to the area that was occupied and used by the nine Ngok Dinka Chiefdoms. It was these nine Ngok Dinka Chiefdoms which were the object of the 1905 transfer to Kordofan and it was the Ngok Dinka Chiefdoms that were transferred to Kordofan. Given this, it is irrelevant to the definition of the Abyei Area whether the nine Ngok Dinka Chiefdoms’ territory was partially (or wholly) within Kordofan prior to the transfer. Contrary to the Government’s artificial interpretation, Article 1.1.2 refers to the nine Ngok Dinka chiefdoms that were transferred, and not to the area that was transferred.

840. The Government’s Reply Memorial argues that “on either interpretation [of Article 1.1.2,] it would still be necessary to determine what the area of those chiefdoms was that Sudanese Government Officials decided to transfer to Kordofan in 1905.”<sup>1085</sup> Again, the Government’s argument is confused. As discussed above, Article 1.1.2 refers to the area of the nine Ngok Dinka Chiefdoms; it was these Chiefdoms, and not some specified area, that the GoS and SPLM/A agreed that the “Sudanese Government Officials decided to transfer to Kordofan in 1905.”

841. Parenthetically, the parties’ intended meaning in Article 1.1.2 of the nature of the 1905 transfer paralleled what the Condominium officials intended in 1905; as discussed above, the Condominium officials also intended to transfer the Ngok Dinka tribe in 1905, without knowing (or caring) what specific territory they occupied.<sup>1086</sup> That is precisely consistent with the fact, discussed above, that no such area was defined by Condominium administrators, or on Condominium maps, for nearly another decade.<sup>1087</sup> Again, this was because, contrary to the Government’s claims, the “Sudanese Government Officials” simply

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<sup>1078</sup> GoS Reply Memorial, at para. 110.

<sup>1079</sup> GoS Reply Memorial, at para. 112 (emphasis added).

<sup>1080</sup> GoS Reply Memorial, at para. 114.

<sup>1081</sup> See above at paras. 64, 70, 744, 829-832. See also SPLM/A Reply Memorial, at paras. 1505-1514.

<sup>1082</sup> See below at paras. 843-850. See also SPLM/A Reply Memorial, at paras. 1515-1516.

<sup>1083</sup> See above at paras. 362, 800-825.

<sup>1084</sup> GoS Memorial, at para. 359 (emphasis added).

<sup>1085</sup> GoS Reply Memorial, at para. 512.

<sup>1086</sup> See above at paras. 802-810.

<sup>1087</sup> See above at paras. 802-810.

did not “decide to transfer” any specific area, but instead decided to transfer a tribe, together with whatever area it might turn out that the tribe occupied.

842. Further, the Government’s position rests on the premise that there was a determinate boundary between Kordofan and Bahr el Ghazal in 1905 – which there plainly was not.<sup>1088</sup> There was instead confusion and uncertainty about what the boundary might be and about what the term “Bahr el Arab” referred to.<sup>1089</sup> In these circumstances, the Government’s effort to define the Abyei Area based upon its contrived definition of the 1905 provincial boundary is particularly implausible and unattractive.

b) Implausibility of the Government’s Refusal to Address the Purposes of Article 1.1.2’s Definition of the Abyei Area

843. The purposes of the Abyei Protocol confirm that the Abyei Area includes all of the territory of the nine Ngok Dinka Chiefdoms as they stood at the time that they were transferred in 1905. Indeed, as discussed in the SPLM/A’s Memorial, it would contradict the basic objectives of the Abyei Protocol (and the Comprehensive Peace Agreement) to limit the Abyei Area to only a truncated portion of the Ngok Dinka’s historic territory or to only some of the nine Ngok Dinka Chiefdoms.

844. Like the Government’s Memorial, its Reply Memorial adopts the extraordinary view that there is no need to address in any way the parties’ purposes in agreeing to the Abyei Protocol. That refusal to engage with one of the most elementary – and important – rules of interpretation confirms the completely artificial and contrived nature of the Government’s position.

845. According to the Government, “the task of the Tribunal does not require recourse to supplementary sources of interpretation”<sup>1090</sup> and only a “simple reading of the mandate” is necessary or permitted.<sup>1091</sup> Consistent with this analysis, the Government’s Memorial and Reply Memorial never *once* consider what the purposes of the Abyei Protocol or the definition of the Abyei Area were. From the Government’s perspective, the Abyei Protocol is some verbal puzzle dropped out of the sky that the Tribunal should interpret without regard to the parties’ true objectives.

846. That position makes no sense. The Abyei Protocol and the definition of the Abyei Area were negotiated for specific reasons, which have important consequences and which must (under Article 31(1) of the Vienna Convention) be taken into account. As discussed in the SPLM/A Memorial, the definition of the Abyei Area was of importance because it defined the area and people that were the subject of the Abyei Referendum.

847. In turn, the reason for the Abyei Referendum was to permit the Ngok Dinka – who had consistently contended over the past decades that their people belonged to the southern Sudan<sup>1092</sup> – to vote on whether to be included in the South.<sup>1093</sup> In these circumstances, it would be completely absurd to treat the Abyei Area as only including *some* of the Ngok

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<sup>1088</sup> SPLM/A Reply Memorial, at paras. 70-74, 91, 872, 877, 1393-1497.

<sup>1089</sup> SPLM/A Reply Memorial, at paras. 1393-1399.

<sup>1090</sup> GoS Reply Memorial, at para. 115.

<sup>1091</sup> GoS Reply Memorial, at para. 169.

<sup>1092</sup> See SPLM/A Memorial, at paras. 417-423, 445-486.

<sup>1093</sup> This right of the Ngok to decide for themselves whether to stay with Kordofan or ‘go south’ was recognized and openly stated by the British prior to Sudan’s independence. See Letter from G. Hawkesworth (Governor Kordofan) to Editor Kordofan Magazine, dated 3 April 1951, **Exhibit-FE 18/17**.

Dinka and *some* of their historic territories. Dividing the Ngok Dinka territories and peoples in two would contradict the basic principles of self-determination underlying the Abyei Protocol,<sup>1094</sup> as well as the SPLM/A's consistent assertion that the Ngok Dinka were a unitary and highly cohesive political and cultural entity.<sup>1095</sup>

848. 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.<sup>1096</sup> (It is noteworthy in this regard that the Government's Memorial expressly concedes that the Ngok Dinka were "unusual ... in having centralised leadership."<sup>1097</sup>)

849. The Government's Reply Memorial makes no effort to address these arguments. Instead, in a single sentence, the Government addresses a different (and confused) question of the purpose of the 1905 transfer of the Ngok Dinka chiefdoms. According to the Government, the purpose of the 1905 transfer was "to transfer an area from one province to another to enable better administrative control over tensions between Baggara Arab and Dinka tribes."<sup>1098</sup> That is not only incorrect as a statement of the *Condominium officials' purpose for the 1905 transfer*, but it is completely irrelevant to the *purposes of the GoS and the SPLM/A in concluding the 2005 Abyei Protocol*.

850. The essential question in interpreting the definition of the Abyei Area in the Abyei Protocol is what the purposes and objects of the parties was in arriving at their 2005 agreements. Those purposes, which centered on the Abyei Referendum, are completely clear. And they completely contradict – indeed, render absurd – the Government's artificial notion that a non-existent 1905 boundary should divide the territory of the Ngok Dinka in two.

c) Implausibility of the Government's Claims that Abyei Town Would Have Been Excluded from the Abyei Area

851. The Government also argues that there is nothing unacceptably odd about excluding Abyei town from the Abyei Area. The Government's Reply Memorial reasons "Abyei town did not exist at the time [i.e., 1905], and the key question is to determine the area that was transferred in 1905, not an allocation of towns, villages or people appearing afterwards."<sup>1099</sup>

852. Again, the Government ignores the central question of whether the parties, in adopting their 2005 definition of the Abyei Area, could seriously have considered excluding Abyei town from the Abyei Area. The answer – as the Government's refusal to address the issue confirms – is that this is patently absurd. The Government does not dispute that the location around Abyei town has been the center of Ngok Dinka political, commercial and cultural life for generations and the idea of cutting it out of the Abyei Area is simply unthinkable.

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<sup>1094</sup> See SPLM/A Memorial, at paras. 473-486.

<sup>1095</sup> See SPLM/A Memorial, at paras. 473-486. See also Bahr el Ghazal Region's Consultative and Coordinating Committee (CCC)'s Position Paper on the Abyei issue, dated 12 November 2002, at p. 2 ("the Ngok Dinka of Abyei is homogeneously, culturally, historically, ethnically, traditionally and socially part and parcel of the Mounjang (Dinka) nationality of the Sudan and geographically located in the South Sudan."), **Exhibit-FE 10/2**.

<sup>1096</sup> See SPLM/A Memorial, at paras. 111-113, 133-163, 206-216.

<sup>1097</sup> GoS Memorial, at para. 337.

<sup>1098</sup> GoS Reply Memorial, at para. 115.

<sup>1099</sup> GoS Reply Memorial, at para. 109.

853. Moreover, as demonstrated in the SPLM/A Reply Memorial, it is clear that from 1903 until his death in 1906, the Ngok Dinka Paramount Chief resided in Burakol – to the north of the Kiir/Bahr el Arab and in the immediate proximity of present day Abyei town.<sup>1100</sup> Again, the Government’s position leads to the utterly untenable result that the Abyei Area would not include either the seat of the Ngok Dinka Paramount Chief in 1905 – or Abyei town – the location of the Ngok Dinka’s cultural, political and commercial heart for more than a century. That is absurd.

- d) Implausibility of the Government’s Claims that the Abyei Area Is A 14 Mile Wide Strip of Swampland Along the Kiir/Bahr el Arab’s Southern Bank

854. The Government makes no effort to defend the fact that its interpretation of the Abyei Area would confine the Ngok Dinka to a narrow, 14 mile wide strip of swampland to the south of the Kiir/Bahr el Arab. On the contrary, although the Government’s own evidence now concedes expressly that the Ngok Dinka lived well to the north of the Kiir/Bahr el Arab in 1905,<sup>1101</sup> its position is that these territories are not to be included in the Abyei Area. As with its argument that the Abyei Area does not include Burakol or Abyei town, this position is completely untenable.

- e) Implausibility of the Government’s Claims that the Some of the Ngok Dinka Chiefdoms Would Have Been Excluded from the Abyei Area

855. A further implausible result would arise from interpreting Article 1.1.2, as the Government insists, to divide the territory of the nine Ngok Dinka Chiefdoms into two parts, along the purported 1905 boundary between Kordofan and Bahr el Ghazal. As already noted, that interpretation would result in excluding *entirely* several of the nine Ngok Dinka Chiefdoms from the Abyei Area – for the reason that *at least three Chiefdoms* (the Alei, Achaak and Bongo) lay entirely north of the putative Kordofan/Bahr el Ghazal border claimed by the GoS, – and it would also exclude the majority of the lands of the other six Ngok Dinka Chiefdoms (the majority of their lands are north of the Kiir/Bahr el Arab).<sup>1102</sup>

856. The Government’s Reply Memorial makes no effort at all to explain how the parties – when specifically referring in Article 1.1.2 to the area of the “*nine* Ngok Dinka chiefdoms” – might have meant to include only *six* of the nine Ngok Dinka tribes in the definition of the Abyei Area. Nor does the Government make any attempt to explain why the parties would have disregarded the exceptional political, cultural and historic unity of the Ngok Dinka people,<sup>1103</sup> which was the premise of the Abyei negotiations, while tearing into two the Ngok Dinkas’ unique centralized political structure.

- f) The Language of the 1905 Transfer Records Referred to by Article 1.1.2 of the Abyei Protocol

857. As already discussed briefly, the definition of the Abyei Area is also only sensibly interpreted as referring to the territory of the nine Ngok Dinka Chiefdoms that were

<sup>1100</sup> SPLM/A Reply Memorial, at paras. 918, 932, 979-980, 999-1010, 1026, 1055, 1062.

<sup>1101</sup> See below at paras. 426-430. See also GoS Reply Memorial, at paras. 479-481.

<sup>1102</sup> **Map 13** (Ngok Dinka Chiefdoms, 1905); SPLM/A Reply Memorial, at para. 882; SPLM/A Memorial, at paras. 1015-1063; **Map 15** (Achaak Chiefdom, 1905); **Map 17** (Alei Chiefdom, 1905); **Map 19** (Bongo Chiefdom, 1905).

<sup>1103</sup> See SPLM/A Memorial, at paras. 111-113, 133-163, 206-216.

transferred to Kordofan in 1905 because this is how the relevant Sudan Government transfer documents addressed the issue. As discussed above,<sup>1104</sup> in each 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. Sudan Intelligence Report No. 128: “It has been decided that *Sultan Rob, whose country is on the Kir river*, and Sheikh Rihan of Toj ... are to belong to Kordofan Province.”<sup>1105</sup>
- b. 1905 Kordofan Annual Report: “*The Dinka Sheikhs, Sultan Rob and Sultan Rihan Gorkwei* are now included in Kordofan....”<sup>1106</sup>
- c. Bahr el Ghazal Province Annual Report 1905: “In the north *the territories of Sultan Rob* and Sheikh Gokwei *have been taken from this Province and added to Kordofan.*”<sup>1107</sup>

858. The Government’s Reply Memorial pretends to discover what it now says is the “crucial document” for the purposes of interpreting the 1905 transfer documents. The Government relies on a 1905 memorandum by Governor General Wingate, reporting to London that the:

“districts of Sultan Rob and Okwai, to the south of the Bahr el Arab and formerly a portion of the Bahr el Ghazal province, have been incorporated into Kordofan.”<sup>1108</sup>

859. The Government’s Reply Memorial claims that this “description could not be clearer as regards the northern limit of the area that was transferred in 1905.”<sup>1109</sup> That is misconceived.

860. The only thing that the half-sentence passage in Wingate’s memorandum does is provide an *ex post facto* and general summary of the earlier 1905 transfer decision (as he understood it). The transfer documents themselves make it clear that it is the Ngok Dinka and Twic Dinka peoples of Sultan Rob and Sheikh Gokwei that were transferred to Kordofan, not any specific area. Wingate’s brief report to British officials in London was not intended in any way to change the decisions that had been taken in Sudan.<sup>1110</sup>

861. Moreover, Wingate’s passing reference to the transfer certainly did not purport to fix “the northern limit of the area that was transferred in 1905.”<sup>1111</sup> Wingate’s reference to the “Bahr el Arab” was merely a general geographic description, and not the delimitation or

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<sup>1104</sup> See above at paras. 800-825.

<sup>1105</sup> Sudan Intelligence Report, No. 128, dated March 1905, at p. 3, **Exhibit-FE 2/8** (emphasis added).

<sup>1106</sup> Annual Report of the Sudan, 1905, Province of Kordofan, at p. 111, at p. 34 of **Exhibit-FE 2/13** (emphasis added).

<sup>1107</sup> Annual Report on the Sudan, 1905, Province of Bahr el Ghazal, at p. 3, at p. 29 of **Exhibit-FE 2/13** (emphasis added).

<sup>1108</sup> GoS Reply Memorial, paras. 466 - 472 citing reports on the Finances Administration and Condition of the Sudan Memorandum of Wingate, 1905, at p. 24, **Exhibit-FE 2/13**.

<sup>1109</sup> GoS Reply Memorial, at para. 468.

<sup>1110</sup> Wingate was the Governor General of the whole of Sudan, was based in Cairo, Egypt, and never went near the Abyei Area. His reports were by nature very general, for the purposes of reporting to London, and necessarily paraphrased the information provided by the provincial governors and inspectors.

<sup>1111</sup> GoS Reply Memorial, at para. 468.

definition of a boundary. The Government's effort to read some specific territorial limitation into a passing reference in a report to London is entirely unsustainable.

862. It also bears repetition, as noted above, that the Government has repeatedly underscored the importance of the Sudan Intelligence Report No. 128, describing the 1905 transfer decision, to the terms of the Abyei Protocol. In particular, the Government's Memorial noted that it "***was precisely this passage which led to the formulation of the ABC's mandate.***"<sup>1112</sup> Thus, it was the operative description of the 1905 transfer in the Sudan Intelligence Report No. 128, and not the later passing reference in Wingate's memorandum, which was relevant to the drafting of the Abyei Protocol.

g) The Witness Testimony

863. The witness testimony of the individuals involved in drafting the Abyei Protocol, including Article 1.1.2, precisely corroborates the ABC Experts' interpretation of the definition of the Abyei Area. This testimony is set out in the SPLM/A's Memorial and Reply Memorial, and includes the witness statements of Lieutenant General Lazaro Sumbeiywo (IGAD mediator), Mr. Jeffrey Millington (Chargé d'Affairs at the U.S. Embassy in Khartoum, and the U.S. Department of State representative to IGAD), and Minister Deng Alor (Chief SPLM/A negotiator of the Abyei Protocol).<sup>1113</sup>

864. In contrast, GoS has submitted witness evidence from only one person who had any real involvement in the drafting of the Abyei Protocol – Vice President Ali Osman Mohamed Taha, the leader of the GoS delegation at Naivasha.<sup>1114</sup> In relation to the language proposed by the U.S. for the Abyei Protocol, nothing in Vice President Taha's witness statement undermines the evidence of the SPLM/A witnesses.

865. Taha's claim that the GoS supposedly believed that the definition in Article 1.1.2 "leaves no doubt that any territory not transferred to Kordofan in 1905 would not be the subject of any referendum"<sup>1115</sup> does no more than repeat the GoS legal argument in the present arbitration, essentially verbatim. Notably, Taha does not suggest that anyone in the GoS delegation communicated this belief to the US team, or to the SPLM/A delegation.

866. In addition, Taha's suggestion that "the SPLM never posed any... queries of whether this definition includes the '***entire Ngok territory***' or not,"<sup>1116</sup> is striking. If true, it would indicate that the Government proceeded with the view that the SPLM/A was under a misapprehension as to the meaning of the parties' agreement. Even if this were true, it would preclude the Government from relying on its putative interpretation.

h) ABC Experts' Statements During the ABC Proceedings

867. Finally, the ABC Experts 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:

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<sup>1112</sup> GoS Memorial, at para. 359 (emphasis added).

<sup>1113</sup> See SPLM/A Memorial, at paras. 1140-1141.

<sup>1114</sup> Witness Statement of Ali Osman Mohamed Taha, at ¶1.

<sup>1115</sup> Witness Statement of Ali Osman Mohamed Taha, at ¶20(2).

<sup>1116</sup> Witness Statement of Ali Osman Mohamed Taha, at ¶30.



- a. “the *Abyei area that was occupied by the nine sections of the Ngok Dinka*,”<sup>1117</sup>
- b. “*boundaries of the nine Dinka Chiefdoms as they existed 100 years ago*,”<sup>1118</sup>
- c. “*boundaries that existed in 1905 between the Misseriya and Ngok Dinka*,”<sup>1119</sup>
- d. “*area of the nine Ngok Dinka Chiefdoms that were transferred to Kordofan from Bahr el-Ghazal province in 1905*,”<sup>1120</sup> or
- e. “*area of the Nine Ngok Dinka Chiefdoms, which were transferred to Kordofan Province from Bahr El-Ghazal Province in 1905*.”<sup>1121</sup>

868. The Government’s Reply Memorial addresses each of these statements (at paragraph 183), categorizing the ABC Experts’ various statements as either “ambiguous and incomplete,” or “clearly erroneous,” or “acceptable.” Critically, however, the Government does not explain how it could have remained silent during the “clearly erroneous” statements of the ABC Experts’ interpretation of the Abyei Area.

869. Equally, the Government’s claim that certain of the ABC Experts’ interpretations of the Abyei Area were “ambiguous and incomplete” is simply wrong: in fact, these formulations (at subparagraphs (a) and (c) above) made it perfectly clear that the ABC Experts were interpreting the Abyei Area as the area of the nine Ngok Dinka chiefdoms which were (that is, which chiefdoms were) transferred to Kordofan in 1905. This interpretation rejected the Government’s contorted argument that only the area south of the putative Bahr el Arab boundary was included within the Abyei Area – and yet the Government again remained silent in the face of the ABC Experts’ statements. For the reasons set forth in the SPLM/A Memorial and Reply Memorial,<sup>1122</sup> the Government’s failure to raise what it now terms excess of mandate objections was both a waiver and confirmation that those objections have no merit.

870. Moreover, the Government’s Reply Memorial effectively concedes the linguistic formulation advanced by the SPLM/A. The Government quotes Ambassador Petterson’s statement at Muglad on 17 April 2005 referring to “the area of the nine Ngok Dinka Chiefdoms *that were transferred* to Kordofan from Bahr el-Ghazal province in 1905,”<sup>1123</sup> and then terms this an “*acceptable interpretation of the mandate* [sic].”<sup>1124</sup> Similarly, the Government also remarks that Ambassador Petterson’s statement at Agok on 18 April 2005 referring to “the area of the nine Ngok Dinka Chiefdoms, *which were transferred* to Kordofan Province from Bahr El-Ghazal Province in 1905,”<sup>1125</sup> again characterizing this as “*an acceptable interpretation*.”<sup>1126</sup>

<sup>1117</sup> ABC Report, Part II, App. 4, at p. 129, **Exhibit-FE 15/1**.

<sup>1118</sup> ABC Report, Part II, App. 4, at p. 41, **Exhibit-FE 15/1**.

<sup>1119</sup> ABC Report, Part II, App. 4, at p. 53, **Exhibit-FE 15/1**.

<sup>1120</sup> ABC Report, Part II, App. 4, at p. 79, **Exhibit-FE 15/1** (emphasis added).

<sup>1121</sup> ABC Report, Part II, App. 4, at p. 58, **Exhibit-FE 15/1** (emphasis added).

<sup>1122</sup> SPLM/A Memorial, at paras. 792-868; SPLM/A Reply Memorial, at paras. 860-868.

<sup>1123</sup> GoS Reply Memorial, at para. 183 citing para. 630(c) of the SPLM/A Memorial.

<sup>1124</sup> GoS Reply Memorial, at para. 183 citing para. 630(c) of the SPLM/A Memorial. There was no disagreement of the SPLM/A members of the ABC or GoS representatives at the meeting.

<sup>1125</sup> GoS Reply Memorial, at para. 183 citing para. 630(d) of the SPLM/A Memorial.

<sup>1126</sup> GoS Reply Memorial, at para. 183 citing para. 630(d) of the SPLM/A Memorial.

871. This is a significant concession on the part of the Government. It is incontrovertible that the inclusion of the finite clause “were” in the sentence above has the effect of linking the verb “transferred” to the noun “chiefdoms” rather than the noun “area.” It follows that the Government must accept that it was the tribal Ngok Dinka “chiefdoms” that were being transferred in 1905 rather than an “area.”

872. Professor Crystal explains clearly in his Expert Report that the use of the finite clause “were” removes any possible doubt as to the interpretation of mandate language:

“Transferring this to the present case, *if finite clauses had been used, the text would have been clear as singular/plural concord would decide the matter:*

The area of the nine Ngok Dinka chiefdoms **which was** transferred to Kordofan in 1905

The area of the nine Ngok Dinka chiefdoms **which were** transferred to Kordofan in 1905.”<sup>1127</sup>

873. Thus, the Government’s stated views in its Reply Memorial, specifically categorizing as “acceptable” the interpretation advanced by the SPLM/A (and Professor Crystal) leaves no serious room for debate. Put simply, having reflected with the benefit of legal counsel, the Government has formally accepted in its Reply Memorial precisely the interpretation of the Article 1.1.2 that it criticizes the ABC Experts for adopting.

i) The Drafting History

874. As detailed in the SPLM/A Memorial, in cases of the ambiguity, the drafting history of the Abyei Protocol can also be of relevance.<sup>1128</sup> The Government’s Reply Memorial has not addressed this issue and the Tribunal is respectfully referred to the discussion of the drafting history in the SPLM/A Memorial.<sup>1129</sup> That discussion leaves no doubt that the parties never mentioned or imagined dividing the Ngok Dinka territory in two or excluding Abyei town from the Abyei Area.

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875. In sum, the ABC Experts reached exactly the correct conclusion in defining the Abyei Area to include all of the territory of the nine Ngok Dinka Chiefdoms which were transferred to Kordofan in 1905. That conclusion is required by the language (“*the area of the nine Ngok Dinka chiefdoms...*”), the ordinary English meaning and the grammatical structure of Article 1.1.2. It is also compelled by the basic purposes and drafting history of the Abyei Protocol (and the CPA), which the Government does not even attempt to address. Indeed, it would be an inconceivable result to limit the Abyei Area to a truncated portion of the Ngok Dinka’s historic territory or to only some of the nine Ngok Dinka Chiefdoms.

876. It is also important to note that the Government’s disagreement with the ABC Experts’ interpretation of the definition of the Abyei Area in Article 1.1.2 of the Abyei Protocol is a *substantive disagreement with the ABC Experts’ conclusions*, not a potential excess of mandate. As discussed above, it is well-settled that a decision-maker’s incorrect

<sup>1127</sup> Crystal Report, at para. 8, **Appendix A of SPLM/A Reply Memorial.**

<sup>1128</sup> See SPLM/A Memorial, at paras. 669, 1148 fn 1899.

<sup>1129</sup> See SPLM/A Memorial, at paras. 1148-1189.

resolution of the dispute submitted to it is not an excess of mandate; it is at most an error of law or fact. The Government's complaints about the ABC Experts' interpretation of the definition of the Abyei Area are simply not a potential excess of mandate.

2. Alternatively, the Area that the Anglo-Egyptian Condominium Transferred to Kordofan in 1905 Consisted of All of the Territory of the Nine Ngok Dinka Chiefdoms

877. Alternatively, even if Article 1.1.2 of the Abyei Protocol was interpreted as referring to the area of the Ngok Dinka which was transferred to Kordofan in 1905, the same result would apply. That is because, as the ABC Experts found, the Sudan Government's 1905 instruments relating to the transfer all proceeded on the explicit basis that "Sultan Rob" and all of his "territories" or "country" were being transferred to Kordofan from Bahr el Ghazal. As discussed in the SPLM/A's Reply Memorial, that factual finding was correct<sup>1130</sup> (and, in any case, may not be challenged in these proceedings<sup>1131</sup>).

G. *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*

878. As discussed above, there are no grounds for finding an "excess of mandate" within the meaning of Articles 2(a) and 2(b) of the Abyei Arbitration Agreement. Consequently, there is also no reason for the ABC Experts' decision defining the Abyei Area to be disturbed.

879. Nonetheless, for the sake of completeness, the SPLM/A confirms the request, made in its Memorial and Reply Memorial, that if the Tribunal concludes that there was an excess of mandate under Article 2(a), then it should go on to define the Abyei Area to include all of the territory north of the current Kordofan/Bahr el Ghazal boundary to latitude 10°35'N (with the east and west boundaries identified by the ABC Experts).

880. The GoS purports to reformulate the SPLM/A case by asserting (wrongly) that the "SPLM/A Memorial claims a Ngok-Baggara **boundary** across the whole of Kordofan at 10.35'N."<sup>1132</sup> This is not a position expressed in the SPLM/A Memorial.

881. The SPLM/A case does not depend upon, and does not seek to identify, a "Ngok-Baggara boundary" in 1905 or at any other time. The SPLM/A case instead rests on defining the area of the nine Ngok Dinka chiefdoms in 1905. The fact that other tribes used the Ngok Dinka territory – whether the Misseriya to the north or Dinka tribes to the south – is in no way inconsistent with that territory belonging to the Ngok Dinka. Rather, it is precisely consistent with both the Abyei Protocol and the historic population movements of the Ngok Dinka and Misseriya.

882. The GoS complains that the SPLM/A claims regarding the traditional homelands of the Ngok Dinka proceed "on the assumption of Ngok priority over all others."<sup>1133</sup> For the purpose of defining the Abyei Area pursuant to the Abyei Protocol, that is precisely what the

<sup>1130</sup> See SPLM/A Reply Memorial, at paras. 601-602, 1537-1538.

<sup>1131</sup> As the Government concedes: "It is not the case that a mere disagreement, however justified, with the Experts' appreciation of the facts is sufficient to indicate an excess of mandate," GoS Memorial, at para. 161.

<sup>1132</sup> GoS Reply Memorial, at para. 203 (emphasis added).

<sup>1133</sup> GoS Reply Memorial, at para. 201.

SPLM/A did in the ABC proceedings and is precisely what it is doing before this Tribunal. The whole purpose of the Abyei Protocol is to create a process by which the lands of the Ngok Dinka can be defined.

883. Rather, the parties agreed in the Abyei Protocol to the definition of the area of the *nine Ngok Dinka chiefdoms*, fully recognizing that other tribes used that same area. Insofar as the Abyei Area is used by the Misseriya and other nomadic neighbours for seasonal grazing, that use is specifically addressed and protected by Articles 1.1.2 and 1.1.3 of the Abyei Protocol.<sup>1134</sup>

884. In particular, Article 1.1.3 provides: that the “Misseriya and other nomadic peoples retain their traditional rights to graze cattle and move across the territory of Abyei.”<sup>1135</sup> It was through this mechanism, of guaranteed rights of access and usage, that questions of the Misseriya’s use of the Abyei Area was resolved. Conversely, the fact that the Misseriya (or others) *also* used particular territory is not grounds for excluding that area from the Abyei Area. This reality is echoed in the statements of the GoS’s own witnesses, where they assert that “the Misseriya has no boundary with the Ngok Dinka, whether demarcated or otherwise.”<sup>1136</sup>

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<sup>1134</sup> Abyei Protocol, Arts. 1.1.2 and 1.1.3, **Appendix C to SPLM/A Memorial**. See also SPLM/A Memorial, at paras. 46-47, 635-637.

<sup>1135</sup> Abyei Protocol, Art. 1.1.3, **Appendix C to SPLM/A Memorial**.

<sup>1136</sup> Witness Statement of Mukhtar Babu Nimir, at ¶4.

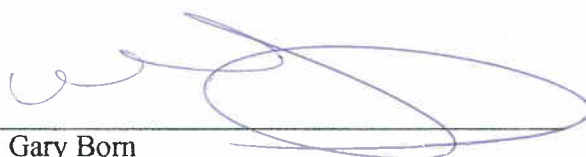
#### IV. REQUEST FOR RELIEF

885. For the reasons set forth in this Memorial, the SPLM/A respectfully requests that the Arbitral Tribunal make an Award granting the following relief:

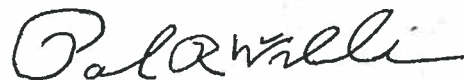
- a. A declaration that the ABC Experts did not, on the basis of the agreement of the Parties as per the CPA, "exceed their mandate which is 'to define (i.e. delimit) and demarcate the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905' as stated in the Abyei Protocol, and reiterated in the Abyei Annex and the ABC Terms of Reference and Rules of Procedure;"
- b. On the basis of relief in the terms of sub-paragraph (a) above, a declaration that the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are as defined and delimited by the ABC Experts in the ABC Report, and that definition and delimitation, and the ABC Report shall be fully and immediately implemented by the parties;
- c. In the alternative, if the Tribunal determines that the ABC Experts exceeded their mandate and makes a declaration to that effect, a declaration that the boundaries of the area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905 are the current boundary of Kordofan and Bahr el Ghazal to the south extending to 10°35'N latitude to the north and the current boundary of Kordofan and Darfur to the west extending to 29°32'15"E longitude to the east;
- d. A declaration that the Tribunal's Award is final and binding on the parties;
- e. Costs, including the direct costs of the arbitration, as well as fees and other expenses incurred in participating in the arbitration, including but not limited to, the fees and/or expenses incurred in relation to the Tribunal, solicitors and counsel, and any experts, consultants and witnesses, internal legal costs, the costs of translations, archival research and travel; and
- f. Such additional or other relief as may be just.

The SPLM/A reserves the right to amend or supplement this request for relief.

Respectfully submitted this 28th day of February 2009



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